

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

In the matter of an application for the grant of Writs of Certiorari, under terms of Article 140 of the Constitution.

(Dr) Kodagoda Hitige Jayampathy Rohanakumara
Wickramaratne
Petit Schonberg 65, 1700 Fribourg,
Switzerland.

CA (Writ) Application No: 331/2021

Petitioner

-Vs-

1. Hon. Upali Abeyrathne
(Retired Judge of the Supreme Court)
Chairman
No. 42/10, Beddagana North,
Pita Kotte,
2. Hon. Chandrasiri Jayathilaka
(Retired Judge of the Court of Appeal)
Member
No. 24, Diyawanna Gardens,
Pelawatta,
Battaramulla.
3. Chandra Fernando,
Member
No. 1, Shubbery Gardens,
Colombo 04.

Presidential Commission of Inquiry to Inquire into and obtain information in relation to alleged Political Victimization of Public Officers, Employees of State Corporations, Members of the Armed Forces and the Police Service who held posts during the period commencing 08th January 2015 and ending 16th November 2019.

4. Mrs. Pearl K. Weerasinghe
Secretary, Presidential Commission of Inquiry to Inquire into and obtain information in relation to alleged Political Victimization of Public Officers, Employees of State Corporations, Members of the Armed Forces and the Police Service who held posts during the period commencing 08th January 2015 and ending 16th November 2019.

C/O Secretary to the President, Presidential Secretariat, Colombo 1.

5. Secretary to the President, Presidential Secretariat, Colombo 1.

Respondents

Before: **Hon. Justice N. Bandula Karunarathna**
Hon. Justice D.N. Samarakoon
Hon. Justice M.T. Mohammed Laffar

Counsel: Faiz Musthapha PC with, Suren Fernando AAL, Faisza Marker AAL, Keerthi Weeraratne AAL, instructed by Vidanapathirana Associates for the Petitioner.

No appearance for the 01st to 4th Respondents.

Milinda Gunathilake PC, ASG with Chaya Sri Nammuni DSG for the 5th Respondent.

Written Submissions: By the Petitioner - not filed
By the Respondent - not filed

Argued on: **14.03.2022**

Order on: **09.05.2022**

N. Bandula Karunarathna J.

This is an application for a Writ of Certiorari to quash the decisions/ determinations/ recommendations, made by the 1st to 3rd respondents. The petitioner requests to grant and issue an interim order suspending the operation of the purported decisions, determinations and recommendations made by the 1st to 3rd respondent in so far as they are applicable to the petitioner.

The Petitioner is an Attorney-at-Law of the Supreme Court since August 1977 and was appointed President's Counsel in 2001. He was a Member of Parliament from September 2015 to January 2020.

The 1st, 2nd and 3rd respondents were appointed by the President as members of a Commission of Inquiry to "Inquire into and obtain information in relation to alleged Political Victimization of Public Officers, Employees of State Corporations, Members of the Armed Forces and the Police Service who held posts during the period commencing 08.01.2015 and ending 16.11.2019" under section 2 of the Commissions of Inquiry Act No. 17 of 1948 (as amended) by notification (P 2)

published in the Gazette Extraordinary No. 2157/44 dated 09.01.2020, The 1st respondent above named was appointed Chairman of the said Commission. The 4th respondent was the Secretary of the said Commission and the 5th respondent is the Secretary to the President.

According to the said notification (P 2), the Presidential Commission of Inquiry (hereinafter referred to as "the PCI") was required to inquire into and report, *inter alia*, the following:

- (i.) "Whether there has been any malpractice or irregularity, or non-compliance with or disregard of the proper prudence, norms, guidelines, procedures and best practices applicable in relation to the administration of the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Investigations Divisions (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police;
- (ii.) Whether any investigations by the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Investigations Divisions (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police had been influenced or obstructed or prevented in any manner, resulting in loss, damage, injury or detriment, either direct or imputed to any person or persons;
- (iii.) Whether any officer entrusted with conduct of investigations by the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Investigations Divisions (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police have acted under undue influence by third parties, including by the said Anti-Corruption unit;
- (iv.) Whether any person had committed any act of political victimization, misuse or abuse of power, corruption or any fraudulent act in relation to the functions of the said Anti-Corruption unit, Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Crimes Investigations Division (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police, or in relation to the administration of any law or the administration of justice."

The Petitioner states that on or about 30.10.2020, he was made to understand that, in some Sri Lankan newspapers that carried reports of the proceedings of the PCI, he had been referred to as being amongst persons described as "evading the Commission". The Petitioner is a citizen of Sri Lanka and he left Sri Lanka on 10.11.2019 and arrived in Germany. Since 16.11.2019, he has been residing in Switzerland.

The petitioner states that he was not served with any process or intimation requiring his attendance or response before the PCI. The petitioner is advised and states that he was not amenable to any process issued by the PCI as he was continuously resident outside Sri Lanka from November 2019.

Under section 7 (1) (c) of the Commissions of Inquiry Act, a Commission of Inquiry may "summon any person residing in Sri Lanka to attend any meeting of the commission to give evidence or produce any document or other thing in his possession, and to examine him as a witness or require him to produce any document or other thing in his possession".

The petitioner further states that in terms of section 21 of the Commissions of Inquiry Act every process issued by a Commission appointed under the Act shall be served and executed by the Fiscal.

The petitioner says that by his letter dated 30.10. 2020 addressed to the 1st to 3rd respondents, he has stated, *inter alia*, that he had been made to understand that, in some Sri Lankan newspapers that carried reports of the proceedings of the PCI. He had been referred to as being amongst persons described as "evading the Commission". He further stated that if such a reference had been made, it would be grossly unfair in as much as he has not been served with any process or intimation requiring his attendance or response.

The petitioner brought to the attention of the 1st to 3rd respondents that he had been continuously residing outside Sri Lanka from November 2019. The Petitioner further stated that although he was not amenable to any process issued by the PCI, he was nevertheless anxious, without prejudice to this position, to assist the Commission in any manner possible in regard to any matters which are legitimately within the provisions of the Commission and in respect of which he could be of any assistance.

Apart from the fact that he was not compellable to attend, the prevailing pandemic that did not permit any travel. However, the petitioner was ready and willing to communicate with the Commission, if the 1st to 3rd respondents so desire, by Skype or some other alternate virtual means. The petitioner further stated he trusts that, in the event of any such arrangements being mutually agreed upon, the Commission would provide him with all such information and material as may be relevant in accordance with the principles of natural justice, to enable him to assist the Commission in a meaningful manner.

The petitioner provided the 1st to 3rd respondents with his Skype ID, email address and telephone number and informed them that he was available on WhatsApp. The petitioner states that the said letter (P 3) was sent through the TNT courier through Swiss Post on 30.10.2020. The Petitioner did not receive any response to the said letter. The petitioner is now aware that on or about 08.12.2020, the report of the aforesaid PCI was handed over to the President. However, the said report has not been published up to date.

The petitioner, further stated that by his email communication dated 17.02.2021 addressed to the Information Officer of the Presidential Secretariat, requested that he be issued with a copy of the report of the PCI (including all annexures and amendments, if any) under the provisions of the Right to Information Act. The Petitioner did not receive a response to the said request.

The petitioner states that he attended only a few initial meetings of the Anti-Corruption Committee at which only matters of a general nature were discussed. There was no discussion on any action to be taken in respect of any particular person. The petitioner did not take part in any subsequent meetings of the Anti-Corruption Committee as he was heavily involved in the preparation of the drafts of the Nineteenth Amendment to the Constitution Bill and was thereafter in matters relating to the passage of the Bill.

The petitioner was, at that time, Senior Advisor to the President on Constitutional Affairs. After he responded about twice when informed over the telephone by the Prime Minister's Office of meetings of the Anti-Corruption Committee to say that he was unable to attend, he was not

informed of any further meetings. The petitioner categorically denies that the Anti-Corruption Committee had no legal basis.

The petitioner denies that he has committed any act that warrants action against him under the Special Presidential commission of Inquiry Act or any other law and denies that he has committed any offence as has been alleged by the PCI. The petitioner states that he was not informed by the PCI of any allegations against him nor was he provided with any information and material as may be relevant in accordance with the principles of natural justice, to enable him to explain matters and respond to any allegations against him. The petitioner was not given any opportunity to communicate with the PCI through Skype or some other alternate means despite his willingness communicated to the Commission. The petitioner says in any event that the conclusions arrived at and recommendations made by the 1st to 3rd respondents in respect of the petitioner are unsupported by evidence.

The petitioner states that in the aforesaid circumstances, the 1st to 3rd respondents have;

- (i.) acted ultra vires their powers under the Commissions of Inquiry Act;
- (ii.) acted in violation of the rights of the Petitioner including the rules of natural justice;
- (iii.) acted arbitrarily, unreasonably and irrationally as aforesaid;
- (iv.) acted in violation of the fundamental right to equality and equal protection of the law guaranteed to the Petitioner by Article 12 (1) of the Constitution.
- (v.) have exposed the Petitioner to the peril of the institution of criminal proceedings against him without a fair and impartial inquiry as mandated by law.

The petitioner further states that irreparable loss and damage will be caused to him and this application rendered nugatory unless this court make an interim order suspending the operation of the purported decisions, determinations and recommendation made by the 1st to 3rd respondents in so far as they are applicable to the petitioner.

In Felix Dias Bandaranayake vs. The State Film Corporation and another 1981 (2) SLR 287 which was held in deciding whether or not to grant an interim relief the following sequential tests should be applied

- (i.) Has the plaintiff made out a strong prima facie case of infringement or imminent infringement of a legal right to which he has a title?
- (ii.) Is there a serious question to be tried in relation to his legal rights?
- (iii.) Whether the probabilities are there that he will win.
- (iv.) In whose favour is the balance of convenience.
- (v.) The main factor being the un-compensable disadvantage.
- (vi.) Is there irreparable damage to either party?

The injunction is an equitable relief granted at the discretion of the Court. Do the conduct and dealings of the parties justify the grant of the injunction?

It was decided in Subramaniam vs. Shabdeen 1984 (1) SLR 48, The principles which govern the exercise of the discretion to grant an interim relief are;

- (i.) The person who seeks an interim relief must show Court that there is a serious matter to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. In other words, he must establish a prima facie case. He must first show the prima facie existence of a legal right and that there was an infringement or invasion of that legal right.
- (ii.) The plaintiff must show that irreparable injury will be caused to him if the injunction is not granted. Where damages are an adequate remedy, no injunction will lie. The test to be applied is, "is it just that the plaintiff should be confined to his remedy in damages?"
- (iii.) The balance of convenience should favour the grant of the interim relief and here the test is "how does the injury that the defendant will suffer if the interim relief is granted and he ultimately comes out victorious weigh against the injury which the plaintiff will suffer if the interim relief is refused and he wins?" Where any doubt exists as to the plaintiff's right or if his right is not disputed but its violation is denied the court will take into consideration the balance of convenience. If the plaintiff establishes his right and its infringement the balance of convenience need not be considered.

This Court is inclined to issue notice on the Respondents. Having considered the issuance of a notice, the question arises whether this Court can grant the interim relief.

Now I advert to the facts and circumstances in this application in view of considering the tests applicable to grant the interim relief.

Thus, in deciding in whose favour the balance of convenience would lie, in our view, it is not only the damages that would be caused to a party by not issuing an interim relief, but that be also taken into consideration. If the circumstances and the evidence placed before Court provides an opportunity, prima facie, for the Court to consider the conduct and the conscience of a particular party, then the Court should take such conduct and conscience also into consideration in view of assessing the balance of convenience and also the test to ascertain whether the final order is rendered nugatory if the Petitioner is successful.

We are of the view that this is a fit and proper case for this Court to consider the conduct and the conscience of the petitioner in deciding on the interim relief sought by him. Thus, we are of the view that although there is a question of law to be looked into in this application, the circumstances and the documents placed before the Court do not warrant this Court to issue any interim relief.

It is clear that the stability of the government has been completely shattered due to the political turmoil. It appears to have been established that the opportunity to make decisions which were prejudicial to the petitioner had completely disappeared after the abolishment of the previous Cabinet. Accordingly, the Court is of the view that the ability to make unjust or illegal decisions against the petitioner has now vanished.

The present Cabinet will certainly be compelled not to take decisions which are prejudicial to the petitioner. Therefore, it is our view that there is no need at this juncture to grant the interim relief requested by the petitioner.

Bearing this in mind and on careful consideration of the whole matter, we have concluded that by reasons of the special circumstances of this case, we should exercise our discretion not to grant interim relief as prayed for in the prayer (g) of the petition.

The registrar of this court is directed to issue notices to all the respondents. Notice returnable on 30.06.2022.

Judge of the Court of Appeal

D.N. Samarakoon J.

I agree.

Judge of the Court of Appeal

M.T. Mohammed Laffar J.

I agree.

Judge of the Court of Appeal