

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

In the matter of an Application for orders in the nature of a writ of Certiorari and Mandamus under an in terms of the provisions of Article 140 of the Constitution.

1. Withanage Don Hemantha
Ranjith Sisira Kumara,
Executive Director,
Centre for Environmental
Justice,
No. 20A, Kuruppu Road,
Colombo 8.
2. Centre for Environmental Justice
(Guarantee) Limited,
No. 20A, Kuruppu Road,
Colombo 8.

CA (Writ) Application
No. 303/2019

Petitioners

Vs.

1. Central Environmental
Authority,
No. 104, Parisara Piyasa,
Robert Gunawardena Mawatha,
Battaramulla.
2. Director General of Customs
Sri Lanka Customs,
No. 40, Main Street,
Colombo 2.
3. Board of Investment of Sri
Lanka
Level 24, West Tower,
World Trade Centre,
Echelon Square,

Colombo 1.

4. Heyleys Free Zone Limited,
No. 400, Deans Road,
Colombo 10.
5. ETL Colombo (Pvt.) Limited
No. 12, Park Road,
Colombo 5.
6. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

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

Counsel: Ravindranath Dabare with Waruni Bamunusinghe for the Petitioners.

Romesh de Silva, PC with Harsha Amarasekera, PC, Niran Ankatell and Shahila Wijewardane for the 4th Respondent.

Avindra Rodrigo, PC with Akiel Deen and Himantha Wickremaratne for the 5th Respondent.

Charuka Ekanayake, SC for the 1st to 3rd and 6th Respondents.

Submissions of Counsel for the Petitioners and Respondents made on 25th, 29th, and 30th July 2019.

Order: 31st July 2019.

Hon. Justice Yasantha Kodagoda, PC, President of the Court of Appeal

The Petitioners filed this Application on 22nd July 2019, invoking the jurisdiction of this Court in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka, seeking Writs in the nature of

Certiorari and Mandamus on the 1st, 2nd, and 3rd Respondents. This is an Application filed in public interest, and the Petitioners have claimed that, they have the mandate to do so. This position was not challenged by the learned counsel for the Respondents.

Learned Counsel for the Petitioners brought to the attention of the Court that this Application relates to a matter pertaining to the health and wellbeing of the people of Sri Lanka and relates to alleged harm being caused to the environment. In the circumstances, he moved that this matter be taken up on the earliest possible day, and moved this Court to consider the issue of formal Notice to the Respondents and the consideration of the grant of interim relief as prayed for by the Petitioners. Parallel to the filing of this Application, the Petitioners had issued direct Notice to the Respondents, and following a decision being taken by this Court to permit the Support of this Application on 24th July 2019, the Petitioners were directed to issue a fresh direct Notice to the Respondents notifying them that this matter would come up for Support on that date. When this matter was taken up for Support on the 24th July 2019, the 1st to the 3rd Respondents (the only Respondents at that time) were represented by learned State Counsel, and the present 4th Respondent was represented by learned President's Counsel. While the 1st to 3rd Respondents had received direct Notice sent to them by the Petitioner, the present 4th Respondent had retained counsel upon getting to know of this Application.

On the 24th July 2019, learned counsel for the Petitioner supported this Application and learned State Counsel made certain submissions, based on limited instructions he had received from the 2nd Respondent. In view of the information contained in the Petition and attached documents and the submissions made by learned counsel, this Court observed the national importance of the matter before Court, and in the circumstances, called upon the learned State Counsel to be of assistance to Court in the due administration of justice, and to make a full disclosure of all relevant information. As the learned State Counsel also required time to obtain necessary detailed instructions, Court adjourned proceedings, and fixed this matter for further Support on 29th July 2019.

On 29th July 2019, the Petitioners had filed an amended Petition, which *inter-alia* introduced the present 4th and 5th Respondents to this Application. When this matter was taken up for Support, the learned counsel for the Petitioners sought to Support the Application afresh on the strength of the amended Petition. That application was allowed by Court.

Position of the Petitioners

According to the Petitioners, the 4th and the 5th Respondents have imported into Sri Lanka from the United Kingdom consignments of waste which allegedly include clinical waste, human body parts, used cushions and mattresses, plant parts, plastic waste and other uncategorized waste and hazardous waste, in the guise of importing permitted consignments with the intention of disposing such waste within the country. The Petitioners have alleged that severe damage to the health of the general public and to the environment would be caused by such importation, the storage, and disposal of the contents of these consignments. The Petitioners have alleged that, approximately 130 containers containing hazardous waste imported from the United Kingdom have been taken from the Colombo Port to the premises of the 4th Respondent which is situated within the export processing zone in Katunayake. The Petitioners have further alleged that these consignments have been piled up at the said site over an exposed area (exposed to the elements of nature). Further, the Petitioners have alleged that approximately 102 containers allegedly containing similar hazardous waste were lying at the Colombo International Container Terminal (CICT) situated within the Colombo Port. The Petitioners have pointed out that, if any of the contents of these consignments containing hazardous and contaminated waste is permitted to be buried in Sri Lankan land or sent to open dumps within the country, the underground water table and the surrounding environment will be severely affected, thereby polluting and contaminating the surrounding water bodies. According to the Petitioners, certain chemicals used to make products such as cushions and mattresses when released to the environment may cause adverse serious health consequences.

The Petitioners pointed out that, import of waste should be carried out in strict compliance with the BASEL Convention on the Control of Transboundary Movements of Hazardous Waste and their Disposal, to which Sri Lanka is a signatory. It is the position of the Petitioners that Sri Lanka at

present does not have facilities to manage such waste, and according to the said Convention, reception of hazardous and contaminated waste could be done only by a country which has the capacity to handle hazardous waste adhering to international standards. The Petitioner also pointed out that, disposal of waste and hazardous waste should be done under the provisions of certain Regulations made in terms of the National Environmental Act.

The learned counsel for the Petitioners pointed out that, it was the legal responsibility of the 1st to the 3rd Respondents to conduct investigations into the importation of the contents of the containers in issue containing waste, and deal with offenders in terms of the applicable laws. He pointed out to the National Environmental Act and the Customs Ordinance as being the applicable laws, the provisions of which should be enforced with regard to these consignments. The basic premise upon which this Petition has been presented to this Court is that, according to the Petitioners, the importation of both consignments referred to above, have been carried out contrary to provisions of the law, without valid legal authority, and amounts to violation of prohibitions contained in the applicable laws. The Petitioners have complained to this Court of alleged inaction on the part of the 1st to the 3rd Respondents to give effect to their statutory obligations in terms of the applicable laws gave rise to the need to petition this Court and to move this Court to issue interim and final reliefs as prayed for.

In support of the factual averments contained in the Petition, the Petitioners have produced to Court a considerable amount of material available in the public domain pertaining to the two consignments referred to in the Petition.

Position of the 1st, 2nd, 3rd and the 6th Respondents

According to the learned State Counsel, a total of 111 shipping containers allegedly containing certain types of waste material are presently lying at the Colombo International Container Terminal (CICT) situated within the Colombo Port. In fact approximately 1,000 shipping containers are said to be presently at the CICT without their having been cleared on time, thus giving rise to some suspicion. Due to a strong stench emanating from the 111 containers referred to above, personnel of the CICT had alerted the 2nd Respondent (Director General Customs), who had caused the opening and an initial examination of a random sample of five of these containers, by

officers attached to the Consumer Protection Unit of the Sri Lanka Customs. This examination had been carried out on 24th May 2019. A prior examination of the related shipping, importation and customs documents had revealed that, a total of 111 containers belonging to this category were at the CICT. Of them, 65 containers were piled up at the CICT for over a year without clearing them. The exporter of all consignments was a company named VENGAADS LTD of the United Kingdom, and the goods had been imported from the United Kingdom. While the consignee of all the consignments was the 5th Respondent [ETL Colombo (Pvt) Ltd.], the *Notifying Party* was a company named Ceylon Metal Processing Corporation (Pvt.) Ltd, which is not a Respondent to this Application. As per the *Way Bill* the goods had been described as 'used mattresses', 'bales of mattresses', 'bales of textiles felt', and 'bales of textiles'. The examination of the random samples had revealed that the consignments in issue contained not only used mattresses, but also carpets. There had been fungal growth and broken pieces of glasses. Mud had been observed on some of the carpets, and bird feathers and dead plants had been found. Living organisms such as cockroaches and larvae had been observed. The examiners have observed that, there exists a threat to the bio diversity and the eco-system of Sri Lanka.

According to the learned State Counsel at the premises referred to as the *Hayleys Free Zone* of the 4th Respondent in Katunayake, the consignments in issue related to 130 shipping containers. According to the related shipping and customs documents, these consignments had been imported into Sri Lanka during the period September 2017 to January 2018. These consignments had also been shipped from the United Kingdom and the exporter at that end had been VENGAADS LTD (with regard to all but 10 containers). The exporter with regard to the remaining 10 containers had been DM Logistics Ltd. While with regard to 85 of the containers, the consignee had been the 4th Respondent, the consignee of the remaining 45 containers had been 5th Respondent. The *Notifying Party* as regards some of the containers had been the 4th Respondent and with regard to some others the 5th Respondent. An examination of these consignments had been carried out on 22nd July 2019 by officials of the 1st Respondent (Central Environmental Authority). This examination had revealed at the time of the examination, the goods of these consignments had been stocked outside partially exposed to the elements of the nature, and contains used mattresses with metal springs,

carpets and some other non-descriptive material. Rainwater had been absorbed to these items. The examiners have expressed the view that, due to soakage of the goods by rainwater, there was the possibility of the said water subsequently entering the surrounding areas and thereby polluting the environment.

Learned State Counsel submitted that, an examination of the related documents revealed that the 4th Respondent had entered into an agreement with 3rd Respondent (Board of Investment) dated 8th May 2014 to conduct an *Entreport Trade* involving the importation, minor processing and re-export, and the operation carried out by the 4th Respondent seemed to relate to the said agreement. He pointed out that, notwithstanding the operation of Commercial Hub Regulations No. 1 of 2013 (made in terms of Part IV of the Finance Act by the Minister of Finance) to such activities as those covered in terms of the afore-stated agreement and the exemptions contained in these Regulations, compliance with provisions of the Customs Ordinance and the Imports and Exports (Control) Act was necessary, as the goods in issue ex-facie related to an item of Schedule B of the Customs Ordinance. He also submitted that, in any event, compliance with provisions of the National Environmental Act was necessary and hence in order to operate the *entreport* trade referred to in the afore-stated agreement, it was necessary for the 4th Respondent to have obtained an Environmental Protection License.

Learned State Counsel submitted that, in the given circumstances, both the 1st and the 2nd Respondents were conducting investigations and were contemplating law enforcement measures to be taken against persons if any found to have violated the law.

Position of the 4th and 5th Respondents

Both learned President's Counsel for the 4th and 5th Respondents submitted that, the importation of the consignments in issue had been carried out in terms of the law, and their respective clients had in no way infringed the law. They submitted that, the goods in issue were not hazardous waste, and the said goods were not injurious to either the environment or to the health and wellbeing of the public. Learned President's Counsel for the 4th Respondent submitted that, the minor processing of the imported goods took place in a manner not polluting the environment and no by-product or a waste

emanating from the said minor processing of the goods were released to the Sri Lankan environment. He further submitted that the totality of the good imported to the country were to be re-exported following minor processing within the zone.

Learned President's Counsel for the 5th Respondent submitted that the actual owner of the imported goods was Ceylon Metal Processing Corporation (Pvt.) Ltd (which is not a party to this Application), and that the 5th Respondent had an agreement on the one hand with the said company and on the other hand had another agreement relating to these goods with the 4th Respondent.

Consideration by Court and the order

Based on the material placed before this Court by the Petitioners and the Honourable Attorney General (on behalf of the 1st to 3rd Respondents) and the submissions made by learned counsel for all parties, this Court is of the view that, the legality or illegality of the importation into Sri Lanka of the relevant consignments, storage of the imported goods in the CICT of the Colombo Port, transportation from the Colombo Port to the Hayleys Free Zone in Katunayake, storage of the imported goods at the said zone, possession of the goods, processing of the imported goods, re-transportation to the Colombo Port and re-export of the goods out of Sri Lanka, would depend primarily on the exact nature of the goods. Apart from positions taken up by the parties, and a superficial and initial examination of the goods by certain officials who have not been proven before this Court to possess expertise, this Court has not been briefed of reliable independent expert opinion regarding the exact nature of goods at the CICT and at the Hayleys Free Zone. It is therefore not possible at this stage to arrive at a finding on whether or not the imported goods amount to hazardous waste, which may be injurious to the environment and or the health and wellbeing of the public. However, based on the material presently before this Court, there is a serious doubt regarding the possible impact of these goods to the environment and the health of the people.

Therefore, this Court issued an order on the Government Analyst to examine the said goods at both locations, and present to Court a Report. It is to be

noted that on 29th July 2019, when consideration was given to the making of this order, all counsel representing the several parties gave their consent to the making of such an order.

Following the receipt of expert evidence regarding the exact nature of the goods imported into the country and presently lying at the CICT and at the Hayleys Free Zone, and other related evidence which the parties may place before this Court, consideration can be given to the need to judicially review any decision, action or omission by the 1st to the 3rd Respondents relating to these consignments, which is seen to be illegal, unreasonable or procedurally flawed.

Consideration of the grant of other reliefs prayed for by the Petitioners can also be considered at that stage.

It is also noted by Court that, due to the business relationship between the 4th and 5th Respondents on the one hand and between the 5th Respondent and Ceylon Metal Processing Corporation (Pvt.) Ltd. and the identities of the exporter, consignee and notifying parties of the consignments at both the CICT and at the Hayleys Free Zone, there appears to be ex-facie a link between the goods at the two locations and parties involved in the importation of both consignments. This is a matter that requires to be examined more fully in due course.

It is the view of this Court that, due to the reasons set out above pertaining to the presently available description of the goods, identity of the exporter, consignee, notifying party, time period during which the goods have been imported into the country, contractual relationship between the consignee, purported owner, notifying party and the party presently possessing some of the goods, it is not possible to at this stage artificially separate and consider the legality pertaining to the goods at the CICT in the Colombo Port and the goods at the Hayleys Free Zone in Katunayake. This is a matter that needs to be considered by Court after the entirety of the pleadings are filed by the Respondents and the Petitioners are afforded an opportunity of countering the said pleadings.

In all these circumstances, Court is of the view that, the Petitioners have satisfied the initial threshold requirement of Applications of this nature, which warrants the Court to issue formal Notice (through Court) of this Application to all the Respondents. It is to be noted that, both learned President's Counsel for the 4th and 5th Respondents indicated to Court that they had no objection to the issue of formal Notices of this Application to their respective clients. In the circumstances, this Court hereby directs the Registrar to issue Notice of this Application to the Respondents returnable 20th September 2019.

The Petitioners have prayed for an order in the nature of interim relief directing the Respondents to prevent any transportation or other movement of waste inside the country for any other purpose other than the purposes of re-exportation of the said goods. This is understood to be a reference to the two consignments referred to be at the CICT in the Colombo Port and at the Hayleys Free Zone. It is the view of this Court that, certain aspects of the reliefs prayed for by the Petitioners would become nugatory if either the whole of or any part of the said consignments are moved out of their present locations for whatever purpose. In this regard, this Court notes that, according to the learned State Counsel, the 1st to 3rd Respondents have now commenced taking certain law enforcement measures regarding these two consignments and certain investigations are underway as well. Therefore, the Respondents are hereby ordered not to move out of the present locations any of the goods at either of the afore-stated locations, without obtaining the prior sanction of this Court. This interim order thereby restrains the 4th and 5th Respondents from re-exporting any of the goods of the two consignments in issue, without the prior approval of this Court. In this regard, it is to be noted that, the learned President's Counsel for the 4th Respondent submitted to Court that, it was never the intention of the 4th Respondent to move out any of the goods at the Hayleys Free Zone other than for the purpose of re-exporting the said goods, and hence he would not object to the grant of interim relief as prayed for in paragraph (j) of the prayer of the Petition. However, it is to be also noted that, the interim order being issued by this Court slightly varies from the interim relief prayed for by the Petitioner. Such variation is made in the best interests of justice.

This Court wishes to reiterate the order made on the Government Analyst on 29th July 2019 to examine the goods in issue and present a Report to this Court as soon as possible. The Respondents are directed to facilitate the Government Analyst to access the relevant sites, open the relevant shipping containers and examine the relevant goods.

It is to be noted that, the orders this Court has made should in no way be interpreted as a bar or restriction imposed on any law enforcement or regulatory measure any competent law enforcement or regulatory authority may wish to take in terms of the law with regard to the consignments referred to in this order.

The Registrar is directed to issue copies of this order to the Petitioner and the Respondents.

This matter is to be mentioned on 20th September 2019.

**Justice Yasantha Kodagoda, PC,
President of the Court of Appeal**

Justice Arjuna Obeyesekere

I agree.

Judge of the Court of Appeal