

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

*In the matter of an application for revision
under and in terms of Section 11(1) of the
High Court of the Provinces (Special
Provisions) Act No. 19 of 1990.*

Commission to Investigate Allegations of
Bribery or Corruption,
No 36,
Malalasekera Mawatha,
Colombo 07.

Plaintiff

Vs.

Court of Appeal Application
No: **CPA/77/22**

High Court of Colombo
No: **HCB/115/21**

1 Maldeniyage Don Upali Gunarathne
Perera
No. 372, Upper Karagahamuna
Kadawatha

2. Hewa Rajage Wasantha Wimalaweera
No. 59, Wilabada Road,
Gampaha

3. Upali Senerath Wickramasinghe,
No.300, G. Godagama Road,
Athurugiriya.

4. Sudeera Parackrama Jinadasa,
No.65 Model Town,
Rathmalana

Accused

And now in between

Maldeniyage Don Upali Gunarathne
Perera
No. 372, Upper Karagahamuna
Kadawatha

1st Accused-Petitioner

Sudeera Parackrama Jinadasa,
No.65 Model Town,
Rathmalana

4th Accused-Petitioner

Vs.

Commission to Investigate Allegations of
Bribery or Corruption,
No 36,
Malalasekera Mawatha,
Colombo 07.

Plaintiff-Respondent

BEFORE : Menaka Wijesundera J
Neil Iddawala J

COUNSEL : Maithri Gunaratne P.C. with Ashen
Nanayakkara for the Petitioner

A Navavi DSG with Shashika
Chandrawansha for the Respondents.

Supported on : 07.09.2022

Decided on : 12.10.2022

Iddawala – J

The President's Counsel supported the instant application on 07.09.2022 and this Court reserved its order for notice.

The accused-petitioner (*hereinafter the petitioner*) was indicted on 29.06.2021 for charges under the Bribery Act before the High Court of Colombo in Case No HCB/115/2021. During the pendency of the trial, the petitioner raised a preliminary objection to the legality of maintaining the action based on the premise that the institution of action against the petitioner has violated the *ratio decidendi* of **Anoma S. Polwatte v L. Jayawickrama** SC/Writ Application No. 01/2011 SC Minute dated 26.07.2018 and **Nandasena Gotabhaya Rajapakse v Director General of Commission to Investigate Allegations of Bribery and Corruption** CA (Revision) APN No 29/2018 CA Minute dated 12.09.2019. On 21.02.2022, the learned High Court judge pronounced an order dismissing the preliminary objections of the petitioner. Thereafter on 15.06.2022 petitioner further asserted arguments to support his contention that the Attorney General was precluded from being retained as the Advocate on behalf of the respondent Commission. Subsequently, the petitioner made an application in the High Court

seeking to disqualify the Hon. Attorney General from prosecuting the case filed by the Commission to Investigate Allegations of bribery or Corruption (*hereinafter the CIABOC*). On 15.06.2022 the High Court refused the petitioner's application. Aggrieved, the petitioner has preferred the instant application for revision on 18.08.2022 to set aside the order dated 15.06.2022 delivered by the learned High Court judge. Furthermore, the petitioner is seeking an order preventing the respondent from retaining the Hon. Attorney General for the task of prosecuting in the High Court of Colombo in Case No HCB/115/2022.

When this matter came up for support, the President's Counsel for the petitioner submitted that the Hon. Attorney General has no right to appear on behalf of the respondent as per Section 13, 17 of the Commission to Investigate Allegations of Bribery or Corruption Act (*hereinafter the Commission Act*) and Section 24D of the Commission of Inquiry Act No 3 of 2019. The President's Counsel relied on the Hansard Report of the debate conducted on 04.10.1994 in the Parliament of Sri Lanka when the Commission to Investigate Allegations of Bribery or Corruption Act, No 19 of 1994 was presented by the then Minister of Justice Prof. G. L. Pieris to assert that the very purpose for which the Act was introduced was to ensure that the CIABOC is empowered to carry out prosecutions independent of the Attorney General's Department. It was further contended that the collaboration between the CIABOC and the Attorney General's Department in relation to prosecutions ought to be limited to either advice or opinion. The learned Deputy Solicitor General appearing on behalf of the respondent vehemently objected to the issuance of notice and asserted that Section 13(1) of the Commission Act allows any Attorney-at-Law authorised by the CIABOC to appear on their behalf and as such, there is no legal impediment for an officer of the Attorney General's Department to prosecute a case on behalf of the CIABOC. The learned Deputy Solicitor General objected to the issuance of notice and stated that the application was 'frivolous', filed in an attempt to subvert the due administration of justice. Having considered the submissions of both parties this Court reserved its order for notice.

Hence, the primary contention to be determined is whether the petitioner has established *prima facie* exceptional circumstances for this Court to issue formal notice on the respondents.

At the outset, it is pertinent to note the distinction between examining exceptionality during the notice stage and examining exceptionality during the argument stage. This Court in **Horathal Pedige Prishriya Ratna Vilochani v Hon. Attorney General** CA/PHC/90/18 CA Minute dated 25.07.2022 extensively examined the judgements of **Sarath Andarahennadi v Officer in Charge, Police Station Sigiriya** CA/PHC/APN/117/2017 CA Minute dated 27.03.2019 and **Ingiriya Multi-Purpose Co-operative Society Ltd v Kalubalage Dona Laitha Srimathi** CA/PHC/123/16 CA Minute dated 17.05.2022, which dealt with a similar issue. And as such, this Court held as follows:

*“Hence, an extrapolation of the **Sarath Andarahennadi case** (supra) and **Ingiriya case** (supra) reveals that prior to issuing notices to a respondent, an application invoking the revisionary jurisdiction of the Court ought to set out exceptional circumstances in the body of the petition. Whether the averred circumstances satisfy the threshold expected by the Court should be decided after notices are issued to the respondents, and both parties are given an opportunity to make respective submissions.*

However, this contention does not impose a blanket ban on the Court against considering the averred exceptional circumstances at the support stage for the purpose of issuing notices. Such a blanket ban would essentially limit judicial discretion endowed within the revisionary jurisdiction. At the support stage, the Court is required to make an assessment as to whether the resources of the Court ought to be exhausted by proceeding to the next stage by issuing notice to the respondents. That determination is at the discretion of the judge and is made by ascertaining whether the purported exceptional circumstances require further examination or not. If the Court

*determines that such an examination is not warranted, it can dismiss the application in limine, thus preserving the Court's resources for a more deserving application. This entire process is an act of judicial discretion, which falls in line with the revisionary jurisdiction of both the Court of Appeal and the Provincial High Courts as a petitioner cannot invoke the revisionary jurisdiction of the Court as of right. A blanket ban from even referring to the exceptional circumstances at the support stage, on the other hand, would amount to ousting the said discretion vested with the Court acting in revision. The Courts can refer to the exceptional circumstances averred during the support stages **to the extent of examining whether a prima facie case has been made out** in the application so as to warrant the issuance of notice on the respondents. (Emphasis added) Hence, even when a petition purports exceptional circumstances, if the Court is able to determine at the support stage itself (without having gone into the merits), that a prima facie case does not exist (thereby rendering an examination of the merits futile) then, such Court can dismiss the application in limine. This reinforces the judicial discretion within the ambit of revisionary jurisdiction of the Court.”*

Speaking on the burden cast on an applicant at the support stage, His Lordship Justice Arjuna Obeysekera recently held the following in **P. M. Ranasinghe v Asselage Sujith Rupasinghe and Others** SC Appeal No. 59/2021 SC Minute dated 08.04.2022: *“In order to have notice issued on the Respondents, the burden cast on the Appellant was to establish a prima facie sustainable case and for the Court to be satisfied that there is a prima facie case to be looked into. In other words, the Court was only required to be satisfied that the application before it warrants a full investigation at a hearing with the participation of all parties”*. Hence, this Court will determine the instant application with the backdrop of the above reasoning.

The application of the petitioner for revision pivots on the interpretation of Section 13 of the Commission Act and this Court notes that the said objection

has not been previously canvassed before this Court in applications of this nature. The impugned order in the instant case has referred to the Hansard concerning the interpretation of Section 13 of the Commission Act and has refused to uphold the objection of the petitioner. Having carefully considered the submissions of the learned President's Counsel for the petitioner and the learned Deputy Solicitor General, the material placed by the petitioner before this Court and especially the nature of the objection in relation to the interpretation of Section 13(1) of the Commission Act, this Court is satisfied of the existence of *prima facie* exceptionality which warrants the issuance of formal notice on the respondents.

Accordingly, notice issued.

JUDGE OF THE COURT OF APPEAL

Menaka Wijesundera J.

I agree.

JUDGE OF THE COURT OF APPEAL