

**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, Mandamus and Prohibition under and in terms of Article 140 read with 126(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

C.A. Writ No.83/2023

Athuluwage Chaminda Pushpakumar,
3/2A, School Lane,
Niwanthidiya,
Piliyandala.

Petitioner

Vs

1. Mohan Wijerathane,
Officer-in-Charge,
Financial Crimes Investigation Unit,
Criminal Investigation Department,
Colombo 01.

2. Attorney-General,
Attorney General's Department,
Colombo 12.

Respondents

Before : **N. Bandula Karunarathna J. (P/CA)**
M. Ahsan R. Marikar J.

Counsel : Manohara de Silva, P.C. with Boopathi Kahathuduwa and Sasiri Chandrasiri for the Petitioner.

Shanil Kularatne, D.S.G. with Shilima David, SC for the Attorney-General.

Argued on : 20.02.2023

Decided on : **15.03.2023.**

M. Ahsan R. Marikar J.

Introduction

1. The application made by the Petitioner for the judicial review is whether the Petitioner could be arrested based on the “B” report dated 3rd February 2023, and/or other “B” reports filed in Case No. B 2675/2015 of the Fort Magistrate Court.

Background of the case

2. The Petitioner had made this application as he was the former Chairman of the National Lotteries Board (NLB). During the year 2014 it had been suggested to erect advertising boards to improve the depleting sales of the lotteries.
3. After a survey had been conducted, a board paper had been presented dated 22nd August 2014, by the Assistant Manager, submitted through the Assistant General Manager (Dealer Administration and Assistant General Manager Sales) and had sought the approval for the erection of 100 large hoardings island wide.
4. The said board paper had been approved at the board meeting.

5. Subsequently another board paper had been presented on 9th September 2014, for erecting another 50 large hoardings prepared by the same Assistant Manager which was approved at the board meeting. The said facts are supported by X1 to X3 documents.
6. Later on quotations had been called for the erection of 150 hoardings. Of the 10 suppliers who submitted the bids, Digi Fact Media (Private) Limited had the lowest bid and the Technical Evaluation Committee had approved the bid submitted by Digi Fact Media (Private) Limited.
7. The Petitioner had specifically stated that he was not a member of the Technical Evaluation Committee that selected the supplier but he was a member of the Departmental Procurement Committee with other representatives.
8. The Financial Crimes Investigation Division (FCID) had filed a “B” Report in the Case No. B 2676/2015 and reported facts to Court on 16th September 2015, regarding a complaint made by the new Chairman of the National Lotteries Board.
9. Subsequently, the “B” Report dated 3rd February 2023, had been filed by the FCID and steps were taken to prosecute against the Petitioner.

Argument related to the interim relief claimed by the Petitioner

10. When this application came up to be supported, the President’s Counsel Manohara De Silva challenged the decision to initiate criminal action through the case bearing No. B 2676/2015 in the Fort Magistrate Court and sought the interim reliefs prayed for in the prayers (E) to (H) on the

grounds that there is no reasonable suspicion and/ or documental proof at this stage to arrest the Petitioner and produce before the Magistrate.

11. The Petitioner being the former Chairman of the NLB, had no dealings with the contractor to whom the billboards were awarded.
12. The Deputy Solicitor General Shanil Kularatna who appeared for the Respondent objected the application made by the Counsel for the Petitioner and contended that there are sufficient grounds that the Petitioner had misappropriated the NLB money on issuing the tender and releasing the money to prepare 150 hoardings.
13. On the said grounds we have to consider the following disputed facts to issue or not to issue the interim orders prayed for in the prayers of the petition.
 - i. Is there a prima facia or are there serious matters to be looked into in the case put forward by the Petitioner?
 - ii. Is there reasonable suspicion that the Petitioner had committed the offences as pleaded in the “B” Report filed in Case No.B2676/2015?
 - iii. If not, is the Petitioner entitled for the interim reliefs claimed by him?

Is there a prima facia or are there serious matters to be looked into in the case put forward by the Petitioner?

14. The Counsel for the Petitioner raised the question, was there sufficient evidence to file the “B” Report in the Magistrate Court Case No. B 2676/2015. His argument was that at this stage to arrest the Petitioner on the “B” Report filed against the Petitioner, sufficient documents or proof had not been submitted. As the 150 hoardings were a concept of

the government of that period and as the Petitioner being the Chairman of the NLB, the Petitioner had implemented the said program.

15. To erect the said hoardings the Petitioner had followed the correct tender procedure and he was not a member of the tender committee.
16. It is reported in **Pamkayu (M) SDN BHD and another V. P. Liyanaarachchi, Secretary, Ministry of Transport and Highways and others**¹: per Amerasinghe J. has held that,

‘the award of a tender must be based on compliance with the terms and conditions of the tender documents on the date and at the time specified for the closing of the tender.’

17. This Court observes examining the documents marked and produced as X2 to X6 and X13 reveals that the Petitioner was not involved with the tender procedure.
18. When considering the said facts there are serious questions that need to be resolved after full argument.
19. Further, at this juncture we are of the view that the Petitioner has a prima facia case.
20. It is decided in **R v. Legal Aid Board ex p Hughes**² in which Lord Donaldson MR held that notice/permission should be granted if an application is prima facia arguable. The presiding Judge needs to be satisfied that there is a proper basis for claiming judicial review and it is wrong to grant notice without identifying an appropriate issue on which the case can proceed.

¹ [2001] 1 Sri LR 118 at 125.

² [1993] 3 Admin LR 623 at 628D at para 2.

21. Further, useful guidance can be determined on the grounds on which a prima facie case should be considered which has been decided in **Felix Dias Bandaranaike V. State Film Cooperation and another**³. In the said judgement,

*"In Sri Lanka we start off with a prima facie case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the plaintiff should be certain to win. It is sufficient if the probabilities are he will win. Where however the plaintiff has established a strong prima facie case that he has title to the legal right claimed by him but only an arguable case that the defendant has infringed it or is about to infringe it, the injunction should not be granted (**Hubbard v Vosper**)⁴. If the probability is that no right of the plaintiff will be violated or that he will suffer no wrong such as the law recognizes then the injunction will not issue - see for instance the cases of **Richard Perera v Albert Perera**⁵ and **Gamage v The Minister of Agriculture and Lands**⁶."*

22. On the aforesaid decision and considering the documents we are of the view that there are serious questions arguable and there is a prima facie case put forward by the Petitioner.

³ [1981] 2 Sri LR 287.

⁴ [1972] 1 All ER 1023, 1029.

⁵ [1963] 67 NLR 445.

⁶ [1973] 76 NLR 25, 43, 44.

Is there reasonable suspicion that the Petitioner had committed the offenses as pleaded in the B Report filed in Case No.B2676/2015?

23. The Deputy Solicitor General, Shanil Kularatne, vehemently argued that the Petitioner had misappropriated millions of rupees when he was the Chairman of the NLB, pertinent to the “B” Report filed in the Magistrate Court Case No. B2676/2015.
24. However, other than the statements recorded by the FCID there is no strong evidence at this juncture to support the argument put forward by the Deputy Solicitor General and it is a matter to be considered at the argument stage with the available documents and facts.
25. Further, the Deputy Solicitor General, Shanil Kulartne, had not given any valid reason for delaying to charge the Petitioner and / or delaying the indictment after the investigation commenced in 2015.
26. The decision in **Wijesiri vs AG**⁷ and in **T.N. Fernando vs Nelum Gamage**⁸ decided that a mere suspicion is not enough. A reasonable suspicion or credible information is required.
27. In the said circumstances at this stage there is no strong evidence to consider that there is a reasonable suspicion against the Petitioner. However, there is no bar for the prosecution to conduct further investigations and to produce material to determine the facts reported at the Magistrate Court Case No. B2676/2015.

⁷ [1980] 2 Sri LR 317 at 340-341.

⁸ [1994] 3 Sri LR 192.

If not, is the Petitioner entitled for the interim reliefs claimed by him?

28. In the above circumstances this Court has to consider the interim reliefs sought by the Petitioner.

29. In doing so this Court would bear in mind the following observation by the Chief Justice Neville Samarakoon in **Billimoria vs Minister of Lands and Land Development and two others**⁹,

*"The only question we need decide in this appeal is whether the stay order was made per incuriam since the order of the Court of Appeal has reserved all other "matters involved" for further hearing. In considering this question we must bear in mind that a stay order is an incidental order made in the exercise of inherent or implied powers of Court. Without such power the court's final orders in most cases would if the petitioner is successful be rendered nugatory and the aggrieved party will be left holding an empty decree worthless of all purposes. Vide Bertram C.J. in **Weerasooriya v. Sedambaram Chetty**. Cader, J. himself considered the stay order in this case in the same light."*

30. Further, in **Duwearachchi and another vs Vincent Perera and other**¹⁰,

The term "balance of convenience" - as regards the issue of injunctions has been defined in Halsbury's Laws of England

⁹ [1978-79-80] 1 Sri LR (SC) 10 at page 15.

¹⁰ [1984] 2 Sri LR 94.

- 4th Ed ; Volume 24, para 956 as follows :-"The Court takes into consideration the balance of convenience to the parties and the of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right".

31. The case of **Mohamed Felumesh v. S. Mondale and others**¹¹ is a case in which in a writ application the Court considered the balance of convenience in the issue of an interim stay order. The Court ruled as follows :-

"The question of balance of convenience poses a more difficult problem, but, in our opinion, in the facts and circumstances of this case, that question should be answered in favour of the appellant". The third principle that has to be considered, which is seen from the authorities in the issue of an interim order is whether if an interim order is not issued "irreparable and irremediable mischief or injury" will be caused to a party. In C. M. Row's book referred to above - page 201 "Irreparable injury" has been defined as - "injury which 105 cannot be adequately remedied by damages".

32. In the said judgements it is specified the grounds on which an interim order can be granted.

¹¹ A.I.R [1960] Cal 582.

33. When considering the application made by the Petitioner, in the event the Petitioner succeeds at the end of the application if the interim relief is refused more damage or irreparable loss will be caused to the Petitioner.
34. For these reasons this court is of the view that the balance of convenience lies in favour of the Petitioner as reported in **Duwearachchi and another vs Vincent Perera and other**¹².

CONCLUSION

35. In the above circumstances it is the view of this court that the Petitioner at this stage had proven sufficient material to issue interim orders prayed for in the prayers (E), (F) and (G) of the petition dated 10th February 2023, until the final determination of this application.

Therefore, we issue an interim relief upon prayers (e) (f) and (g) of the petition dated 10.02.2023, against the respondents until the final determination of this application.

Judge of the Court of Appeal

N. Bandula Karunarathna J. (P/CA)

I agree

President of the Court of Appeal

¹² [1984] 2 Sri LR 94.

