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 Writ of Prohibition under and in terms of Article 140 of the Constitution.

CA/WRIT/450/2022

1. Chandana Niroshana Lokuliyanage
   Vice President,
   Matara Law Society,
   The Law Library,
   Fort, Matara.

2. Mettha Sudarshi Narasinghe
   Deputy Secretary,
   Matara Law Society,
   The Law Library,
   Fort, Matara.

Petitioners

Vs.

1. Hon. Wijeyadasa Rajapakshe
   Minister of Justice and Prison Reforms,
   Ministry of Justice and Prison Reforms,
   Colombo 01.

2. Mrs. Wasantha Perera
   Secretary,
   Minister of Justice and Prison Reforms,
   Ministry of Justice and Prison Reforms,
   Colombo 01.

3. Mrs. Samanthika Vithanage
   Registrar,
   District Court,
   Fort, Matara.

4. Mr. Saliya Peiris PC
President,
Bar Association of Sri Lanka,
No. 153, Mihindu Mawatha,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Faisz Musthapha PC with Geeth Karunarathna, Faiza Markar and Bishren Iqbal for the Petitioners.

Nerin Pulle PC, ASG for the 1st, 2nd and 3rd Respondents.

4th Respondent appeared in person.

Supported on : 09.12.2022 and 15.12.2022

Decided on : 09.01.2023

Sobhitha Rajakaruna J.

The main relief sought by the Petitioners in this application is a remedy by way of a writ of Prohibition restraining the Minister of Justice ('1st Respondent') from framing regulations in terms of the Judicature Act to relocate the Matara Courts Complex to Kotawila. The Petitioners assert that the Matara Courts Complex which is currently within the Matara Fort will be relocated as per the Notice, marked 'P19', to the newly built Courts Complex at Kotawila, Matara ('New Complex').

At the outset, I need to draw my attention to the letter dated 15.12.2020 ('P18') addressed to the then Minister of Justice by the Matara Law Society ('MLS'). I observe that MLS has raised their concerns in respect of the shifting of the existing court premises and summarizing the whole issue the MLS has proposed the following points therein to

mitigate the alleged destruction that could be caused due to the shifting of the Courts Complex;

A. *"We propose that a common time table should be laid out for the moving of the courts to Kotawila and construction of the Lawyers Office Complex.*
B. *All the court houses should be moved together. The proposed piecemeal basis of moving would cause great inconvenience to litigants as well as the Attorneys. As you are well aware, lawyers who are practicing in original Courts are the same who practice in higher Courts and that will cause immense hardships to lawyers as well as to litigants.*
C. *We have come to know that now there is a proposal for the Government to give the building of the Lawyers offices to some agency from whom the lawyers will be able to rent the office spaces. We would like some assurance about the rent which could be charged by such agency which could bearable especially by junior lawyers.*
D. *All of the issues listed above must be addressed adequately before moving of the court houses".*

When the Petitioners filed the instant Application in the month of December 2022, apart from the legal submissions, their main concern was the issue on the Lawyers' Office Complex which is well described in the above paragraph (C) in 'P18'. Other than the Resolution, the Constitution of the MLS, Report of the Surveyor, and Town plan etc., almost all the other documents annexed to the Petition are to illustrate the issues on constructing a Lawyers' Office Complex close to the said New Complex. It appears that the MLS has initially taken endeavors to get a Lawyers' Complex built with the assistance of the Urban Development Authority adjacent to the New Complex and thereafter has entered into a Memorandum of Understanding also with the Pradeshiya Sabha of Weligama. As per the submissions made on behalf of the Petitioners, the MLS has not received the expected support from the relevant Pradeshiya Sabha. It is very much clear that the Government is not bound to construct office complexes for lawyers when shifting or building court houses. However, it appears that the lawyers usually get the fullest support and the corporation of the relevant Ministries when putting up lawyers' office complexes.

The question which arises here is whether the obstacles faced by the members of the MLS can be considered as a ground for judicial review, particularly to grant a writ of Prohibition as prayed for in the prayer of the Petition of the Petitioners. In view of the averments of the Petition, 'Maha Matara Project' has been initiated in the year 2010 and shifting the

existing Matara Courts Complex is also one of the main proposals under the said project. The MLS has prepared a construction plan for a Lawyers' Office Complex in Kotawila near the New Complex in the year 2017. Already five years have lapsed since then and during such period the MLS has not made any objections for issuing a Regulation by the Minister of Justice under Section 5(3) of the Judicature Act No. 2 of 1978 ('Act') until the time the Petitioners filed the instant Application in December 2022.

Anyhow, the Petitioners complain that the garbage disposal site which is closer to the New Complex lets out a foul odour throughout the day and night and it causes a great risk to hygiene and sanitization of court's staff, lawyers and litigants. When this Court inquired from the learned Counsel who appeared for both the Petitioners and the Respondents, it emerged that the said garbage disposal site has been there from the time of commencement of construction of the New Complex.

The Review Courts which usually grant discretionary remedies tend to refuse applications based on futility, laches, un-meritoriousness, lack of promptitude etc. The cardinal principle is that the person who seeks judicial review should explain laches, if any, by establishing the facts as to why he is not negligent for long and unreasonable delay. There is no evidence tendered to Court to the effect that the MLS has raised their objections against the New Complex at the time of construction or even at the time of ceremonial opening of the building by the then Minister. This Court is aware of the difficulties the lawyers would undergo when their regular offices are not within the close proximity to a Court Complex situated out of Colombo. However, this Court is unable to undermine the fundamental principles in issuing a writ by only considering particular hardship that may be faced by certain members of the MLS which cannot be assumed as an appropriate ground to seek for a writ of Prohibition.

Moreover, it is necessary to examine whether the aforesaid garbage disposal site is a serious legal ground to prevent the 1st Respondent exercising his powers under Section 5(3) of the said Act. To my mind, a reasonable query raises as to how it would amount to unlawfulness, illegality or unreasonableness when the relevant Minister issues a Regulation under the said Section 5(3) in respect of the New Complex.

The Petitioners' legal submissions are based on the provisions of Section 5(3) of the said Act. The Section 5(3);

> 'Each court referred to in subsection (1) may be held at such convenient place or places within such judicial district or division, as the case may be, as the Minister shall by regulation from time to time appoint:
> Provided that nothing in this section shall be construed to restrict or curtail the power possessed by every Judge to hold court at any convenient place within his territorial jurisdiction.'

The contention of the Petitioners is that the 1st Respondent Minister should not promulgate a Regulation appointing Kotawila New Complex as the place of hearing for the courts of Matara and such assertion is made on the ground that the said location is not a 'convenient' place. The learned President's Counsel for the Petitioners heavily relies on the word 'convenient place' embodied in the said Section 5(3).

A. R. B. Amarasinghe J. has extensively discussed on the 'Place of hearing' of Courts in his renowned book - '***Judicial Conduct, Ethics and Responsibilities', Wishwaleka (2002)*** (pp.793 to 803). He has observed that though the Minister has the power to appoint, time to time by Regulation under the relevant section of the Judicature Act, a convenient place for hearing of Courts[1], nothing in that Section shall be construed to restrict or curtail the power possessed by every judge to hold Court at any convenient place within the judge's territorial jurisdiction. Amarasinghe J. has referred, inter alia, to ***Kulantaivelpillai vs. Marikar 20 NLR 471 (at p. 475)***, where Bertram C.J. has held;

> "*….He referred to the definition of " Court " as given in the Courts Ordinance. " Court " is defined in the Courts Ordinance as being " a Judge empowered by law to act judicially alone, or a body of Judges empowered by law to act judicially as a body, when such Judge or body of Judges is acting judicially." That definition seemed to Withers J. and Bonser C.J. to imply that a Judge is only acting judicially when he is sitting in Court. Personally, I do not so read the words in that sense. The definition does not say " in any place in which such Judge or*

[1] which are mentioned in Section 5(1). The Section 5(1); 'There shall be in such judicial district of Sri Lanka a "District Court" and in every judicial division there shall be a "Small Claims Court" and "Magistrates' Court" and each such court shall be holden by and before one person to be called the "District Judge", "Judge of the Small Claims Court" and "Magistrate" respectively.'

body of Judges is empowered to act judicially," but when, i.e., on any occasion on which such Judge or body of Judges is acting judicially. The question whether a Judge is acting judicially- as I understand the matter-is not to be determined by the building or place in which he sits, but by the capacity in which he purports to act."

Amarasinghe J. has illustrated several judgements where the relevant judges have taken decisions sitting at their chambers; judge's residence and at the crime scene based on several circumstances. An examination of case law shows that the interpretation of the words 'convenient place' has not been extended to an instance where the State as a policy decision/administrative decision has decided to relocate the buildings of courts to another location. On a careful perusal of such judicial precedent and the effect of Section 5(3), it implies that every judge is possessed with the power to hold Court at any convenient place within his territorial jurisdiction on special circumstances on temporary basis and that power cannot be exercised to change the place of the 'building' which constitutes Court rooms decided by the relevant Minister by way of a Regulation. It comes to my mind in the year 1998 when the terrorists attacked the 'Dalada Maligawa' in Kandy, the District Judge started hearing cases at his official residence as none of the court rooms were in a suitable condition to hold court proceedings due to severe damages caused to the court buildings. Thus, I take the view that the interpretation of the word 'convenient' embodied in the said Section 5(3) should not be enlarged beyond such special circumstances. I am not discussing here about the Constitutional provisions relevant to the sittings of Courts.

As opposed to the arguments of the Petitioners, the learned Additional Solicitor General ('ASG') who appeared for the Respondents contended that the provisions of the proviso to Section 5(3) can be read as a stand-alone Section. In support of his argument, the learned ASG brought to the attention of this Court the letter written by the Hon. High Court Judge of Matara, marked 'X' (annexed to the motion dated 12.12.2022), by which he attempted to express consensuses among the learned judges of Matara to shift the existing Court premises to the said New Complex. He submits that the relocation of the court premises can be done even only with such consensuses of judges in terms of the proviso to the said Section 5(3). I simply cannot agree with the assertions of the learned ASG as the judges cannot possess an unfettered discretion under the proviso to Section 5(3) to change or relocate the building allocated for court rooms by the relevant Ministry. Anyhow, the

judges have the discretion under the said proviso to change the place of hearing on temporary basis under special circumstances as discussed above.

I take the view that the provisions of the sections with provisos should not be interpreted as if they were parallel enactments. Such provisos should be considered as limitations on the manifestation of the main section but should not go against the scheme of the whole enactment. In ***Ismalebbe vs. Jayawardane, Assistant Commissioner of Agrarian Services (1990) 2 Sri. L.R. 199 (CA)***, S.N. Silva J. held that the proviso should be construed in relation to the entire section and where necessary in the context of even the other sections. (Also see: ***Jayagoda vs. Attorney General (2006) 2 Sri. L.R. 387 (CA); Salgado vs. Moses 1980 2 Sri. L.R. 6 (CA***)). The Supreme Court of India in ***Shimbhu and another vs. State of Haryana (decided on 27.08.2013),*** held that a proviso should be construed in relation to the main provision. In ***Union of India and others vs. Dileep Kumar Singh (decided on 26.02.2015)***, it has been held that though a proviso does not travel beyond the provision to which it is appended, golden rule is to read the whole section, inclusive of the proviso in such manner that they mutually throw light on each other and result in a harmonious construction.

In light of my above findings, I am not inclined to agree upon the definition on the words 'convenient place' formulated even by the learned President's Counsel for the Petitioners as I see no substantive ground in this case to consider the lawyers' 'convenience' in relocating the court premises. This is merely because the only main relief sought by the Petitioners is for a writ of Prohibition restraining the 1st Respondent from framing Regulations to relocate the existing Courts Complex to the New Complex at Kotawila. Thus, the instant Application of the Petitioners is presumably pre matured and thus, if the Minister promulgates a Regulation under Section 5(3), the Petitioners may gain a right to get such decision reviewed on appropriate grounds, if any.

I cannot gather any reason, at this stage, to restrain the relevant Minister's power under Section 5(3) as the decision to shift the Matara Court premises has not been taken overnight but taken after much deliberations with the lawyers/judges over several years. As the learned ASG pointed out the Auditor General has raised several concerns over the issue of not occupying the New Complex after expending millions of Rupees of public funds. Based on the special circumstances of this case, the non-removal of the aforesaid garbage disposal site cannot be considered as a prime reason, at this stage, to justify further postponement of the commencement of occupation of the New Complex. It is a

mandatory duty of the relevant Local Government institutions to find a solution to the relevant garbage issue expeditiously. It seems that the New Complex has been abandoned several months after completion of its construction and the concerns of the Auditor General need to be taken into serious consideration at this juncture of the country as more and more deterioration of the condition of the building would be an unnecessary and heavy expenditure to public funds.

In the circumstances, based on the arguability principles that should be adopted in respect of matters relating to issuance of notice in a judicial review application, I hold that there is no appropriate or additional question to be decided at a fuller hearing of this case which warrants this Court to issue formal notice on the Respondents of this Application.

Application is refused.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal