

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

In the matter of an Application for mandates in the nature of Writs of Certiorari under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka

CA (Writ) Application No: 272/2018

General Leonard Brinley Ravindra Mark,
No. 507/A/1/2, Gane Road,
Peralanda, Ragama.

PETITIONER

Vs.

1. Hon. P.Padman Surasena,
Chairman,
Presidential Commission of Inquiry.
2. Hon. Vikum A. Kaluarachchi.
3. Hon. P. Ranasinghe.
4. Hon. Gihan Kulatunga.
5. P.A.Pemathilake.

2nd – 5th Respondents are Members of
the Presidential Commission of Inquiry.

1st – 5th Respondents at Ground Floor,
Building Complex No. 5, BMICH,
Baudhaloka Mawatha, Colombo 7.

6. Justice T.B.Weerasuriya.

7. Justice W.L.R.Silva.

8. C.N. Guruge,

6th, 7th and 8th Respondents are the Chairman and the members, respectively of the Commission to investigate allegations of Bribery or Corruption.

9. Sarath Jayamanne,
Director General,
Commission to investigate allegations of
Bribery or Corruption.

6th – 9th Respondents at
No. 36, Malalasekara Mawatha,
Colombo 7.

RESPONDENTS

Before: Achala Wengappuli, J
Arjuna Obeyesekere, J

Counsel: Upul Jayasuriya, P.C., with Laknath Seneviratne and
Sampath Wijewardena for the Petitioner

Janaka Bandara, Senior State Counsel with
H.M.A.C.Wijesinghe, Assistant Director (Legal)
(CIABOC) for the 6th – 9th Respondents

Supported on: 20th February 2019 and 24th June 2019

Written Submissions: Tendered on behalf of the Petitioner on 21st June 2019
Tendered on behalf of the 6th – 9th Respondents on
10th May 2019

Decided on: 15th November 2019

Arjuna Obeyesekere, J

When this matter was taken up for support on 20th February 2019, the learned President's Counsel for the Petitioner and the learned Senior State Counsel for the 6th – 9th Respondents agreed that the Order that would be made in this application would apply to Writ Application No. 273/2018, and that the Petitioners in that application would be bound by this Order.

The Petitioner has invoked the jurisdiction conferred on this Court by Article 140 of the Constitution, seeking *inter alia* the following relief:

- a) A Writ of Certiorari to quash the decision contained in the Order dated 27th November 2017 made by the 1st – 5th Respondents, annexed to the petition marked '**P4(a)**'¹;
- b) A Writ of Certiorari quashing the decision of the 1st – 5th Respondents holding that the Petitioner has committed an offence under Section 70 of the Bribery Act read together with Sections 102 and 113(b) of the Penal Code;
- c) An interim order staying the operation of the said decision marked '**P4(a)**';
- d) An interim order preventing the 6th – 9th Respondents from taking steps to prosecute the Petitioner in a Court of Law.²

¹ The 1st Respondent was the Chairman of the Presidential Commission of Inquiry appointed by H.E. the President while the 2nd – 5th Respondents were the members of the said Commission of Inquiry.

² The 6th Respondent is the Chairman of the Commission to investigate allegations of Bribery or Corruption while the 7th and 8th Respondents are the members of the said Commission. The 9th Respondent is the Director

At the time this application was supported, the learned Senior State Counsel appearing for the 6th – 9th Respondents raised a preliminary objection with regard to the jurisdiction of this Court to hear and determine this application against the 6th – 9th Respondents.

This Court has been vested with the jurisdiction to issue writs by Article 140 of the Constitution, which reads as follows:

“Subject to the provisions of the Constitution, the Court of Appeal shall have full power and authority to inspect and examine the records of any Court of First Instance or tribunal or other institution, and grant and issue, according to law, orders in the nature of writs of certiorari, prohibition, procedendo, mandamus and quo warranto against the judge of any Court of First Instance or tribunal or other institution or any other person:

Provided that Parliament may by law provide that in any such category of cases as may be specified in such law, the jurisdiction conferred on the Court of Appeal by the preceding provisions of this Article shall be exercised by the Supreme Court and not by the Court of Appeal”

The learned Senior State Counsel submitted that in terms of Section 24 of the Commission to investigate allegations of Bribery or Corruption Act No. 19 of 1994, *“The jurisdiction vested in the Court of Appeal by Article 140 of the Constitution shall, in respect of applications in which relief is sought against the*

General of the said Commission. In terms of Section 4 of the CIABOC Act, investigations are conducted by the Commission. In terms of Section 11 of the CIABOC Act, the power to direct the Director General to institute proceedings is with the Commission.

Commission, be exercised by the Supreme Court and not by the Court of Appeal”.

In **Basil Rohana Rajapakse vs His Lordship Justice Preethi Padman Surasena and others**³ Janak De Silva, J cited with approval the following passage of Sansoni, CJ in **P.A. Anthony Naide v. The Ceylon Tea Plantation Co. Ltd. of London**⁴ which correctly summarises what is meant by jurisdiction:

“Jurisdiction is the authority of a Court to exercise judicial power in a specific case and is, of course, a prerequisite to the exercise of judicial power, which is the totality of powers a Court exercises when it assumes jurisdiction and hears and decides a case. In Garthwaite v. Garthwaite⁵ Diplock, L.J. said,-" in its narrow and strict sense, the 'jurisdiction' of a validly constituted court connotes the limits which are imposed upon its power to hear and determine issues between persons seeking to avail themselves of its process by reference (1) to the subject-matter of the issue or (2) to the persons between whom the issue is joined or (3) to the kind of relief sought, or to any combination of these factors.”

Section 24 makes it clear that the authority of this Court to exercise judicial power in applications filed against the Commission to investigate allegations of Bribery or Corruption (CIABOC) under Article 140, has been removed from this Court and vested with the Supreme Court, as provided for in the proviso to Article 140.

³ CA (Writ) Application No. 89/2017; CA Minutes of 24th May 2019.

⁴ 68 N.L.R. 558 at 560.

⁵ (1964) 2 WLR 1108 at 1120.

Even though no final relief in the form of a Writ has been sought against the 6th – 8th Respondents and the Petitioner is only seeking interim relief against the 6th – 9th Respondents, this Court is of the view that where the jurisdiction conferred on this Court by Article 140 of the Constitution has been vested with the Supreme Court by Act No. 19 of 1994, this Court cannot consider the granting of any relief against the CIABOC in the course of an application under Article 140, even though such relief may not be a Writ enumerated in Article 140. In these circumstances, this Court is of the view that it does not have the jurisdiction to entertain this application against the 6th – 8th Respondents, and therefore upholds the preliminary objection raised by the learned Senior State Counsel with regard to the maintainability of this application against the 6th – 9th Respondents.

In view of the above finding, the next question that this Court must consider is whether the Petitioner is entitled to have and maintain this application against the 1st – 5th Respondents, as there is no legal impediment to this Court assuming jurisdiction in respect of recommendations of the PRECIFAC.

The facts which are relevant to a consideration of the above issue very briefly are as follows.

The Petitioner states that he joined the Sri Lanka Army in 1980, and had an unblemished career of 34 years, until his retirement as a Major General in 2014. The Petitioner states that soon after his retirement, he was appointed as the Director General of the Sri Lanka Disaster Management Centre established by the Sri Lanka Disaster Management Act No. 13 of 2005.

H.E. the President, acting in terms of the powers vested in him in terms of Section 2 of the Commissions of Inquiry Act No. 17 of 1948, as amended, had appointed the 1st Respondent as the Chairman and the 2nd – 5th Respondents as members, respectively, of the Presidential Commission of Inquiry to investigate and inquire into acts of corruption, fraud, criminal breach of trust, criminal misappropriation of property, cheating, abuse or misuse of power or authority of State resources and privileges, which offences and acts of wrongdoing occurred during the period 10th January 2010 to 10th January 2015.⁶ The said Commission of Inquiry was commonly referred to as the PRECIFAC.

The PRECIFAC had commenced sittings in 2015 and among the many complaints received by it was a complaint relating to an irregularity that is alleged to have taken place with the tender for the procurement of maintenance services of the Tsunami warning towers and the subsequent agreement that was entered into by the Disaster Management Centre. The said complaint had been investigated by the PRECIFAC and copies of the witness statements recorded by the PRECIFAC, as well as the relevant documentary material have been annexed to the petition marked 'P4'.

The Petitioner states that in its report submitted to H.E. the President, annexed to the petition marked 'P4(a)', the PRECIFAC had concluded that the Petitioner has contravened the procurement procedure and had taken measures to award the tender to a company that had been rejected in the tender process. As the said acts of the Petitioner were punishable in terms of Section 70 of the Bribery Act read together with Sections 102 and 113(b) of the

⁶ Order published in Extraordinary Gazette No.1904/57 dated 6th March 2015, read together with the Order published in Extraordinary Gazette No. 1909/42 dated 8th April 2015.

Penal Code, the PRECIFAC had recommended that the notes of investigation be forwarded to the CIABOC for its consideration.

Dissatisfied by the said decision of the PRECIFAC, the Petitioner invoked the jurisdiction of this Court, seeking the aforementioned relief. In considering the said relief, this Court would bear in mind the following statement made by Lord Diplock in Council of Civil Service Unions vs Minister for the Civil Service:⁷

“Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call 'illegality', the second 'irrationality' and the third 'procedural impropriety'.

“By 'illegality' as a ground for judicial review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.”

“By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness'⁸. It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no

⁷ 1985 AC 374.

⁸ Associated Provincial Picture Houses Ltd v Wednesbury Corporation 1948(1)KB223

sensible person who had applied his mind to the question to be decided could have arrived at it."

I have described the third head as 'procedural impropriety' rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."

Paragraph 54 of the petition sets out three grounds urged by the learned President's Counsel for the Petitioner as to why this Court should grant the said relief. They are:

- a) The said decision/order of the 1st – 5th Respondents or any one or more of them are unreasonable and/or arbitrary and/or irrational;
- b) The Respondents are public officers and owe a public and a statutory duty;
- c) The Petitioner has no other alternative remedy other than to invoke the Writ jurisdiction of this Court.

This Court must observe that the matters set out in paragraphs (b) and (c) are not grounds on which a Writ of Certiorari will lie, and thus, does not merit any further consideration.

The Petitioner is not challenging the legal authority of the 1st – 5th Respondents (PRECIFAC) to inquire into the said complaint nor is the Petitioner challenging the legality of the said recommendation.

This Court observes that the Petitioner has not made any specific complaint to this Court with regard to the procedure that was followed by the PRECIFAC nor has the Petitioner complained that he did not receive a fair hearing. However, there is a general complaint that the rules of natural justice have not been followed. This Court has examined 'P4' in order to ascertain if there is any merit to this complaint of the Petitioner and find that not only has the statement of the Petitioner been recorded, his Attorney-at-Law had been afforded an opportunity of filing written submissions. This Court is therefore satisfied that the Petitioner has been afforded a hearing as well as an opportunity of clarifying matters and presenting his side of the story, and that the requirements of a fair hearing have been met.

That leaves this Court to only consider the complaint of the Petitioner that the said recommendation by the PRECIFAC is irrational or unreasonable. The Petitioner however has not elaborated in this regard, either in the petition, or in the written submissions filed before this Court. This Court examined the written submissions filed on behalf of the Petitioner before the PRECIFAC in order to ascertain the position taken up by the Petitioner before the PRECIFAC. Having done so, this Court observes that the Petitioner has not denied the allegation that the tender was awarded to a supplier who was more expensive than the supplier recommended by the Tender Evaluation Committee, thereby not only suppressing and/or deviating from the tender procedure but also causing a loss to the Disaster Management Centre. The position taken on

behalf of the Petitioner instead is that his subordinate officers did not apprise the Petitioner that another supplier had been chosen by the Tender Evaluation Committee. This position is borne out by the following paragraphs of the said written submissions:

“29. මේ අනුව පෙනී යන්නේ මෙහි පහත සඳහන් නිලධාරීන් විසින් පෙර සඳහන් තාක්ෂණික වාර්තාව සම්බන්ධයෙන් දැන සිටිය දී එවැනිත් කොමිෂන් ඛවට (වාචනිකව) හුවා දක්වමින් 1 වන නොතිසිලන් පාර්ශවය පවතින හදිසි අවස්ථාව හමුවේ (එකම විකල්පය ලෙස පෙන්වා දී ඇති) ෆෝසයිට් ඉංජිනියරීං සමාගම සමග ගිවිසුමකට එලඹීමට පොලඹවා හෝ කරුණු උද්ගත කර ඇති බවයි.

එම තත්වයන් හමුවේ දී 1 වන නොතිසිලන් පාර්ශවය සාධාරණ හා යුක්ති සහගත ලෙසට තම බල අධිකාරිය තුල ක්‍රියා කර ඇති බව

30. මෙහිදී ගෞරවයෙන් සැල කර සිටින්නේ ආපදා කළමනාකරණ මධ්‍යස්ථානයේ ප්‍රමුඛතම පරමාර්ථය වන්නේ පනතාවගේ පිවිත ආරක්ෂා කිරීමත් දේපල ආරක්ෂා කිරීමත් ය. එම අවස්ථාවේ දී විද්‍යාත්මක කරුණු මත 1 වන නොතිසි ලන් පාර්ශවය ඉදිරියේ පැවැති හදිසි අනතුරක අවදානම හමුවේ අක්‍රිය කුළුණු යටාවන් කිරීමටත් ඉදිරියට එම කුළුණු නඩත්තු කිරීමත් අත්‍යවශයෙන්ම සිදුකළ යුතු විය. 2004 දී සිදුවූ විනාශය හමුවේ තවත් එවැනි විනාශයක් වලක්කවා ගැනීමේ අසීමිත වගකීම 1 වන නොතිසිලන් පාර්ශවය වෙත පැවරී තිබුණි.

31. එහිදී 1 වන නොතිසි ලන් පාර්ශවය වෙත උපදෙස් ලබා දීමේ පරම වගකීම දැරූ නිලධාරීන් වූයේ හදිසි මෙහෙයුම් අංශයේ අධ්‍යක්ෂ සහ නියෝජ්‍ය අධ්‍යක්ෂ (රා.ඉ) වරුන් දෙදෙනාය (රවින්ද්‍ර පයරත්න සහ ප්‍රදීප් කොඩිප්පිලි). පෙර සඳහන් පරිදි එම අංශයේ අධ්‍යක්ෂ සරත් මොහොට්ටි විසින් ද පවසා ඇත්තේ ඔහු එකී නියෝජ්‍ය අධ්‍යක්ෂවරුන් දෙදෙනා මත විශ්වාසය තබා කටයුතු කළ බවකි. එසේම අධ්‍යක්ෂ මානව සම්පත් මතද 1 වන නොතිසිලන් පාර්ශවය විසින් විශ්වාසය තබා කටයුතු කර තිබේ.

32. මෙම කිසිවෙකු විසින් එකී රවින්ද්‍ර පයරත්න සහ ප්‍රදීප් කොඩිප්පිලි සම්බන්ධ වී සාදන ලද තාක්ෂණික වාර්තාව සම්බන්ධයෙන් 1 වන නොතිසිලන් පාර්ශවය

දැනුවත් කිරීමට පියවර ගෙන නොතිබුණි. පෙර සඳහන් පරිදි 2014 අගෝස්තු මස දී එවැනි වාර්තාවක් මානව සම්පත් අංශයට යවන ලද බවට සඳහන් වුවද එවැනි කිසිදු වාර්තාවක් අධ්‍යක්ෂ ජනරාල් හමුවට ඉදිරිපත් වී නොමැත. පෙර සඳහන් සිද්ධිමය කරුණු සංක්ෂිප්තව ගත් කළ ෆෝසයිට් සමාගම සමග ගිවිසුමකට එළඹීමට තීරණය කිරීමේ දී 1 වන නොතිසි ලත් පාර්ශවය විසින් සත්ඛාවයෙන් විශ්වාස කර ඇත්තේ (ඔහු වෙත ඉදිරිපත් තරන ලද නිල වාර්තා හා ප්‍රකාශ මත) මෙසේය -එනම්-

- (අ) හදිසි සුනාමි තත්වයක් එලඹ ඇති බව
- (ආ) සුනාමි කුළුණු යටාවන් කිරීමේ හදිසි අවශ්‍යතාවයක් පැන නැගී ඇති බව
- (ඇ) සුනාමි කුළුණු නඩත්තු කිරීම සඳහා ටෙන්ඩර් පටිපාටියක් ආරම්භ කර තිබුණද එය අතරමග නැවති (සම්පූර්ණ වී නොමැති) බව හා ඉදිරිපත් වූ අයදුම්කරුවන් හුසුදුසු බවට එවකටත් තීරණය කර ඇති බව.
- (ඈ) සුනාමි කුළුණු නඩත්තු කිරීම හා යටාවන් කිරීමට ඇති එකම සුදුසු ආයතනය වන්නේ එවකටත් එම කටයුත්තේ ම නියැලී සිටි ෆෝසයිට් ආයතනය වන බව හා එම සුනාමි කුළුණු ක්‍රියාත්මක වීම සඳහා අවශ්‍ය වන්දිකා තාක්ෂණය සහ සම්බන්ධීකරණය ලබා දීමට හැකි එකම ආයතනය ෆෝසයිට් ඉංජිනේරින් ආයතනය වන බව.
- (ඉ) ෆෝසයිට් ආයතනය සමග එම දිරිස කිරීමේ ගිවිසුමකට එළඹීම සඳහා හදිසි මෙහෙයුම් අංශය විසින් ඉල්ලා (නිර්දේශ) කර තිබෙන බව.”

This Court thereafter considered ‘**P4(a)**’, which the Petitioner states contain the recommendations of the PRECIFAC. It appears from ‘**P4(a)**’ that another report pertaining to this investigation had been submitted on a previous occasion and that what is contained in ‘**P4(a)**’ is only a summary. Be that as it may, it is clear from the said summary that the defence of the Petitioner has been rejected by the PRECIFAC, and that the 1st – 5th Respondents were satisfied that the awarding of the tender to a tenderer who had been rejected

by the Tender Evaluation Committee, and who was more expensive than the party recommended by the Tender Evaluation Committee, contravened the provisions of Section 70 of the Bribery Act⁹.

It is only thereafter that the PRECIFAC had made the following recommendation:

“ඉහත කී වරදවල් සිදු කර ඇති පුද්ගලයින්ට එරෙහිව කාපරාධ නීති කෘතය ඇරඹීම සලකා බැලීමට සහ ඔවුන්ට වරද්ධව නියමිත අධිකරණයේ නඩු කටයුතු පැවරීම සලකා බැලීම සඳහා අල්ලස් හෝ දූෂණ චෝදනා විමර්ශන කොමිෂන් සභාවට අවකාශ සලස්වනු පිණිස මෙම පෙත්සමට අදාළ විමර්ශනයේදී සටහන් කරන ලද ප්‍රකාශ සහ පරීක්ෂණයට අදාළ සාක්ෂි ද, සලකුණු කරන ලද ලේඛන ද ඇතුළත් ගොනු පිටපත් අල්ලස් හෝ දූෂණ චෝදනා විමර්ශන කොමිෂන් සභාව වෙත ඉදිරිපත් කිරීමට මෙම කොමිෂන් සභාව විසින් තීරණය කරන ලදී.....”

Taking into consideration the material that was placed before the PRECIFAC and the defence of the Petitioner, this Court is of the view that the above recommendation is reasonable. The objective of going through public procurement is to obtain *‘financially the most advantageous and qualitatively the best services and supplies for the country’*.¹⁰ If, having gone through such a process, the tender is awarded to a party who had been rejected during evaluation, and who is more expensive than the party who had been

⁹ Section 70 of the Bribery Act provides as follows: “Any public servant who, with intent, to cause wrongful or unlawful loss to the Government, or to confer a wrongful or unlawful benefit, favour or advantage on himself or any person, or with knowledge, that any wrongful or unlawful loss will be caused to any person or to the Government, or that any wrongful or unlawful benefit, favour or advantage will be conferred on any person- (a) does, or forbears to do, any act, which he is empowered to do by virtue of his office as a public servant; (b) induces any other public servant to perform, or refrain from performing, any act, which such other public servant is empowered to do by virtue of his office as a public servant; (c) uses any information coming to his knowledge by virtue of his office as a public servant; (d) participates in the making of any decision by virtue of his office as a public servant; (e) induces any other person, by the use, whether directly or indirectly, of his office as such public servant to perform, or refrain from performing, any act, shall be guilty of the offence of corruption and shall upon summary trial and conviction by a Magistrate be liable to imprisonment for a term not exceeding ten years or to a fine not exceeding one hundred thousand rupees or to both such imprisonment and fine.”

¹⁰ Per Amerasinghe, J in *Smithkline Beecham Biologicals S.A and another Vs. State Pharmaceutical Corporation of Sri Lanka and others* (1997 3 Sri LR 20 at 38).

recommended, the objective sought to be achieved is nullified. Therefore, in the words of Lord Diplock, this Court is of the view that the recommendation of the PRECIFAC is a recommendation which a *'sensible person who had applied his mind to the question to be decided could have arrived at'*. Thus, this Court does not see any merit in the argument presented on behalf of the Petitioner that the said recommendation is unreasonable or irrational.

In the above circumstances, this Court does not see any legal basis to issue notices on the Respondents. The application of the Petitioner is accordingly dismissed. This Court makes no order with regard to costs.

As agreed upon by all the learned Counsel, this Order must apply to CA (Writ) Application No. 273/2018. Hence, CA (Writ) Application No. 273/2018 must also stand dismissed without costs.

Judge of the Court of Appeal

Achala Wengappuli, J

I agree.

Judge of the Court of Appeal