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 Writs of Mandamus, Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA /WRIT/417/2021

Ranjith Keerthi Tennakoon
No.482/4
Rajagiriya Road,
Rajagiriya

Petitioner

Vs.

1. **Hon. Attorney General**
   Attorney General's Department
   Hulftsdorp, Colombo 12

2. **Inspector General of Police**
   Police Head Quarters
   Colombo 01

3. **Ajith Nivard Cabral**
   No. 32/7, School lane,
   Nawala

4. **P.B. Jayasundare**
   Secretary to the President
   Presidential Secretariat,
   Galle Face, Colombo 01

5. **Basil Rajapakshe**
   Ministry of Finance
   The Secretariat
   Colombo 01, Sri Lanka

6. **T.M.J.Y.P. Fernando**
   Deputy Governor
   Central Bank of Sri Lanka
   Janadhipathi Mawatha,
   Colombo 01.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Maithri Gunaratne, PC with Shiral Lakthilaka, Ashan Nanayakkara, Charitha Gunaratne and I. Shahabdeen for Petitioners

Nerin Pulle ASG, PC with N. Vignaeshwaran DSG and A. Gajadeera SC for 1st, 2nd, 4th and 5thRespondents.

Romesh De Silva PC with Palitha Kumarasingha PC and Niran Ankatell for the 3rd and 6th Respondents.

Supported on: 07.10.2021

Written Submissions on: 12.10.2021

Decided on: 03.11.2021

Sobhitha Rajakaruna J.

A Presidential Commission of Inquiry has been appointed by virtue of a warrant issued by His Excellency the President, published in Extra Ordinary Gazette Notification No. 2003/41 on 27.01.2017. The said Commission has made recommendations to His

Excellency the President to appoint a team of experts to conduct a forensic audit affair of the Central Bank of Sri Lanka (CBSL) on issuance of Treasury Bonds and to conduct an inquiry pertaining to the irregularities occurred within the CBSL during the designated period. Accordingly, a forensic audit has been carried out by a company called BDO India LLP as per the instructions of the CBSL, and its Monetary Board. Subsequently, the said company has issued a report to the CBSL.

The Petitioner alleges that according to the said forensic report, the CBSL has incurred losses between 10.4 - 10.6 billion Rupees during the period where the 3rd Respondent was the Head of the CBSL, particularly from the year 2005 to 2015. He further asserts that the 1st and/or the 2nd Respondents have an alleged legal duty to act upon the findings of the forensic report and however, they have deliberately not acted upon or taken steps to bring the 3rd Respondent before the law, based on the purported material listed out in paragraph 16 of the Petition. The Petitioner pleads that there is sufficient evidence in the said forensic report to establish that the 3rd Respondent, being the principal officer to the CBSL, has violated policies and rules approved by the Monetary Board.

The outline of the reliefs sought by the Petitioner from this Court is to prevent the 5th Respondent, Minister of Finance making recommendations to His Excellency the President to appoint the 3rd Respondent as the new Governor of the CBSL under Section 12 of the Monetary Law Act. The Petitioner further seeks for a mandate in the nature of a writ of Certiorari to quash the recommendations made by the 5th Respondent to appoint the 3rd Respondent as the new Governor of CBSL. Additionally, the Petitioner prays, inter alia, for a mandate in the nature of a writ of Mandamus to compel the 1st and 2nd Respondents to take legal action against the 3rd Respondent considering the alleged evidence in the aforesaid forensic audit report.

When this matter was taken up for support for the purpose of issuance of notice, the Respondents took up several preliminary objections. The learned Additional Solicitor General appeared on behalf of 1st, 2nd, 4th and 5th Respondents took up, *inter alia*, the following preliminary objections:

a) the pleadings in these proceedings are prolix and abuse the privilege granted to pleadings by making unsubstantiated allegations against persons who have not been made parties to this application;
b) this court has no jurisdiction to hear this matter in as much as these proceedings are a disguised attempt at challenging the decision of the President acting qua President, which can only be carried out in the Supreme Court in terms of Article 35 of the Constitution;
c) a writ of Mandamus will not lie where discretion is involved and no judicial review can be sought against the 1st Respondent, Attorney General, in the exercise of his prosecutorial discretion;
d) the writ of Certiorari prayed against the recommendation made by the 5th Respondent is futile in as much as the President has already appointed the 3rd Respondent, as the Governor of CBSL.

The learned President's Counsel for the 3rd and 6th Respondents also took up several preliminary objections including the objection based on the immunity of President from suit that is provided in Article 35 of the Constitution. The learned President's Counsel further submitted that no writs of Mandamus, Certiorari or Prohibition would lie on the face of the petition and that the reliefs sort by the Petitioner are misconceived/vague.

All the Respondents raised the objection on locus standi and argued that the Petitioner could not maintain the instant application as the same has not been filed in the public interest.

Having set out the main preliminary objections of the Respondents, I now proceed to the important legal issues that arise in respect of those objections in order to decide whether the Petitioner has established a prima facie case which warrants this Court to issue notice. This Court needs to take in to account at this stage, the question whether the application for notice relates to a matter that ought to be resolved after full argument.

In terms of Section 12 (1) of the Monetary Law Act, the Governor of the Central Bank shall be appointed by the President on the recommendations of the Minister in-charge of the subject of Finance. The argument of the Respondents is that the power of appointment of the 3rd Respondent, Governor of the Central Bank, is vested in his Excellency the President

of the Republic and such appointment is an act of the President. The contention of the 3rd Respondent is that the President is a necessary party to this application if the Petitioner wishes to challenge the appointment done by the President.

By virtue of Article 35 (1) of the Constitution, no proceedings shall be instituted against the President while he holds office as President, in any Court or tribunal in respect of anything done or omitted to be done by him either in his official or private capacity. However, the proviso to the said Article gives the right to any person to make an application under Article 126 against the Attorney General in respect of anything done or omitted to be done by the President, in his official capacity. Therefore, Respondents argue that the said Article 35 (1) clearly barred Writ application being filed against the President in respect of anything done by him.

The 3rd and 6th Respondents rely upon the judgements in ***Victor Ivon and others v. Hon. Sarath Silva and others 2001 (1) SriLR 309*** and ***Centre for Policy alternatives v. B. N. Jayarathne and others SC FR application 23/2013, SE minutes 24.03.2014***. In the said case of Victor Ivon, the Petitioners were challenging the appointment of the then Chief Justice Sarath N. Silva. In the said application, Petitioners have not made the President as a party as the President enjoys blanket immunity and instead named Chief Justice Sarath Silva as the 1st Respondent. The argument raised by the Petitioners in that case was that the said 1st Respondent was the "beneficiary" of the act of the President and the President's act of appointing the 1st Respondent as the Chief Justice was reviewable and could be questioned in those proceedings through the person of the 1st Respondent. The 5-judge bench of the Supreme Court in that case agreeing with Wadugodapitiya J held, inter alia, that; (as per Wadugodapitiya J)

> *'I am unable to agree with Mr. Abeysuriya here either. The 1st Respondent has not "invoked" the President's act of appointment to rely on or justify anything. Unlike in the cases cited above, no allegation is made against the 1st Respondent that he has performed any executive or administrative act violative of anyone's fundamental rights. The only act challenged, is the President's own act in appointing the 1st Respondent as Chief Justice. Therefore, Mr. Abeysuriya's argument fails, in as much as his interpretation is not in accord with the decision he has cited.'*

'I am constrained to say that, in fact, what the Petitioners are asking this court to do, is in effect to amend, by judicial action, Article 35 of the Constitution, by ruling that the immunity enjoyed by the President is not immunity at all. This, of course, it is not within the power of this Court to do. In the guise of judicial decisions and rulings, Judges cannot and will not seek to usurp the functions of the Legislature, especially where the Constitution itself is concerned.'

In the case of *Center for Policy Alternative,* the Supreme Court held that the President enjoys absolute immunity in respect of his act of appointing the 6th Respondent in that case as the 44th Chief Justice of Sri Lanka in terms of Article 107(1) of the Constitution.

This Court observes that the said judgements in the *Victor Ivon case* and the *Center for Policy Alternative case* have been delivered before certifying the 17th Amendment[1] to the Constitution. By the said 17th Amendment, the above Article 107 was amended and thereafter the President could make the appointments of the Chief Justice and the other Judges of the Supreme Court and the Court of Appeal subject to the provisions of Article 41C which stipulates that such appointment has to be approved by the Constitutional Council upon a recommendation by the President. When appointing the Chief Justice Sarath Silva, the then President had unfettered discretion under the Constitution to make such appointments without being subject to any condition. However, the appointment of the Governor of the CBSL, under Section 12 of the Monetary Law Act has to be done by the President on the recommendations of the Minister in-charge of the subject of Finance. The Petitioner in the instant case challenges the recommendations made by the 5th Respondent, the Minister of Finance.

However, the written submissions filed on behalf of the Petitioner highlights the following assertions to emphasize that the Petitioner is not concern on the appointment made by the President;

"In simple terms, the Petitioner has asked to take criminal actions against the 3rd Respondent; not to quash his appointment. The Petitioner is not concern on the appointment made by the President……Preventing the 3rd Respondent acting as the Governor of Central Bank and quashing the decision made by the President of the Republic have a difference of meaning like chalk and cheese"

[1] The 17th amendment to the 1978 Constitution of the Republic has been certified on 03rd October 2001.

The Respondents categorically submits that the President has already appointed the 3rd Respondent as the Governor of the CBSL and accordingly, the application of the Petitioner for a writ of Certiorari to quash the recommendations of the 5th Respondent is futile.

Taking in to consideration of those circumstances including the above assertions of the Petitioner, this Court is not inclined to determine at this stage as to whether the Petitioner is entitled to challenge the recommendations of the 5th Respondent in the backdrop of the provisions of Article 35 of the Constitution. There are several authorities of Superior Courts where the Courts were reluctant to issue a writ when granting relief would be futile if it leaves the final decision intact. The learned Additional Solicitor General cited the Judgement in ***Ratnasiri and others v. Ellawala and others (2004) SLR 180*** where ***Marsoof***, PC. J (P/CA) held that;

> *"This court is mindful of the fact that the prerogative remedies it is empowered to grant in these proceedings are not available as of right. Court has a discretion in regard to the grant of relief in the exercise of its supervisory jurisdiction. It has been held time and time again by our Courts that "A writ... will not issue where it would be vexatious or futile." See, P.S. Bus Co. Ltd. v Members and Secretary of the Ceylon Transport Board[2]. In Siddeek v Jacolyn Seneviratne and Others,[3] at 90, Soza, J. delivering the judgment of the Supreme Court observed that -*
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> > *"The Court will have regard to the special circumstances of the case before issuing a writ of certiorari. The writ of certiorari clearly will not issue where the end result will be futility, frustration, injustice and illegality."*

In the circumstances, we are of the view that even if the recommendations made to the President by the 5th Respondent (in supporting the appointment made under section 12(1) of the Monetary Law Act) are being quashed by this Court, such appointment will remain unchanged. The removal of the 3rd Respondent can be done only in terms of section 16 of the said Monetary Law Act. Thus, no writ of Certiorari can be issued as prayed for by the Petitioner since the end result will be of futility. Moreover, it is observed that the paragraph (e) of the prayer of the Petition deals with a writ of Certiorari to quash the recommendations made by the 5th Respondent. However, the learned Counsel for the Petitioner in his written submissions, particularly in the paragraph referred to above, has waived his rights of

[2] 61 NLR 491, 496
[3] (1984) Sri LR 83

challenging the appointment of the 3rd Respondent. This again emphasizes the proposition that it is a futile exercise for this Court to issue a writ of Certiorari to quash the recommendations of the 5th Respondent. Sharvananda J. (as he was then) held in ***Biso Menike Vs Cyril de Alwis 1982 (1) SriLR 368 at p. 377,*** that a party aggrieved by the order of an inferior tribunal is disentitled himself to the discretionary relief of the Court by reason of his own conduct, like submitting to jurisdiction, laches, undue delay or waiver.

The Respondents vehemently objects to the application of the Petitioner for mandates of writs of Mandamus as prayed for in the prayer of the Petition. The Petitioner pleads *inter alia* for writs of Mandamus;

a) to compel the 1st and 2nd Respondents to take legal actions against the 3rd Respondent considering evidence available within the Forensic Audit Report;
b) to compel the 1st Respondent to file a separate indictment against the 3rd Respondent under the same and/or adding further and additional charges leveled against the 3rd Respondent as mentioned in paragraph No. 22 of the Petition;
c) to compel the 2nd Respondent to arrest, detain and record a statement from the 3rd Respondent considering the evidence available within the Forensic Audit Report.

The crux of the said pleadings of the Petitioner seeking for writs of Mandamus is to compel the 1st Respondent, Attorney General to take legal action against the 3rd Respondent. All the Respondents assert that judicial review cannot be sort against the Attorney General in the exercise of his prosecutorial discretion. In support of this argument, the learned Additional Solicitor General drew the attention of this Court to the judgment of the Supreme Court case in ***Kaluhath Ananda Sarath De Abrew v. Chanaka Iddamalgoda and others SC FR No. 424/2015, SE minutes of 11.01.2015***. His Lordship Justice Priyantha Jayawardane, PC has stated in that judgment 'where the legislature has confided the power on the Attorney General to forward indictment with a discretion how it is to be used, it is beyond the power of Court to contest that discretion unless such discretion has been exercised mala fide or an ulterior motive or in excess of his jurisdiction'. Further, the learned Additional Solicitor General has submitted three judgments of English Courts dealing with the prosecutorial discretion of the Attorney General. Those judgments are ***Attorney General v.***

Gouriet[4]***, R v. Director of the Serious Fraud Office***[5] and ***R v. Director Prosecutions Ex p. Kebilene***[6].

The learned President's Counsel for the Petitioner disagreeing with the above position has cited a Canadian judgement in the case of ***R v. Anderson Supreme Court of Canada (2014) 2 SCR 167*** in which it has been held as follows:

"….Prosecutorial discretion is reviewable for abuse of process. The abuse of process doctrine is available where there is evidence that the Crown's conduct is egregious and seriously compromises trial fairness or the integrity of the justice system. The burden of proof lies on the accused to establish, on a balance of probabilities, a proper evidentiary foundation to proceed with an abuse of process claim, before requiring the Crown to provide reasons justifying its decision….."

The Petitioner has cited several other judgements also to emphasize the doctrine of public trust and the limitations to discretion that conferred by law. However, the argumentation of the Respondents is based on the prosecutorial discretion of the Attorney General.

It is important to note that the judicial review is concerned, not with the decision but with the decision making process[7]. The judicial review has been expanded through judicial creativity during past decades and the Judges have exercised the freedom of employing various theories in reviewing the discretionary power of public authorities. Accordingly, the current position, in my view, is that the Attorney General's power to file or not to file an indictment is a discretionary power which is neither absolute nor unfettered. Therefore, each case that challenges such discretion should no doubt be decided on its own merits.

The vital question at this stage is whether the Petitioner has established a prima facie case for review. The contention of the learned President's Counsel for the 3rd and 6th Respondents is that the entire basis for the Petitioner's application for writs of Mandamus to indict, arrest, and detain the 3rd Respondent, relies solely on the forensic audit report marked 'A5(a)'. He contends referring to bullet points 3 to 6 in page 174 of the said report (A5a),

[4] (1978) A. C. 435 at 487
[5] (2008) UKHL 60
[6] (2000) 2AC 326
[7] See Chief Constable of the North Wales Police v Evans [1982] 3 All ER 141, 154-155 , HL (Lord Brightman; R v Panel on Take-overs and Mergers, ex p Datafin plc [1987] QB 815, 842 (Sir John Donaldson); Lonrho plc v Secretary of State for Trade and Industry [1989] 2 All ER 609, 617 (Lord Keith of Kinkel).

that the audit report does not contain conclusions or findings relating to legal matters. He further submits that the relevant Indian company has relied on information provided to them and they have not verified the information provided and cannot guarantee its reliability or completeness. Among those bullet points, referred to by the learned President's Counsel, the bullet point 3 particularly stipulates that:

"BPO India does not tender any legal advice or related services and therefore none of the services rendered under the contract should be considered to be legal services. In respect of any and all legal matters, the CBSL may consult its legal advisors as they deem fit and in their own discretion"

On perusal of those provisions of the said audit report it is apparent that it doesn't emanate prima facie evidence or any proof to compel the 1st and 2nd Respondents to arrest, detain and indict the 3rd Respondent. Moreover, we observe that the Petition of the Petitioner does not divulge any abuse of process or *malafides*, unreasonableness, excess of jurisdiction on the part of the 1st or the 2nd Respondents in exercising their authority. Therefore, we are compelled to abide by the principles adopted upon the discretion of the Attorney General in the above Supreme Court case of ***Kaluhath Sarath de Abrew v. Chanaka Iddamalgoda and others*** and conclude that the Petitioner has not submitted any prima facie material which warrants this court to review the discretion of the 1st & 2nd Respondents and to make directions against them. Further, we are of the view that the contents of the said audit report have no binding effect, which generates a mandatory duty upon the 1st Respondent to exercise his prosecutorial discretion.

The Indian company, BDO India LLP or any of its principal officers have not been made parties to this instant application. The investigations have been carried out by the said company in order to submit the final report, 'A5a', upon which the Petitioner constructs his claim for writs of Mandamus. We are of the view that it is necessary to make the said company a party for the purpose of fuller and proper adjudication of the matters sought to be advanced by the Petitioner in this application.

Mark Fernando J. in ***Victor Ivon v. Sarath N. Silva, Attorney General and another (1998) 1 SriLr 340 at p.349*** stated as follows;

"A citizen is entitled to a proper investigation - one which is fair, competent, timely and appropriate - of a criminal complaint, whether it be by him or against him. The criminal law exists for the protection of his rights - of person, property and reputation - and lack of a due investigation will deprive him of the protection of the law. But the alleged lack of a proper investigation, which resulted in those reports not being available to the Attorney-General was a lapse on the part of those whose duty it was to investigate, and not on the part of the Attorney-General. Those responsible for the investigation have not been made parties, and the petitioner's case has not been presented on the basis of a defective investigation."

The learned Additional Solicitor General referring to the cases of ***Kaluarachchi v. Ceylon Petroleum Corporation and others SC Appeal No. 43/2013: SC minutes 19.06.2019*** and ***Credit Information Bureau of Sri Lanka v. M/s Jafferjee and Jafferjee (Pvt.) Ltd. (2005) 1 Sri LR 89*** raises another important point in exercising jurisdiction on issuance of writs of Mandamus. He submits that the foundation of writ of Mandamus is the existence of a legal right and also that Mandamus will not lie as the Petitioner has failed to explicitly demand an exercise of such a public duty.

Therefore, we are inclined to accept the proposition of the Respondents that this Court should not intervene to usurp investigatory powers and prosecutorial powers of the 1st and/or the 2nd Respondent depending on the circumstances of this case. Based on the above line of reasoning, we are of the view that the preliminary objections examined above should be upheld and there is no necessity to examine deeply into the other preliminary objections on standing etc., raised by the Respondents.

In an application for judicial review, the stage of notice demands that a court seized of an application for notice should consider whether the case is suitable for full investigation at a hearing at which all parties have been given notice. (See ***A. M. Chaminda Bandara Adikari v. Kapila Adikari, Chief Inspector of Police CA/Writ/Application 216/2020 decided on 25.08.2020 at p.14)*** The court will take into account the question whether the application for notice relates to a matter that ought to be resolved after full argument.

The interpretation given upon the words 'prima facie case' in ***Ginadasa v. Weerasignhe, 31 NLR 33*** by Dolten, J. is apt here. Accordingly, "*the court must be satisfied that there is a serious case to be tried at the hearing and that on the facts before it there is a probability that plaintiff is entitled*

to relief." The test for prima facie case in applications for judicial review should be similar. (See ***Sandresh Ravindra Karunanayake v. AG and others CA/ Writ/Application No.63/2020 decided on 07.07.2020 at p.13***).

In the circumstances, we take the view that the Petitioner, has not made out a prima facie or an arguable case and this court is unable to grant any relief as prayed for in the prayer of the Petition. Accordingly, we decide to refuse issuance of notice on the Respondents of this application. Therefore, the application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola, J.

I agree.

Judge of the Court of Appeal