

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

In the matter of an Application for a mandate in the nature of a Writ of Certiorari in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka,

Ranil Wickremasinghe
117, 5th Lane,
Colombo 03.

Case No: CA / WRIT / 364 / 2021

Petitioner

Vs.

1. Upali Abeyrathne
Retired Judge of the Supreme Court
Chairman,
No. 42/10, Beddagana North,
Pita Kotte.
2. Daya Chandrasiri Jayathilaka
Retired Judge of the Court of Appeal Member, No. 24,
Diyawanna Gardens,
Pelawatta,
Battaramulla.
3. Chandra Fernando
Retired Inspector General of Police Member
No. 1, Shrubbery Gardens,
Colombo 04.
Being Chairman and Members respectively of the
Commission of Inquiry as morefully set out
hereinafter.
4. Mrs. Pearl K. Weerasinghe
Secretary of the Commission
Room No.210, Block No.2, 2nd Floor, Bandaranayake
International Conference Hall Bauddhaloka Mawatha,
Colombo 7.
Being Secretary of the Commission of Inquiry as
morefully set out hereinafter.
5. P. B. Jayasundera
Secretary to the President,
Presidential Secretariat,
Galle face,
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, Ronald Perera PC, Eraj de Silva 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 findings and recommendations, made by the 1st to 3rd respondents contained in the report marked as P 6. The petitioner requests to Issue an interim Order until the final determination of this Application, staying and suspending the operation of the findings and recommendations and material contained in the report annexed marked P-6 and the findings and recommendations contained in and flowing from the findings contained in pages 17-51 thereof in so far as it relates to the petitioner.

The petitioner states that he is the former Prime Minister of Sri Lanka. The petitioner has served as;

- (i.) The Prime Minister of Sri Lanka from 1993 to 1994.
- (ii.) The Prime Minister of Sri Lanka from 2001 to 2004.
- (iii.) The Prime Minister of Sri Lanka from 2015 to 2019.

The petitioner further states that he has held several portfolios and has also served as Leader of the Opposition. The Petitioner is the current Leader of the United National Party. In the circumstances, the petitioner states that the petitioner has served for more than 44 years in Sri Lankan politics and has held highest positions of the land and is well versed in the business of government and executive functions of government.

The petitioner says that;

- (i.) The 1st to the 3rd respondents is Chairman and Members of Commission of Inquiry appointed in terms of the Commission of Inquiry Act No. 17 of 1948 (as amended) on or about 09.01.2020.

(ii.) The 4th respondent is the Secretary to the aforesaid Commission.

(iii.) The 5th respondent is the Secretary to the President of Sri Lanka.

The petitioner says that he received certain summons purporting to be under the hand of the 4th respondent of the aforesaid Commission and states that on or about 04.09.2020 thereafter the Petitioner attended the said Commission. He was informed by the Commission that the petitioner was not being treated as a respondent, but only as a witness. In the circumstances, the petitioner was led to believe and had a legitimate expectation that no findings and recommendations would be made against the petitioner and there would be no material collected against the Petitioner to the detriment of the petitioner. In those circumstances the Petitioner gave evidence.

The petitioner states expressly that, inter alia;

(i.) No charges were served on the Petitioner.

(ii.) No complaint was served on the Petitioner

(iii.) The nature of the complaints against the Petitioner, if any, was not disclosed to the Petitioner.

The petitioner states that the Report of the Commission was announced to be handed over to the President. No official copy of the said Report has been given to and served on the petitioner. The said copy of the Report contains findings and recommendations and material in relation to the petitioner. The aforesaid findings and recommendations and material collected are principally contained in pages 17-51 of the Report. The said finding and recommendations and material collected affect the legal rights and reputation of the Petitioner and there is an affectation of the Petitioner's legal rights and reputation consequent thereto. The Petitioner has come to know that a Special Presidential Commission has been appointed consequent thereto.

The petitioner says that the said findings and recommendations and material collected is ex-facie and otherwise ultra-vires the powers of the Commission. The said findings and recommendations and material are ultra vires the mandate of the Commission and ultra vires the Commission of Inquiry Act No. 17 of 1948, as amended.

The Petitioner states inter alia that;

(i.) There has been a complete violation of the rules of natural justice

(ii.) No proper hearing has been given to the Petitioner

(iii.) No proper rules of natural justice have been followed.

The said Report and findings and recommendations and material collected against the petitioner are inter alia;

(i.) Unreasonable

(ii.) Irrational

(iii.) Arbitrary

(iv.) Capricious

(v.) Ex-facie has no basis whatsoever.

The findings and recommendations and material collected in relation to the petitioner contained in the said report are vitiated by bias. The aforesaid findings and recommendations and material collected in relation to the Petitioner are in violation and in breach of the Petitioner's legitimate expectation. In the aforesaid circumstances and otherwise there are grave and serious errors on the face of the record.

The aforesaid report and the findings and recommendations and material collected in relation to the Petitioner are a nullity in law.

The petitioner states, *inter alia*;

- (i.) The Anti-Corruption Committee and the Secretariat that was established consequent to approval by the Cabinet of Ministers.
- (ii.) All expenditure therefore were made according to law.
- (iii.) The said secretariat only provided a mechanism for expeditious investigation and disposal of the complaints and did not in any way or manner contribute to a legal impediment to the direct invocation of the powers of Bribery Commission and the Police and any other relevant Authority.

At all material times it was the relevant authorities, including the Police, the Attorney General's Department and the Judiciary that investigated the complaints, took decisions to prosecute and carry out prosecutions in all cases. The Petitioner states that at no point did the Petitioner interfere with such investigations and with such authorities. The Petitioner has not been served with the certified copy of the Report and the proceedings and complaints to date. The Petitioner having so applied was in the expectation of receiving the same prior to coming before this Court. Thereafter, the COVID lockdown took place. In the circumstances and as such, the Petitioner is unable to determine at present whether any other persons are necessary parties to this Application.

The petitioner says that he will suffer irreparable loss and damage unless the interim reliefs are granted by this Court.

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 (d) 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