

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

*In the matter of an application for revision
in terms of Article 138 of the Constitution of
the Democratic Socialist Republic of Sri
Lanka.*

Court of Appeal No:

CPA/0036/23

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

APPLICANT

High Court Colombo

Case No. EXT/4083/2022

Vs.

Omar Saquib Khan,
No. 200, Hilton Colombo Residencies,
Union Place, Colombo 02.

RESPONDENT

AND NOW

Omar Saquib Khan,
No. 200, Hilton Colombo Residencies,
Union Place, Colombo 02.

RESPONDENT-PETITIONER

Vs.

The Hon. Attorney General,
Attorney General's Department,
Colombo 12.

APPLICANT-RESPONDENT

Before : Sampath B. Abayakoon, J.

: P. Kumararatnam, J.

Counsel : Kapila Waidyaratne, P.C. with Nipuna Jagodarachchi
and Akila Jayasundara for the Respondent-Petitioner

: Riyaz Barry, DSG for the Applicant-Respondent

Supported on : 10-05-2023

Order on : 06-06-2023

Sampath B. Abayakoon, J.

This is an application by the respondent-petitioner (hereinafter referred to as the respondent) invoking the revisionary jurisdiction of this Court in terms of Article 138 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Respondent is seeking to challenge the Order dated 21-02-2023 made by the learned High Court Judge of the Western Province Holden in Colombo where the preliminary objections raised by the respondent in relation to the application of the Hon. Attorney General, who is named as the applicant-respondent in the petition, (hereinafter referred to as the applicant) in terms of section 9 of the Extradition Law No. 8 of 1997 as amended by the Amendment Act No. 48 of 1999 was overruled.

Since the respondent has sought a stay order to prevent the inquiry in relation to the application made by the applicant being proceeded before the High Court as well, the matter was allowed to be supported for the requested stay order as well as for notice after having given notice to the applicant namely, the Hon. Attorney General of Sri Lanka.

This Court heard the submissions in support of this application by the learned President's Counsel who represented the respondent as well as the submissions of the learned Deputy Solicitor General (DSG) on behalf of the applicant in determining the question of issuing a stay order and giving notice of the application.

The applicant has made this application to the High Court of Colombo in terms of section 9 of the Extradition Law No. 8 of 1977 as amended by the Amendment Act No. 48 of 1999 (hereinafter referred to as the Extradition Law) seeking the Court's intervention in order to extradite the respondent to the United States of America where he is facing several criminal charges against him.

Together with the application, the applicant has attached the following documents for the consideration of the High Court.

1. A copy of the Treaty between the United States of America and Democratic Socialist Republic of Sri Lanka.
2. Certified copy of the warrant issued by the United States District Court for the Southern District of New York.
3. Synopsis of evidence against the respondent.

The learned High Court Judge after considering the application and the relevant documentary evidence placed before him, and after being satisfied in that regard, has issued a provisional warrant of arrest for the respondent on 14-10-2022 and has ordered to give notice of its issue to the relevant subject Minister with the relevant information provided to enable the subject Minister to allow or disallow an authority to proceed in respect of the person whom the warrant relates, namely the respondent, in terms of section 9 (3) of the Extradition Law.

The respondent has been arrested and produced before the Court on 18-10-2022 and the learned High Court Judge having considered the relevant legal provisions had granted bail to the respondent on the same day, with bail conditions to ensure that the respondent does not leave the country before the conclusion of this extradition proceedings. The learned High Court Judge has also permitted the respondent to file his written objections in relation to this application and has permitted the applicant to file counter objections, if any.

In the meantime, the Minister of Defence as the subject Minister has issued the authority to proceed with the extradition application giving the High Court necessary authority to inquire into the matter and come to a determination.

In his written objections filed on 03-11-2022, the respondent has raised several objections under two categories termed as preliminary objections and objections.

Under the heading preliminary objections, the respondent has raised the following;

8. The respondent states that the copy of the Extradition Treaty between Sri Lanka and the United States of America, hereinafter referred to as the "Treaty" had not been duly submitted as per the section 3 of the Extradition Act No. 8 of 1977.

9. The respondent further respectfully states that the petitioner has failed to submit the Gazette incorporating the Treaty to the Sri Lankan legal system.

10. The respondent further states that the petitioner had referred to the section 2 of the Act and had stated that the "Minister is acting by virtue of the powers vested in him in terms of section 2". It is respectfully submitted that section 2 of the Act only refers to the extradition within the Commonwealth Countries. The United States of America is not a Commonwealth Country. Therefore, the petitioner cannot act in terms of section 2 of the Act.

11. It is also respectfully submitted that according to the Treaty, the petitioner must submit a copy of the request to extradite the respondent to Your Honour's Court. However, in the instant case, the petitioner has not submitted any request from the requesting State warranting the extradition of the respondent.

12. Therefore, the respondent respectfully states that the petition of the Hon. Attorney General is not within the ambit of the Extradition Act.

In reply to the relevant objections, it appears that the applicant has filed several other supporting documents to substantiate the application made in terms of section 9 of the Extradition Law. The applicant has also filed the copy of the Gazette Notification published in relation to the relevant extradition arrangement between Sri Lanka and the United States of America in terms of section 3 of the Extradition Law.

The learned High Court Judge having heard the oral submissions, written submissions of the parties, and after having considered the application, the relevant documents, the objections raised and the relevant legal provisions, had overruled the objections by the impugned order and had ordered the inquiry in relation to the extradition request.

It was informed to this Court that the relevant inquiry has now commenced before the High Court.

In his submission before this Court, the main contention of the learned President's Counsel was that the learned High Court Judge had no jurisdiction to issue a provisional warrant in terms of section 9 of the Extradition Law. Therefore, it cannot be considered an Order made in accordance with the law. It is clear from the submissions made to this Court and the written submissions tendered to the High Court in relation to this argument, this objection had been on the basis of section 9 of the Extradition Law No. 8 of 1977, where section 9 (1) (b) states that,

9 (1) A warrant for the arrest of a person accused of an extraditable offence, or alleged to be unlawfully at large after conviction of such an offence, may be issued-

(a) ...

(b) Without such an authority by any High Court Judge, upon information that such person is or is believed to be on his way to Sri Lanka.

The argument appears to be that the respondent was residing in Sri Lanka since 2019 on a legally obtained visa, and hence, there was no basis for the applicant to come to Court and seek a provisional warrant in terms of section 9 (1) (b) of the Extradition Law.

However, it needs to be noted that the said section 9 (1) (b) of the Extradition Law has been amended by the Amendment Act No. 48 of 1999. The amended section 9 (1) (b) reads as follows.

9 (1) (b) Without such an authority, by any High Court judge, upon information that such person-

(i) is in, or is believed to be on his way to Sri Lanka.

It is the view of this Court that hence, there exists no basis whatsoever for an objection as raised since the amended provision provides for a person who is already in Sri Lanka to be arrested on a provisional warrant.

In his submissions before this Court, the learned DSG pointed out that the Hon. Attorney General being the applicant has made an application in terms of section 9 of the Extradition Law together with the relevant documents and since several preliminary and other objections were raised before the Court, the applicant provided additional documents to substantiate the extradition request to the Court. The learned DSG was of the view that the inquiry is now proceeding and there exists no basis for a stay order of the inquiry and even for a notice to be

issued in relation to this revision application as the respondent has failed to establish a prima facie basis for this application.

As determined earlier, this Court finds no basis for the argument that the learned High Court Judge had no jurisdiction to issue a provisional warrant as the law clearly provides for the jurisdiction to issue a provisional warrant.

This Court finds no basis for the argument that there was no authority to proceed as ordered by the relevant Minister in terms of section 8 of the Extradition Law when this application was made to the Court. Having considered the relevant provisions of the Extradition Law, it is the view of this Court that an extradition application can be made to the High Court by the applicant either in terms of section 8 or in terms of section 9 of the Extradition Law. In terms of section 8, the applicant needs to obtain the authority to proceed before making the application to the Court. However, in terms of section 9 of the Extradition Law, the legislature by its wisdom has provided for a High Court Judge to issue a provisional warrant even without an authority to proceed by the relevant subject Minister, upon being satisfied as to the legality of the request and the information provided, as done in the instant matter.

As provided in the law, the learned High Court Judge, after issuing the provisional warrant has rightly ordered to give notice of the provisional warrant to the subject Minister with the relevant documentation and the subject Minister has decided to issue an authority to proceed in respect of the respondent, which is perfectly in accordance with the law.

This Court is in no position to agree with the preliminary objections raised and the submissions made to this Court on the basis that the applicant has failed to satisfy the learned High Court Judge as to the relevant extradition request that the respondent is required for an indictable offence in the United States of America. Together with the application, the applicant has tendered the Extradition Treaty between the United States of America and the Democratic Socialist Republic of Sri Lanka and a copy of the warrant issued by the United

States District Court for the Southern District of New York and also the synopsis of evidence against the respondent. It is the view of this Court that this has provided sufficient information for the learned High Court Judge to issue a provisional warrant against the respondent.

After issuing the warrant, and after the respondent being arrested and produced, the learned High Court Judge has promptly released him on bail. The necessary bail conditions have been imposed to ensure the continuous presence of the respondent in Sri Lanka until the determination of the extradition application, which, in view of this Court, is the purpose of issuing a provisional warrant since if not, the respondent can leave the country being a citizen of the United States of America making the purpose of this extradition request worthless.

However, this Court finds several irregularities in the application of the applicant to the High Court. In the application, the applicant refers that the application is an application in terms of section 2 of the Extradition Law, which refers to the provisions of the law in respect of the Commonwealth Countries. The applicant should know that the United States of America is not a Commonwealth Country and the application should have been in terms of section 3 of the Extradition Law.

Although, the applicant has produced the copy of the Extradition Treaty that exists between the Government of Sri Lanka and the United States of America, it is also necessary for the applicant to produce the relevant Gazette Notification published by the Minister in that regard to establish that the said Treaty has been incorporated into the domestic legal system, which has not also not been done when this initial application was made.

However, it is the view of this Court that such irregularities to become relevant for an application in terms of Article 138 of the Constitution, there should be a basis for this Court to consider that the irregularity had prejudiced the substantial rights of the parties or occasioned a failure of justice.

The relevant proviso to Article 138 (1) which gives the jurisdiction to the Court of Appeal to hear and determine this matter reads thus;

“Provided that no judgement, decree or order of any Court shall be reversed or varied on account of any error, defect or irregularity, which has not prejudiced the substantial rights of the parties or occasioned a failure of justice.”

It is abundantly clear that the respondent has not been misguided due to the fact of mentioning that the application is in terms of section 2 of the Extradition Law, as it clearly demonstrates with the documents annexed and the objections taken.

The irregularity of not tendering the relevant Gazette Notification had been rectified by the applicant when the relevant Gazette Notification was produced to the Court before the commencement of the inquiry. It needs to be noted that the relevant Gazette Notification has been ratified by the Parliament of Sri Lanka on 10th October 2001 making the relevant Treaty, a part of our legal system.

The additional documents tendered by the applicant had been to counter the objections raised by the respondent, which has not created any prejudice towards the respondent.

It is the view of this Court as the matter is being now inquired by the learned High Court Judge, both sides to the application can present their arguments and obtain redress before the High Court of Colombo.

For the reasons considered above, this Court finds no reason to issue a stay order staying the proceedings before the High Court in this regard. Hence, the application for a stay order is refused.

This Court also finds no basis to issue notice to the applicant-respondent mentioned in the application filed before this Court by respondent-petitioner as he has failed to establish a prima facie basis for the notices being issued.

Therefore, the application for notice is refused and the application is dismissed.

The Registrar of the Court is directed to forward this Order to the High Court of Colombo for the necessary information.

Judge of the Court of Appeal

P. Kumararatnam, J.

I agree.

Judge of the Court of Appeal