

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

In the matter of an Application for a Ruling of Contempt of Court under Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Kahapola Arachchige Prabath, Anurada Nilupul Fernando (Nilupul Kahapola Arachchi),
No. 56, Delthara, Piliyandala.

PETITIONER

CA/Contempt/05/2018

Vs.

1. Urban Council Kesbewa,
Kesbewa, Piliyandala.
2. Chairman,
Urban Council Kesbewa,
Kesbewa, Piliyandala.
3. Sri Lanka Land Reclamation
Development and Corporation,
No. 3, Sri Jayawardhanapura
Mawatha,
Welikada, Rajagiriya.
4. Central Environmental Authority,
"Parisara Piyasa",
No. 104, Denzil Kobbekaduwa
Mawatha, Battaramulla.

5. Divisional Secretary,
Kesbewa Divisional Secretariat,
Piliyandala.
6. Urban Development Authority,
6th and 7th Floor,
"Sethsiripaya", Battaramulla.
7. Hon. Attorney General,
Attorney General's Department,
Colombo 12.
8. Hemantha Perera,
No. 476/10, Galle Road, Colombo 3.
9. Roshinee Devika Perera,
No. 474, Galle Road, Colombo 3.
10. Sampath Perera.
No. 36/5, Gangaboda Road,
Delthara, Piliyandala.
11. A.G. Reddi,
No. 39/3, Delthara, Piliyandala.
12. S.M.D. Perera,
No. 92/01/C, Delthara East, Piliyandala.

RESPONDENTS

13. Chaya Sri Nammuni,
State Counsel,
Attorney General's Department,
Colombo 12.

**PARTY SOUGHT TO BE ADDED AS 13TH
RESPONDENT**

Before: Yasantha Kodagoda, P.C., J/ President of the Court of Appeal
Arjuna Obeyesekere, J

Counsel: Petitioner appeared in person.

Viraj Dayaratne, P.C., Additional Solicitor General with Ms. Hashini Opatha, State Counsel for the 7th Respondent and the party sought to be added as the 13th Respondent.

**Amendment of
caption**

supported on: 8th August 2019

Decided on: 6th September 2019

Arjuna Obeyesekere, J

The Petitioner filed this Contempt of Court application against the Respondents on 18th July 2018 alleging that the Respondents have failed to implement the judgment delivered by this Court in CA (Writ) Application No. 177/2010. The Petitioner thereafter filed a motion on 15th November 2018 seeking to amend the caption by adding the aforesaid party who is a Senior State Counsel of the Attorney General's Department as the 13th Respondent. The Hon. Attorney General, by way of a motion filed soon thereafter has objected to the said application of the Petitioner, for the reasons set out therein.

The aforementioned application of the Petitioner to add a Respondent was taken up for support on 8th August 2019. On an inquiry made by this Court prior to the matter being supported, the learned Additional Solicitor General and the Petitioner informed this Court that neither party has any objection to

this matter being taken up before this Bench and an Order being made on the said application.

A consideration of the present application of the Petitioner requires this Court to examine the background circumstances that led to the filing of the original contempt of Court application.

The Petitioner and three others had filed CA (Writ) Application No. 177/2010 complaining that the 8th – 12th Respondents to this application had carried out unauthorized development of lands adjoining the Bolgoda Lake and had sought *inter alia* the following relief against the Respondents:

- (1) A Writ of Mandamus directing the 3rd Respondent, the Sri Lanka Land Reclamation and Development Corporation to act under the provisions of the Colombo District (Low lying area) Reclamation and Development Board Act and to act forthwith against the unauthorized soil fillings in the Bolgoda Lake system;
- (2) A Writ of Mandamus directing the 4th Respondent, the Central Environmental Authority to act under Section 24B of the National Environmental Act No. 47 of 1980, as amended;
- (3) A Writ of Mandamus directing the 5th Respondent, the Divisional Secretary of Kesbewa to recover the State land under Section 65 of the Irrigation Ordinance No. 32 of 1946, as amended, and under the provisions of the State Lands Recovery of Possession Act.

Having heard all parties, this Court, by its judgment delivered on 30th May 2014 issued the above relief directing the 3rd, 4th and 5th Respondents to implement the above, not only with regard to the 8th – 12th Respondents who are alleged to have carried out the illegal development, but with regard to the entirety of the Bolgoda Lake, which, needless to say, was a herculean task, given the extent of the Lake.

It is the position of the Petitioner that the 1st – 6th Respondents initiated action to comply with the said judgment of this Court and that 'after the re-surveying was accomplished and the boundaries were identified to install the boundary stones' by the Survey Department, a person named Bathiya Udumalagala had filed CA (Writ) Application No. 53/2017 on 20th February 2017 challenging the said re-surveying. On an application made by the parties that the subject matter of the said applications are connected with the issue arising in this application, the aforementioned Writ application as well as CA (Writ) Application No. 125/2017 were taken up together with this application.

This Court has examined the petition filed in CA (Writ) Application No. 53/2017 and notes that the complaint of the petitioner was that the Survey Department is utilising a plan prepared in 1888 in order to demarcate the boundaries of the Bolgoda Lake and that utilising a plan that was over 100 years old is both irrational and arbitrary as the physical characteristics of the Lake is likely to have changed over the years and a demarcation of the boundaries based on such an old plan would affect his property rights. The petitioner had also submitted that there was an imminent threat of the boundaries being physically demarcated by placing boundary stones on his property.

The said application had come up for support before this Court on 10th March 2017, for notice as well as for interim relief. The respondents had been represented by the aforesaid learned Senior State Counsel who is the party that is now sought to be added by the Petitioner as the 13th Respondent. In view of the interim relief that had been prayed for, an undertaking had been given by the learned State Counsel (as she was then) that she would inform the Respondents to endeavour to maintain the status quo till the date of support. This Court does not see anything unusual in such an undertaking being given, especially as it preserves the status quo until this Court goes into the matter fully and takes a decision on whether notice and/or interim relief should be issued. There exists in practice a necessary inference that the undertaking given by the learned State Counsel was based on instructions received and the consideration of such instructions.

By a letter dated 13th March 2017, annexed to the petition marked 'X17' the said learned State Counsel, writing on behalf of the Hon. Attorney General had informed the Legal Officers of the 4th Respondent, the Central Environmental Authority and the Survey Department as follows:

“උක්ත තත්ත්වය යටතේ මැතිමි සම්බන්ධයෙන් වෙනත් නව පියවරක් නොගන්නා ලෙස කරන ලද ඉල්ලීමට කාවකාලිකව මා විසින් එකඟ වෙන ලදී.

එසේ හෙයින් 2017.05.05 දින දක්වා නව මැතිමක් නොකරන ලෙස අදාල පාර්ශවයන්ට දැනුම් දෙන ලෙසත්, මෙයින් දන්වන අතරම නව මැතිම නැවැත්වීමට අපහසු නම් හා/හෝ එම එකඟවීම සම්බන්ධයෙන් යම්කිසි හෝ ගැටළුවක් ඇත්නම් මා වෙත වහාම ලිඛිතව දන්වන ලෙසත් මෙයින් දන්වා සිටිමි.”

This shows that the learned State Counsel has correctly conveyed to the parties represented by her, the undertaking given by her to this Court.

The Petitioner has not sought to intervene in CA (Writ) Application No. 53/2017. Instead, the Petitioner filed this Contempt of Court application over a year later on 18th July 2018 against the same persons who were Respondents in CA (Writ) Application No. 177/2010. As observed earlier, it is the complaint of the Petitioner that the Respondents have failed to implement the judgment of this Court in CA (Writ) Application No. 177/2010 and that the failure to comply with the said judgment tantamount to contempt of Court.

It is the position of the Petitioner that as a result of the aforementioned undertaking given by the learned State Counsel, the surveying and re-demarcation process initiated by the Respondents has been stalled after 13th March 2017. Although not pleaded specifically, the Petitioner appears to be of the view that the non-implementation of the judgment in CA (Writ) 177/2010 has arisen as a result of the said undertaking given by the learned State Counsel. This is the basis of the Petitioner's application to add the learned Senior State Counsel as a Respondent.

The question that this Court is called upon to consider is whether the Petitioner has been able to satisfy this Court, on a prima facie basis, that the learned Senior State Counsel acted in willful or contumacious disobedience of the judgment of this Court, when she gave an undertaking to this Court, and by the issuing of the letter marked 'X17'.

Article 105(3) of the Constitution states that the Supreme Court of the Republic of Sri Lanka and the Court of Appeal of the Republic of Sri Lanka shall each 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, with imprisonment or fine or both as the court may deem fit.

The law of contempt as a whole is concerned with the upholding of the due administration of justice, and perceptions the public ought to have regarding Courts of law. It is obvious that disregard of a court order not only deprives the other party of the benefit of that order, but also impairs the effective administration of justice. The need for society to preserve the rule of law and protect the rights of its citizens as well as those of the State lies at the heart of contempt.

In The Law of Contempt by Borrie and Lowe¹ it has been stated as follows:

“Contempt can be divided into two broad categories, contempt by interference and contempt by disobedience.

The former category comprises a wide range of matters such as disrupting the court process itself (contempt in the face of the court), publications or other acts which risk prejudicing or interfering with particular legal proceedings, and publications or other acts which interfere with the course of justice as a continuing process...

¹ 3rd Edition; page 2.

The second category comprises disobeying court orders and breaking undertakings given to the court.”

Borrie and Lowe goes on to state that, “traditionally contempts have been classified as being either criminal or civil. Under this scheme it can broadly be said that interference contempt is seen as criminal contempt and disobedience contempt as civil ...”²

The complaint that is before us with regard to the party sought to be added as the 13th Respondent falls under the ‘disobedience’ category known as ‘civil contempt’.

A charge of contempt of Court is a very serious allegation to be made against a person, and once this Court issues summons, such person is treated as an ‘accused’ and penal sanctions follow if this Court finds such person ‘guilty’ of the charge. Hence, it is important that this Court exercises great caution prior to issuing summons on any person accused of being in contempt of Court.

The caution that should be exercised prior to taking action for contempt is reflected in the following passage from **The Law of Contempt:**

“Even if the contempt powers are sought to be invoked the courts will be reluctant to exercise their powers and will do so only in the clearest cases, namely, where an offender, having had proper notice of the order, has been shown beyond all reasonable doubt to have committed the

² Ibid. page 3.

contempt. In most cases this will mean that the offender will have been shown to have deliberately or willfully disobeyed the court order.³

So far as English law is concerned it is established that the standard of proof is that applicable to criminal cases, so that the breach must be proved beyond all reasonable doubt.”⁴

In Re Bramblevale Ltd.⁵, Lord Denning M.R. held as follows:

“A contempt of Court is an offence of a criminal character. A man may be sent to prison for it. It must be satisfactorily proved. To use the time-honoured phrase, it must be proved beyond all reasonable doubt.”

This was followed in the case of Knight v Clifton⁶ where it was held as follows:

“Contempt of court, even of the type that consists in breach of an injunction or undertaking, is something that may carry penal consequences, even loss of liberty, and the evidence required to establish it must be appropriately cogent.”

The above dicta would become relevant only at the end of the inquiry. However, when seeking to add a party, the person complaining of contempt must make out a prima facie case, which justifies subjecting another to the rigorous process involved in an inquiry into contempt.

³ Ibid; page 558.

⁴ Ibid. page 565.

⁵ [1969] 3 All ER 1062 at 1063.

⁶ [1971] 2 All ER 378 at 381.

In the case of Upali Dharmasiri Welaratne vs. Wesley Jayaraj Moses⁷, Justice Marsoof laid down the following as being the required elements for a finding of civil contempt:

- “(1) the existence of an undertaking or order;
- (2) knowledge of the undertaking or order;
- (3) ability to comply with the undertaking or order; and
- (4) willful or contumacious disobedience of the undertaking or order.”

In Arthur Reginald Perera v. The King,⁸ the Privy Council held that, “there must be involved some “act done or writing published calculated to bring a Court or a judge of the Court into contempt or to lower his authority” or something “calculated to obstruct or interfere with the due course of justice or the lawful process of the Courts.”⁹

Thus, it would be seen that the ‘intention’ to insult or bring Courts and the system of administration of justice into disrepute in the eyes of the public is a cornerstone of Contempt of Court.

As observed earlier, the complaint of the petitioner in CA (Writ) Application 53/2017 was that utilising a survey plan that was over 100 years old is both irrational and arbitrary as the physical characteristics of the Lake is likely to

⁷ SC Appeal No. 65/2003; SC Minutes of 27th May 2009.

⁸ Privy Council Appeal No. 53 of 1950;

⁹ Citing Reg. v Gray 1900 2 Q.B. 36.

have changed over the years and a demarcation of the boundaries based on such an old plan would affect his property rights. The fact that this Court issued formal notice on the respondents in that case demonstrates that this Court was in fact satisfied that there was a matter to be looked into. This Court is also mindful that the judgment in CA (Writ) Application No. 177/2010 did not specify that the demarcations be carried out according to a particular survey plan and that it was open to the authorities to decide on this issue. In doing so, there would be objections by the parties who are affected and it is the right of such parties who are affected by the conduct of public authorities to seek the protection of our legal system. Just as much as the Petitioner has, in the public interest, the right to seek recourse to the legal system in order to protect the environment, the land owners have the right to protect their property rights. This Court cannot turn a blind eye when such a complaint is made, and use as a shield the aforementioned judgment in CA (Writ) Application No. 177/2010 when the judgment itself is silent with regard to the procedure that should be adopted in carrying out the surveys and re-demarcations of the boundaries.

In the above circumstances, can it be said that there been a willful or contumacious disobedience of the judgment of this Court on the part of the learned Senior State Counsel? This Court thinks not, especially in view of the last paragraph of 'X17', where the learned Senior State Counsel has specifically requested the recipients of the letter to inform her of the following: "නව මැතිමි නැවැත්වීමට අපහසු නම් හා/හෝ එම එකඟවීම සම්බන්ධයෙන් යම්කිසි හෝ ගැටළුවක් ඇත්නම් මා වෙත වහාම ලිඛිතව දැන්වන ලෙසත් මෙයින් දැන්වා සිටීම."

There is no material before this Court as to what transpired thereafter.

In these circumstances, this Court is of the view that the Petitioner has failed to make out a prima facie case that the conduct of the learned Senior State Counsel is in willful or contumacious disobedience of the judgment of this Court in CA (Writ) Application No. 177/2010 and for that reason, this Court rejects the application made by the Petitioner seeking to amend the caption by adding the learned Senior State Counsel as the 13th Respondent.

Taking into consideration the fact that the Petitioner has appeared in person and that the Petitioner is purportedly acting in the public interest, this Court makes no order with regard to costs.

Judge of the Court of Appeal

Yasantha Kodagoda, P.C., J/ President of the Court of Appeal

I agree

President of the Court of Appeal