

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 Certiorari and Prohibition, under and in terms of Article 140 of the Constitution.

J.C. Weliamuna,
205, Middleborough Road,
Boxhill Vic 3128,
Australia.

CA (Writ) Application No: 297/ 2021

Petitioner

-Vs-

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

The 1st to 3rd Respondents of The Presidential Commission of Inquiry appointed to inquire into alleged political victimization during the period from 8th January 2015 to 16th November, 2019; C/O Presidential Secretariat, Colombo -1.

4. The Secretary
The Presidential Commission of Inquiry appointed to inquire into alleged political victimization during the period from 8th January 2015 to 16th November, 2019; C/O Presidential Secretariat, Colombo- 1.
5. The Hon. Attorney-General,
Attorney-General's Department,
Colombo- 12.

Respondents

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

Counsel: Faiz Musthapha PC with Ronald Perera PC with Shantha Jayawardena AAL and Pulasthi Hewamanna AAL, Faisza Marker AAL instructed by Tharmarajah Tharmaja 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/ findings/ remarks/ recommendations, made by the 1st to 3rd respondents contained in the report marked as P4/ P4 (A), P4(B), P4(C), P4(D), P4(E), P4(F). Further, the petitioner requests to grant and issue an order in the nature of a Writ of Prohibition preventing the 5th Respondent from prosecuting and taking any action in any manner upon recommendations made by the 1st to 3rd Respondents in so far as they relate to the Petitioner.

Also, to grant and issue an interim order restraining the 5th Respondent from prosecuting and taking any action in any manner upon recommendations made by the 1st to 3rd Respondents, until the final hearing and determination of this application.

The petitioner says that he is a President's Counsel and an Attorney-at-Law of the Supreme Court of Sri Lanka with 31 years of active practice, mainly in the Superior Courts. He had extensive practice in and exposure to human rights and anti-corruption. He has appeared in several constitutionally important cases and contributed to the jurisprudence in Sri Lanka. He has made a valuable contribution, inter alia, to the protection of the independence of the judiciary, good governance, and anticorruption discourse of the country and contributed to national and international discourse on governance and human rights. In May 2015 he was appointed as the Chairman of the Presidential Task Force of State Assets, a committee established by the Cabinet, which position he held till June 2019.

With his extensive experience in global anti-corruption work, in or about February 2015, the Petitioner was invited by the Government (the then President and the Prime Minister) to assist the Anti-Corruption Cabinet Sub Committee as an invited member. The Petitioner accepted the invitation to serve in a *pro bono* capacity, in the honest belief to make a worthwhile contribution to Sri Lanka in the area of his expertise.

The petitioner further says that to the best of his recollection of the Petitioner, he was informed that the government has decided to establish this Sub Committee to guide the anti-corruption landscape of the country in line with the international standards. The Petitioner was specifically requested to develop a blueprint and a white paper on the anti-corruption framework. After extensive consultations, the Petitioner prepared and submitted the initial draft note and it was further developed and submitted in or around October 2015. The Petitioner contributed to vital systemic improvements and policy reforms in the anti-corruption field in the country to be in line with international standards.

The Petitioner states that the matters where the Petitioner was involved were all matters of systemic issues, not individual cases revolving around making anti-corruption agencies more effective. The Petitioner says that he was never involved in selecting or nominating an individual to any of the committees, cabinet sub-committee or any other bodies.

The 1st respondent is the Chairman of the Commission of Inquiry appointed by His Excellency the President by an order published in the Government Gazette Extraordinary No. 2157/44 dated 09.01.2020 (P 2) under the Commissions of Inquiry Act No. 17 of 1948 (as amended) and in particular Section 2 thereof.

The 2nd and 3rd respondents are members of the said Commission of Inquiry. The 4th respondent is the Secretary of the said Commission of Inquiry. The 5th respondent is the Attorney of the Republic.

By the order published in the Gazette marked P 2, the 1st to 3rd respondents were appointed as a Commission of Inquiry [hereinafter PCI] to "inquire into and obtain information in respect of the alleged political victimization during the period commencing 8th January 2015 and ending 16th November 2019 and to make recommendations with reference to any of the matters that have been inquired into". The said PCI was to especially look into the following four (4) aspects;

- (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 the 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 says that he is now made to understand that the Commission of Inquiry has carried out inquiries pertaining to several matters including pending cases before competent courts. The petitioner states that an official copy of the Final Report of the said Commission of Inquiry, has not been officially published, and the Petitioner is unaware of the accurate details therein. The Petitioner further says that he is now aware that on or around 08.12.2020, the report of the aforesaid PCI was handed over to the President.

The petitioner states that certain portions of the said report cite the petitioner as a respondent though he was never given an opportunity of being heard or served with notice of such allegations.

The petitioner states that he has been made a respondent in several inquiries carried out by the commission such as;

- (i.) Allegations have been made regarding alleged malpractices of the Anti-Corruption Committee and its secretariat with regard to the misuse of public funds, based on a complaint by Mr Wijedasa Rajapakse MP.
- (ii.) Allegations have been made which pertain to proceedings before a Competent Court [a Trial-at-Bar] with regard to incidents of abductions of a few citizens by the Sri Lanka Navy based on a complaint by Mr Wasantha Kumara Jayadeva Karannagoda the former Commander of the Navy.
- (iii.) Allegations have been made which pertain to proceedings before a Competent Court [a Trial-at-Bar] with regard to incidents of abductions of citizens by the Sri Lanka Navy based on a complaint by one Mr Priyaratne Dissanayake who is a suspect in such judicial proceedings.
- (iv.) Allegations have been made which pertain to the alleged political victimisation of Dr Nihal Jayatilake (the complainant) the former Director-General of the Department of Divineguma Development and others.

The Petitioner categorically denies all asseverations contained in the report knowingly false and misleading, and arrived to without affording the Petitioner an opportunity of a hearing.

The petitioner states that having regard to his experience in anti-corruption work, nationally and internationally, he was invited by the then President and Prime Minister to play a role in the government's anti-corruption reforms. The petitioner states that he was appointed as Chairman of the Presidential Task Force for Recovery of State Assets (known as START) on or around 25.05.2015. The Petitioner states that such Presidential Task Force for Recovery of State Assets was distinct from Anti-corruption Secretariat, and was a completely separate entity created by a Cabinet Decision. The mandate of the said Task Force included the development of a Proceeds of Crimes Legislation. Representatives of several institutions including the AG's Department, Police, CIOBAC, Central Bank and Foreign Ministry consisted of the START. True copies of the Terms of Reference of START and the Cabinet Memorandum dated 16.03.2015 submitted by the then President of the Republic seeking approval of the Cabinet of Ministers for the establishment of START are compendiously annexed as P 6.

The petitioner states that adverse references have been made against him in the report in relation to a Rapid Response Unit purportedly created under a Cabinet Sub Committee and malpractices of the Anti-Corruption Committee and its Secretariat. The petitioner specifically states to the best of his knowledge that no such Rapid Response Unit was ever established or existed and had there been any such appointments, those appointed individuals would have been issued with letters of appointment.

The petitioner says that he was not involved in drafting or making any suggestions to establish the Anti-corruption Secretariat or the Cabinet Sub Committee. The petitioner was invited to join the Sub Committee after it was established. Neither was the Petitioner in any way involved in "nominating" members to the Cabinet Anti-Corruption Committee or any sub-committees.

The petitioner was invited in March 2015 with a special request to assist the Government's policy to introduce a new national anti-corruption framework. In consultation with other stakeholders and public institutions, between April 2015 to October 2019, the petitioner developed a blueprint to that end. The petitioner states that such work was carried out *pro bono* for the betterment of the State and its resources.

To the recollection of the petitioner, the meetings of the said anti-corruption committee were broken up into different segments and the relevant officials and members attended various segments. The Petitioner attended only the segments of meetings he was invited to be present and was required to. The Petitioner reiterates that he was not a member of the Anti-Corruption Committee nor did he participate in any activities of the Secretariat. The petitioner attended meetings of the Cabinet Sub Committee when invited and made a professional contribution to the discussions. The committee meetings were brief and due to other professional commitments, the Petitioner attended the meetings only in relation to the matters the Petitioner was required to contribute to.

The Petitioner was aware that Cabinet approvals were made at various stages to establish an Anti-corruption Secretariat which was duly adopted by the Cabinet. The Petitioner was not aware whether all the decisions of the Cabinet were ever implemented. Though not involved in any way with the affairs of the Secretariat, until an office for the Presidential Task Force of the State Assets was established, the Petitioner was allowed to use the space for the meeting of the Task Force. The Task Force is a completely different entity from the Anti-Corruption Secretariat. The Petitioner did not have any role to play nor was he ever involved with any of the functions of the Secretariat.

The petitioner states that he was never noticed or heard before the PCI, as required under the legal provisions, by the 1st to 3rd respondents and officers serving thereunder.

The recommendations and findings of PCI affect the rights of persons in respect of whom adverse recommendations and findings are made and as such PCI is required to act fairly, judicially and in accordance with the principles of natural justice. The Petitioner states that therefore, the PCI has a general duty to act fairly, and such duty is a central tenet of procedural propriety. The findings and recommendation of PCI encroach on the Petitioner's interests and severe adverse sanctions may thereafter be imposed upon him and cast aspersions on his character. Therefore, the Commission of Inquiry is under a duty to act judicially.

The petitioner further states that Section 16 of the Commissions of Inquiry Act expressly permits representation by attorneys-at-law. Numerous witnesses have been called and numerous documents have been produced in evidence. The petitioner states that the contents of such documents and evidence led are not publicly available, and of which the Petitioner did not actually or constructively know.

The Petitioner specifically states that therefore the PCI, the 1st to 3rd respondents had a legal duty;

- (i.) To notice the Petitioner as they purported to exercise the powers vested in them against/affecting/concerning the Petitioner;
- (ii.) To provide the Petitioner with sufficient information to enable him to participate effectively in the proceedings;
- (iii.) To award the Petitioner an adequate opportunity of being heard with adequate time to prepare and present his defence.

The petitioner states that his legitimate expectations of being heard before any adverse decisions are taken against him were thus violated. The petitioner states that therefore the violation of the principles of Natural Justice is now incurable. The petitioner says that Section 11(2) of the Commission of Inquiry Act specifically requires that such summons be served on such person whereas Section 21 further requires such process to be served by fiscal.

The petitioner states that Section 7(1) (c) of the Commission of Inquiry Act only permits the respondents from summoning individuals within the Republic. The Petitioner having been resident abroad before the commission was established and continuing to be resident abroad during the entire tenure of the commission, was expressly placed outside the jurisdiction of the commission by the Act itself. The petitioner further says that allegations have been made against him pertaining to matters which are pending before a competent court, and with regard to an Anti-Corruption Committee & Secretariat as well as a Rapid Response Unit, when in fact, the Petitioner was only substantially involved in the Presidential Task Force for Recovery of Assets. The Petitioner states that there appears to be a lack of rational basis or evidential basis in the purported findings of the commission.

Further, the Petitioner states that the Respondents in purporting to make adverse findings against the Petitioner in relation to pending court cases, have come to arbitrary or discriminatory results, and such is an insidious practice that undermines the Rule of Law.

The petitioner states that at no point of time;

- (i.) did he receive a notice and summons from the respondents and their servants, officers or employees and the Commission in any manner or form whatsoever in terms of the Commission of Inquiry Act No. 17 of 1948 (as amended);
- (ii.) was he informed that there were proceedings at the purported Commission in which evidence was to lead against him to his detriment;
- (iii.) was he informed that his conduct was the subject matter of investigations and inquiries;
- (iv.) was he informed in any manner whatsoever of the nature of the complaint and allegation against him?

The petitioner states that in the totality of the aforesaid circumstances, the decisions/ determinations/ recommendations of the purported PCI to make recommendations against the Petitioner without hearing him are *ultra vires* the Law and the Commissions of Inquiry Act. It is open to the 5th respondent in terms of Section 24 of the Commissions of Inquiry Act to institute criminal proceedings against the Petitioner based on the material which had been collected by the Commission without affording the Petitioner an opportunity of explaining or contradicting same. Furthermore, the purported findings and recommendations affect the petitioner's reputation and standing and as such affects the Petitioner both in his capacity and as a member of the bar.

The petitioner states that irreparable loss and damage would be caused to the Petitioner and the instant application would be rendered nugatory unless this Court be pleased to make an appropriate interim order restraining the 5th Respondent from prosecuting and taking any action in any manner upon recommendations made by the 1st to 3rd respondents in so far as they relate to the petitioner until the final determination of this application.

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 (I) 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