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

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/354/2022

Pallewaththa Gamaralalage Maithreepala Yapa Sirisena
C79, Hector Kobbekaduwa Mawatha,
Colombo 07.

Petitioner

Vs.

1. Honorable Magistrate
   Fort Magistrate's Court,
   Colombo 01.

2. The Registrar
   Fort Magistrate's Court,
   Colombo 01.

3. Rev. Cyril Gamini Fernando
   The Residence of his Eminence the Cardinal,
   Gnanartha Pradeepaya Mawatha,
   Colombo 08.

4. Jesuraj Ganeshan
   No. 75/16,
   Paramananda Vihara Mawatha,
   Colombo 13.

Respondents

Before **:** Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Faisz Musthapha, PC with Faiszer Musthapha PC, Upul Jayasuriya PC, Anuja Premaratne PC, Jeewan Jayathilake, Shaheed Barrie, Hafeel Fariz, Pulasthi Rupasinghe, Keerthi Thilakaratne, Ashan Bandara and S. Mathugama for the Petitioner.

R. Arsecularatne, PC with Thilina Punchihewa for the 3rd Respondents.

Riad Ameen for the 4th Respondent.

Rohantha Abeysuriya, PC, ASG for the State.

Supported on : 11.10.2022 and 12.10.2022

Decided on : 14.10.2022

Sobhitha Rajakaruna J.

The 3rd and 4th Respondents on 16.09.2022 have filed a private plaint in the Fort Magistrate's Court by way of the case bearing No. 23084/2022, in terms of Section 136(1)(a) of the Code of Criminal Procedure Act No. 15 of 1979 ('CCPA') against the Petitioner of the instant application. The said Respondents allege, inter alia, in the said complaint marked as 'P3' that the Petitioner has committed an offence under Section 298 of the Penal Code by doing negligent acts causing the death of the persons described in the 1st Schedule to the plaint and also has committed an offence under Section 329 of the Penal Code by doing acts negligently causing grievous hurt to the persons described in the 2nd Schedule to the Plaint. The draft charges are annexed to the said Plaint.

The learned Magistrate of the Fort Magistrate's Court ('the learned Magistrate') having heard the oral submissions on behalf of the 3rd and 4th Respondents made an order, marked 'P4', on 16.09.2022 issuing summons on the Petitioner requiring the Petitioner to be present in the Magistrate's Court on 14.10.2022. The Petitioner by way of this application is seeking to quash the said order, marked 'P4', claiming that the learned Magistrate has failed to exercise the discretion reposed in him in terms of Section 139(1)(ii) of the CCPA in failing to consider whether he should examine on oath the complainant or some material witness/witnesses before issuing summons against the Petitioner.

The primary argument of the Petitioner is that the learned Magistrate has formed an opinion acting on inadmissible material to issue summons against the Petitioner in pursuance to the private plaint filed by the 3rd and 4th Respondents. The Petitioner further argues that the learned Magistrate has failed to form an opinion that there is sufficient ground for proceeding against the Petitioner based on material evidence and instead has taken cognizance of the contents of the final report of the 'Commission of Inquiry to Investigate and Inquire into and Report or Take Necessary Actions on the Bomb Attacks On 21.04.2019' ('COI'). The contention of the Petitioner is that the learned Magistrate is not authorized to act upon the material collected in the course of the investigations by the said COI and also that the learned Magistrate cannot form an opinion whether sufficient grounds are available to proceed against the Petitioner only based on the said Report or on the recommendations therein.

The learned President's Counsel for the Petitioner submits that the complaint of the 3rd and 4th Respondents is entirely based on the aforesaid Report of COI and the learned Magistrate has failed to identify any offence under the Penal Code before issuing summons against the Petitioner. The learned President's Counsel for the Petitioner heavily relies on the provisions of Section 24 of the Commissions of Inquiry Act (Chapter 393) as amended by Act No.16 of 2008 which reads;

> "Notwithstanding anything to the contrary in the Code of Criminal Procedure Act, No. 15 of 1979 or any other law, it shall be lawful for the Attorney General to institute criminal proceedings in a court of law in respect of any offence, based on material collected in the course of an investigation or inquiry or both an investigation and inquiry, as the case may be, by a Commission of Inquiry appointed under this Act".

Based on such provisions of the said Section 24, the learned President's Counsel asserts that it is lawful only for the Attorney General to institute criminal proceedings in pursuance to a report of COI and however, even the Attorney General is empowered to institute criminal proceedings only on material collected in the course of an investigation by COI and not on any recommendations or the report of COI. The learned President's Counsel referring to item Nos.11 and 12 listed under the matters to be inquired by the COI, as reflected in the warrant issued to the said COI by His Excellency the President (published in Gazette Extraordinary Notification No. 2141/88 dated 21.09.2019), argues

that the material on investigations and inquiry can only be transmitted to the Attorney General enabling the Attorney General to consider the institution of criminal proceedings against persons alleged to have committed the offences. Thus, the viewpoint of the learned President's Counsel is that the Report of the COI or such material collected in the course of an investigation by the COI cannot be placed before the learned Magistrate, for him to form an opinion whether sufficient grounds are available to proceed against the Petitioner in pursuance to the private plaint. In view of above item No. 12, the recommendations of the COI should be presented only to His Excellency the President.

The learned President's Counsel for the Petitioner further relies on Section 2 of the said Commissions of Inquiry Act which deals with the power of the President to appoint the Commission of Inquiry. By virtue of Section 2(1), the President is empowered to issue a warrant to appoint a Commission of Inquiry to obtain information as to;

a) the administration, management and functions of any department of Government, any statutory body, any public or local authority or any other institution; or
b) the conduct of any public officer, an employee of a statutory body, any public or local authority or any institution; or
c) any matter or incident in respect of which an investigation or inquiry or both an investigation and inquiry, as the case may be, will in his opinion, be in the national interest or for public safety or wellbeing.

The argument raised by the learned President's Counsel based on the above provisions of Section 2 of the said Act is that the President is empowered to appoint a COI to look into the conduct of any public officer but certainly not of a Minister. In order to strengthen this argument, he draws the attention of the Court to Articles 42 and 43 of the Constitution and Section 22 of the Special Presidential Commissions of Inquiry Act No. 7 of 1978. Although the definition of 'public officer' under the said Special Presidential Commissions of Inquiry Act includes any 'Minister', the legislature has not defined the term 'public officer' under the Commissions of Inquiry Act to spread the jurisdiction of the COI against any such Minister. Thus, the point of contention is that no recommendations can be made by the COI against the Petitioner who does not fall within the category of a public officer as more fully described in the Constitution.

Further, the learned President's Counsel submits that in terms of Articles 42 and 43 of the Constitution, the President and the Cabinet of Ministers are responsible only to the

Parliament and accordingly, a warrant issued under Section 2 of the Commissions of Inquiry Act cannot attract an additional jurisdiction to look into the affairs of a Minister, particularly the Minister of Defense, the post held by the Petitioner during the period relevant to the plaint filed in the Magistrate's Court.

Additionally, the Petitioner asserts that the learned Magistrate has not been apprised of the fact that the Attorney General had taken due action in terms of the said Report of COI and instituted criminal proceedings against the then Secretary to the Ministry of Defense and the former Inspector General of Police, in Hight Court-at-Bar under case Nos. HC(TAB) 2899/2021 and HC(TAB) 2900/2021.

As opposed to the Petitioner's submissions illustrating the above questions, the learned President's Counsel for the 3rd Respondent and the learned Counsel for the 4th Respondent ('the learned Counsel for the Respondents') submit that the right given under Section 136(1)(a) of CCPA to make a complaint to a Magistrate cannot be curtailed except by a provision in a law itself. Furthermore, the Respondents assert that it is irrational to interpret the provisions of Section 24 of the Commissions of Inquiry Act to the effect that;

a) only the Attorney General can take action on a report of the COI;
b) no action can be taken on a report of COI if the Attorney General does not act upon such report.

According to the learned Counsel of the Respondents, the approach taken by the Petitioner on the provisions of Section 24 of the Commissions of Inquiry Act will defeat the whole purpose of Section 136(1)(a) of CCPA. Similarly, the Respondents rejecting the Petitioner's arguments based on Section 2(1)(b) of the Commissions of Inquiry Act, submit that the jurisdiction of the persons in respect of whom the Commission of Inquiry will investigate is not determined by the said Section 2(1) and instead, it is decided by the Terms of Reference in the warrant issued under Section 2(2).

The learned Counsel for the Respondents further assert that the learned Magistrate was aware of the ingredients of the offence as the entire order of the learned Magistrate in multiple occasions refers to numerous acts of negligence committed by the Petitioner and even the location of its commission for the purpose of jurisdiction; and therefore, the learned Magistrate has acted in accordance with the precedent enunciated in ***Malinie Gunaratne, Additional District Judge, Galle vs. Abeysinghe and another (1994) 3 Sri L.R. 196.***

On an overall conspectus of the above submissions, I take the view that several questions of law revolving around the provisions of Section 2 and Section 24 of the Commissions of Inquiry Act have emerged. The pivotal question which needs consideration of this Court is whether a private plaint could be filed based on a report or the material collected in the course of an investigation of a Commission of Inquiry. Moreover, a question arises as to whether the provisions of Section 136(1)(a) of the CCPA could be undermined by a narrow interpretation of the provisions of Section 2 and Section 24 of the Commissions of Inquiry Act. Hence, I take the view that this matter raises a few questions of law which need to be fully considered and determined after due evaluation at a final hearing of this application. In the circumstances, I am of the view that the formal notice of this application should be served on the Respondents.

Having considered the issuance of notice, the question arises whether this Court should grant the interim relief that the Petitioner has sought. In regard to the interim orders that the Petitioner has prayed for in the application, this Court is guided by the principles expanded through the several tests applicable to the grant of interim reliefs.

The learned Counsel for the Respondents strenuously argues that the grounds averred in the Petition to seek for an interim relief would not warrant this court to issue any interim relief in favour of the Petitioner. Traditionally our Courts have followed the precedent established in cases such as ***Duwearatchi & another vs. Vincent Perera & others (1984) 2 Sri L.R. 94*** and ***Billimoria vs. Minister of Lands and Lands Development & Mahaweli Development and others (1978-79-80) 1 Sri L.R. 10.*** As discussed in the said ***Duwearatchi*** case, an interim stay order in a writ application is an incidental order made in the exercise of the inherent or implied powers of the Court and the Court should be guided by the following principles;

(i) Will the final order be rendered nugatory if the petitioner is successful?

(ii) Where does the balance of convenience lie?

(iii) Will irreparable and irremediable mischief or injury be caused to either party?

'Where there is imminent danger of irreparable injury and damages would not be an adequate remedy, the court may grant an interim injunction[1] so as to preserve the position of the parties pending trial. The court must assess the strength of the case and the balance of convenience, and its discretion is very wide[2].' **(Vide-*Administrative Law by Wade and Forsyth, [11th Edition] Oxford at p. 481*)**

M. P. Jain and S. N. Jain has observed in ***Principles of Administrative Law, 9th Edition, [2022], Lexis Nexis, Volume 2, at p. 2404*** as follows;

> *"The Supreme Court has emphasized upon the High Courts that there are no hard and fast rules in the matter, but that they should exercise "prudence, discretion and circumspection" in granting stay orders. The High Court must consider several vital considerations other than the existence of a prima facie case, e.g., balance of convenience, irreparable injury, public interest*."

The Judges exercising the jurisdiction in judicial review have enlarged the scope of granting interim orders by following stringent principles and also sometimes taking lenient approach to issue or not issue interim reliefs. In many instances the review Judge has refused to issue interim orders even after being satisfied that the Petitioner has submitted a prima facie case.

In ***Assistant Collector, C.E., Chandan Nagar vs. Dunlop India Ltd., AIR 1985 SC 330***, the Supreme Court of India has observed;

> *"…where matters public revenue are concerned, it is of utmost importance to realize that interim orders ought not to be granted merely because a prima facie case has been shown. More is required. The balance of convenience must be clearly in favour of making an interim order and there should not be the slightest indication of a likelihood of prejudice to the public interest."*

Even after recognizing an arguable question, I have taken in to consideration the 'conduct of the Petitioner' to assess whether the limbs of the applicable tests are satisfied in the case of

[1] See-Securities and Investments Board vs. Pantell SA (1990) Ch 426
[2] American Cyanamid Co. vs. Ethicon Ltd (1975) AC 396; R vs. Secretary of State for Transport ex p. Factortame Ltd. (No. 2) (1991) 1 AC 603

N and A Engineering Services Private Limited & another vs. People's Bank & others, CA/WRIT/0603/2021 decided on 17.12.2021. The following passages in the said order is very much apt here:

> *"The documents annexed to the limited Statement of Objections, submitted along with an Affidavit by the Respondents, clearly indicates that the 1st Respondent on several occasions requested the Petitioners to repay the due amounts and however, the Petitioners have failed and neglected to settle the loans. On numerous occasions on the request of the Petitioners, the Bank has taken steps to reschedule the loan facilities. Having granted several concessions, the Petitioners have continued to neglect the payment of the outstanding sums as per the rescheduled agreements pertaining to the said facilities".*
>
> *"In deciding in whose favour the balance of convenience would lie, in my view, it is not only the damages that would be caused to a party by not issuing an interim relief be 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 in to consideration in view of assessing the balance of convenience and also the test to ascertain whether the final order be rendered nugatory if the Petitioner is successful. I am of the view that this is a fit and proper case for this Court to consider the conduct and the conscience of the Petitioners in deciding on the interim relief sought by the Petitioners".*

Although the vires of the action of the learned Magistrate giving effect to the Report of COI when arriving at a decision under Section 139(1)(ii) of the CCPA is being challenged in this case, I cannot possibly overlook the conduct of the Petitioner which is reflected in several paragraphs of Chapter 19 of the Report of COI. Perhaps, the Petitioner takes a different view on the contents of the last paragraph of page 265 of the Report, but the fact remains that the COI has arrived at a conclusion that there is a criminal liability on the Petitioner for acts or omissions explained in the Report. The COI has recommended that the Attorney General consider instituting criminal proceedings against the Petitioner under any suitable provision in the Penal code.

I am unable to devalue in any manner in the guise of an arguable legal barrier, the above recommendations of the COI which consisted of distinguished Members whose disposition, in my mind, was not under criticism by any reasonably thinking person during

recent past. I am mindful that it is a duty of any person who is responsible for the administration and execution of the law & order in this country to apprehend any perpetrator who is liable for this horrific massacre which took place on 21.04.2019. Every citizen of this country, in my view, has a right to look forward for due administration of justice against such perpetrators in order to uphold the Rule of Law. Hence, subject to the arguments of this application, I take the view that the rights exercised by the 3rd and 4th Respondents to make the complaint to the Fort Magistrate's Court is not a right limited only to those Respondents but when considering the overall circumstances, it is the duty of any citizen of this country who has faith in fair administration of justice.

In light of the above, I am not inclined to issue an interim order to stay the proceedings of the Fort Magistrate's Court or to stay the execution of the impugned order dated 16.09.2022, marked 'P4' as prayed for in the prayer of the Petition of the Petitioner.

At this juncture, I need to draw my attention to the submissions made by the learned Additional Solicitor General who divulges the fact that there is a series of Fundamental Rights cases, in which the Petitioner is also a party. Such cases are pending before the Supreme Court. According to the learned Additional Solicitor General, the Petitioners of those cases have brought to the attention of the Supreme Court the purported inaction of the Petitioner of the instant application relating to the bomb attacks on 21.04.2019. Those Fundamental Rights cases have been heard by a seven-judge bench chaired by His Lordship the Chief Justice and final determination of Court has been reserved.

In terms of the Article 118 of the Constitution, the Supreme Court shall be the highest and final superior court of record in the Republic. By virtue of Article 126(3) of the Constitution, in the course of hearing in the Court of Appeal into an application for judicial review, if it appears to Court that there is prima facie evidence of infringement of fundamental rights, the Court of Appeal shall forthwith refer such matter to the Supreme Court. Likewise, under Article 126(4), the Supreme Court has power to refer back to the Court of Appeal, a fundamental rights application or an application made to Court under Article 126(3) if in its opinion there is no infringement of a fundamental right or a language right.

Based on such circumstances and on a careful consideration of the whole matter, I take the view that no adverse orders should be made by the learned Magistrate until this Court

considers all above matters at a full hearing of this application. In the circumstances, I take the view that it is appropriate for the learned Magistrate to postpone the relevant case up until a date determined by this Court. Hence, the learned Magistrate of the Fort Magistrate's Court is directed to postpone the case bearing No. 23084/2022 to a date after 10 weeks from today, without making any adverse orders against the Petitioner in the interim, enabling this Court to expeditiously hear and determine this application before the next such date of the Magistrate's Court case.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal