

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

In the matter of an application to deal with the 1st to 3rd Respondents for Contempt of Court under Article 105(3) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Contempt of Court -
COC/10/2021**

Gnendra Shani Abeysekera
No. L/1/1 Elvitigala Flats,
Colombo 08.

Petitioner

Vs.

1. Hon. Upaly Abeyrathne
Chairman
Presidential Commission of Inquiry
No. 42/10, Beddegana North,
Pitakotte.
2. Daya Chandrasiri Jayathilaka
Member Presidential Commission of Inquiry
No. 74/21, Jaya Road, Udahamulla,
Nugegoda.
3. Chandra Fernando
Member, Presidential Commission of
Inquiry No. 01,
Shrubbery Gardens,
Colombo 04.

Respondents

Before:

N. Bandula Karunaratna J. (P/CA)

&

R. Gurusinghe J.

Counsel:

Asthika Devendra AAL with Nihara Gooneratne AAL for the petitioner

Sanjewa Jayawardena PC with Rukshan Senadeera, AAL instructed by Ashoka Niunhella AAL for the 1st and 3rd respondents.

Written Submissions:

By the Petitioner – 15.06.2022

By 1st and 3rd Respondents – 16.06.2022

Argued on : 25.05.2023

Decided on : **10.07.2023**

N. Bandula Karunarathna J. P/CA

The Learned Counsel for the Petitioner supported this application in Open Courts.

The instant application for Contempt of Court was filed by the Petitioner urging that the undertaking given dated 27.07.2020, on behalf of the 1st, 2nd and 3rd respondents in CA/WRIT/ 166/2020 and CA/WRIT/ 167/2020 has been violated. Thus, amounts to contempt of court.

The 1st to the 3rd respondents above named are respectively the Chairman and the members of the Commission of Inquiry, established under Commission of Inquiry Act No. 17 of 1948, as amended, by His Excellency the President of Sri Lanka, by way of a proclamation published in Gazette (Extraordinary) bearing No. 2157/44, dated 09-01-2020, for the purposes of inquiring into and obtaining information pertaining to alleged incidents of Political Victimization, between the period commencing from 08.01.2015 to 16.11.2019.

The members of the Commission were as follows:-

- (a) The 1st Respondent is a retired Supreme Court Judge;
- (b) The 2nd Respondent is a retired Court of Appeal Judge;
- (c) The 3rd Respondent is a retired Inspector General of Police.

The said Commission was established under Commission of Inquiry Act No. 17 of 1948, as amended, by His Excellency the President of Sri Lanka, and hence, the Commission was governed by the provisions of the said Act, and the Commission exercised powers under the same. The Petitioner in the instant Application, was former Senior Superintendent of Police, who held the office of Director CID until 25.11.2019, and thereafter, he was interdicted from service with effect from 07.01.2020.

The Petitioner was served with summons and notice dated 16.06.2020, in respect of a complaint bearing No. PCI/PV/01/Com./50/2020 from the Secretary to the Presidential Commission of Inquiry, under the orders of the 1st to 3rd Respondents, informing the Petitioner to appear before the same on 17.06.2020.

The Petitioner challenged inter alia, the decision of the respondents to inquire into the aforesaid complaint bearing No. PCI/PV/01/Com./50/2020, by instituting CA/WRIT/166/2020, dated 10.07.2020, on the purported basis *inter alia* that: -

- (A) The Commission, (the 1st to the 3rd respondents), is not empowered to issue summons on the Petitioner, naming the Petitioner as a "Respondent";
- (B) The respondents do not have jurisdiction to inquire into the Complain No. PCI/PV/01 /COM/50/2020 and the Complainant has no locus standi to institute this complaint;

The said Writ Application bearing No. CA/WRIT/ 167/2020 was taken up for Support on the 27.07.2020 together with the connected matter bearing No. CA/WRIT/ 166/2020 before Hon. Justice Nawaz, P/CA and Hon. Justice Sobitha Rajakaruna. On that day the learned Counsel appearing for the petitioner in CA/WRIT/ 166/2020, concluded their principal submission in support of their applications for notice and an interim relief. The learned President's Counsel appearing for the 1st to 4th respondents made submissions and further gave an undertaking (dated 27.07.2020) which is now in issue together with a further undertaking given on behalf of the 5th respondent.

The counsel for the 1st to 4th respondents had also undertaken that both the Petitioners in CA/WRIT/ 166/2020 and the instant application will be dispensed with their presence before the Commission, until this court decides on the Question of notice and an interim order and that their absence will not be held against them. The said undertaking reads as follows;

"Mr. Uditha Egalahewa the Learned President's Counsel who appears for the 1st to 4th respondents namely the Hon members of the Commission and the Secretary of the Commission states as follows;

"In deference to this Court and taking in to consideration that the proceedings are still continuing voluntarily as the Counsel for the 1st to 4th respondents would like to give an undertaking that the Commission will be advised not to Summon the 5th respondent especially in view of the letter written by the Hon. Attorney General taking in to consideration that the 5th respondent is the prosecuting Counsel in the pending case in the High Court. Further, I wish to give an undertaking that both the Petitioners in CA/WRIT/ 166/2020 and CA/WRIT/ 167/2020 will be dispensed with their presence until this Court decided on the question of notice and interim order and their absence will not be held against them."

Though this matter was resumed for support on several occasions, the matter had to be re-fixed on various grounds and had been further delayed owing to the pandemic. Accordingly, the court as of date had not been able to decide on the question of notice and an interim order. The learned counsel for the petitioner says that, until the commission ended its tenure the said undertaking was in operation. While matters remained as such, the Commission had proceeded to make recommendations and decisions dated 24.11.2020 *inter alia* on the complaint bearing No: PCI/PV/01/Com./50/2020 which forms the subject matter of the original application.

The recommendations and decisions of the said Commission dated 24.11.2020 on the complaint bearing No: PCI/PV/01/Com./50/2020 *inter alia* are as follow;

The Recommendations:

- (1) That, legal action must be taken against the Respondents in respect of;
 - i. Committing crimes under and in terms of section 189 read with section 191 of the Penal Code by framing false and fabricated evidence against the complainant,

- ii. Committing crimes under section 100 of the Penal Code by abating the action of fabricating false evidence against the Complainant,
 - iii. Committing crimes of bribery under section 70 of the Bribery Act,
- (2) That, action must be taken in respect of the crimes committed under and in terms of section 335 of the Penal Code, for unlawfully retaining the complainant in the CID pursuant to a detention order made under the Prevention of Terrorism Act.
- (3) That, the Commission recommends that the evidence of this inquiry must be sent to the Attorney General and the Commission to investigate Allegations of Bribery and Corruption of Sri Lanka, in order to frame charges against the Respondents in respect of the matters stated herein.
- (4) That, the Commission recommends that, some relief be given to the complainant for his suffering by having been kept in custody.
- (5) That, action be taken under and in terms of the Disciplinary Code of the Police, in respect of the Respondents having falsified and fabricated evidence, Bribery, disgracing the police service.

The Decision;

- (1) That, the Commission has unanimously decided that the Respondents has put forward, aided, abated the fabrication of evidence in order to frame false charges against the Complainant and to imprison him,
- (2) That, the Commission has unanimously decided on the facts and evidence before it, that the complainant should be availed of all charges placed against him by way of the B Report bearing number 32528/15 and Case number 44146 and further Reports produced in regard to same,
- (3) That, the Commission has unanimously decided that the complainant should be availed of the charges made against him in the case bearing number HCB 25/2017, before the High Court of Colombo, by withdrawing the indictment filed against the complainant in that matter.

It is evident that the said recommendations and decisions had received cabinet approval by way of cabinet paper dated 15.01.2021 and that the same is encapsulated at annexure II, Item No.09 point XXXI of the said cabinet paper.

It is not in dispute that the respondents have made recommendations against the petitioner which is prejudicial to the petitioner. The learned counsel for the petitioner says that the decision is flawed and should be set aside by an appropriate forum. Not only that the

learned counsel for the petitioner further says that it is also not in dispute that the undertaking given is similar to or parallel to an order of court.

The only issue in dispute is the interpretation and construction of the words or phrase "...their absence will not be held against them". It is the contention of the petitioner that such undertaking went to the extent of the Presidential Commission of Inquiry (hereinafter sometimes 'the said Commission') not being able to make the above-mentioned recommendations and findings against the petitioner;

The respondent maintains that it only meant that no action will be taken against the Petitioner by the said Commission in terms of the Commission of Inquiry Act for not attending the Commission. The petitioner says that he is not seeking court to come to a finding regarding same as it is a question of fact and can only be decided upon leading evidence. At the time of support of the above writ application parties decided what would happen if the commission of inquiry went on to record evidence which would be prejudicial to the petitioner and further went on to make a recommendation against the petitioner, especially considering the fact that at that time its tenure was only for a period of six months as per Gazette Extraordinary 2159/16 dated 22.01.2020 read with 2157/44 dated 09.01.2020 as at 27.07.2020 on which date the said undertaking was given, the time period was extended till 09.11.2020 by Gazette Extraordinary 2183/26 dated 08.07.2020.

Thus, the understanding was that if evidence is led prejudicial to the petitioners and in the event the writ applications failed, they should be allowed to controvert the same and no such finding against the petitioners would be made. The learned counsel for the petitioner argued that it is with this understanding that the case was re - fixed to be resumed for support to a relatively longer date.

If this court was pleased to allow this matter to proceed evidence regarding same would be brought at the inquiry. The attention of this Court was brought to the list of witnesses and documents dated 28.02.2022 filed in this matter. The attendees at the Writ matter inclusive of the counsel for the petitioners as well as the counsel for the Respondents are named. if and when the matter proceeds to inquiry then their evidence will shed light to the interpretation of the matter at hand.

The learned counsel for the petitioner argued that the wording of the undertaking is such that it clearly indicates that no adverse decision or finding could have been made against the petitioner till CA/WRIT 167/2020 was supported and an order as to interim relief was made by this Court. The surrounding circumstances in which the undertaking was given is such that, it provided a vital purpose. The learned counsel for the petitioner further says that action for contempt of court should be duly dealt with by this Court in the administration of justice in the interest of justice, public order, stability of the judicial system and maintains of respect to the law, irrespective of whether the of contempt in question has caused prejudice to the party in concern.

The wording of the undertaking is such that it clearly indicates that no adverse decision or finding could have been made against the Petitioner till CA/WRIT 167/2020 was supported and an order as to interim relief was made by this Court. Learned counsel for the petitioner

reiterated that court need not come to a final conclusion at this juncture but must however be satisfied that there is a prima facie case against the Respondents to proceed.

The Counsel for the 1st to 4th respondents had undertaken that both the petitioners in CA/WRIT/166/2020 and the instant application will be dispensed with their presence before the Commission until this Court decides on the question of notice and an interim order and that their absence will not be held against them.

The said undertaking of the petitioner to the instant application and CA/WRIT/ 166/2020 has been made in addition to and independent to the undertaking already made in respect of the Senior States Counsel (5th respondent to CA/WRIT/167/2020 and CA/WRIT/166/2020) which undertaking *inter alia* specifically only dispensed the said Senior States Counsel for not be summoned by the Presidential Commission of Inquiry.

However, the undertaking with respect to the Petitioner in the instant matter and CA/WRIT/166/2020 the undertaking given was worded in such manner that it;

- i. Distinguishers and identifies the said Petitioners specifically,
- ii. Dispensed with their presence until this Court decided on the question of notice and interim order
- iii. More specifically also provided that their absence will not be held against them.

The wording and the manner in which the undertaking is recorded also specifically entails the fact that such undertaking in respect of the petitioner was made in addition to the undertaking in respect of the Senior States Counsel.

The said wording reads;

Further, I wish to give an undertaking ..."

As afore stated, such undertaking additionally provided that the absence of the petitioner will not be held against him and it is specifically submitted that if the President's Counsel who gave the undertaking only meant for such undertaking to be given in order to only dispense the Petitioners from appearing before the Commission, then such undertaking could have been identical or similar to the undertaking given on behalf of the 5th respondent.

The petitioner in the instant application and the petitioner in CA/WRIT/166/2020 are concerned, the learned President's Counsel has given an undertaking which is separate and distinguished from the undertaking given in respect of the Senior States Counsel and specifically provides that the absence of the Petitioner would not be held against him and thereby prevents the Commission from making adverse findings in respect of the petitioner.

The court needs to decide on the meaning attached to the wording "their absence will not be held against them". the petitioner's contention is that the said wording meant no prejudicial decision could have been made until the Writ Application CA/WRIT/ 167/2020 was supported and an order as to interim relief was made by this court. The contention of the Respondents seems to be that the said wording only means that no action would be taken against him under the Commission of inquiry act for none appearance.

The learned counsel for the petitioner says that it was admitted by the respondents that the commission report cannot stand as the same contains a number of errors. The respondents have admitted that the Commission Report has caused prejudice to the petitioner. This court was not invited to decide on the guilt of the Respondents. It will be decided at the inquiry once summons are issued to the respondents and after leading of evidence.

The decision as to what was actually meant by the words "their absence will not be held against them" is to be determined after leading of evidence. The petitioner contends that at the time of support and at the time the undertaking was given it was discussed in court and it was informed to court that;

- (i) since at the time, the commission had a limited time period, that if the commission was to decide on the issue, then the case would be made nugatory and
- (ii) if evidence was recorded by other witnesses which was prejudicial to the petitioners, the petitioners in those cases would need to controvert the same in the event those cases were dismissed.

The learned counsel for petitioner argued that it was in the above circumstances that all the parties agreed and accordingly the undertaking was given in the wording above, intending to mean that as the cases were pending no prejudice would be caused to the Petitioner.

The interim relief prayed for by the petitioner in CA/WRIT/167/2020 is as follows;

"Grant interim relief staying further proceedings of the inquiry bearing No 50/2020 before the 1st to 4th respondents emanating from the complaint made by the 7th Respondent dated 31.01.2020 marked as P 15a."

"Grant interim relief preventing one or more or all of the 1st to 4th respondents from calling and/or requiring the Petitioner to appear before them in relation to the inquiry emanating from the complaint made by the 7th respondent marked as P15 (a) dated 31.01.2020;"

"Granting interim relief staying the operation of the summons issued to the petitioner by one or more or all of the 1st to 4th respondents dated 16.06.2020 marked P14;"

It was the contention of the respondents that the above undertaking was equated on behalf of the latter two of the above whereas it is the contention of the petitioner that the same was given in view of staying proceedings in the commission of inquiry.

The learned counsel for the Petitioner argued that if the undertaking was given to only dispense with the presence of the Petitioner and commission was at liberty to proceed and make recommendations against the Petitioner such undertaking has no value at all. In those circumstances the Petitioner would have been better off participating at the inquiry than at least he could have controverted any allegation against him. Therefore, the above undertaking has been violated by the Respondents, proceeding to make recommendations and findings against the Petitioner.

If the undertaking was not given, the Petitioner would have pursued interim relief as per the prayer to CA/WRIT/167/2020. The learned counsel for the petitioner submits that it is because of the said undertaking so given that the case was fixed for a long date to resume for support if not the counsels for the petitioners in those cases would have insisted for a short date for support.

In the case of Upali Dharmasiri Welaratne v Wesley Jayaraj Moses SC (Appeal) 65/2003 dated 27.05.2009, *inter alia* held that, had the Appellant not given the undertaking, the inquiry with regard to interim relief would have continued and the court of Appeal would have made an order.

The said undertaking was not at any juncture withdrawn by the Respondents and that the same thereby remains valid and effective until the case bearing No CA/WRIT/167/2020 is supported and the matters as to interim relief is decided. The said application was supported before this Court on 20.06.2022.

The said Application No. CA/WRIT/167/2020, is connected to the Application No. CA/WRIT/166/2020, filed by Mr. Anura Kumara Dissanayaka, the leader of the Janatha Vimukthi Peramuna, and both the Applications were supported before this Court, together, and the catalyst for filing the aforesaid Writ application was the decision to summon the Petitioners in the respective cases before the said Commission. From a perusal of the interim orders as prayed for by the Petitioner, in CA/WRIT/166/2020, it is very clear that the Petitioner has sought a very extensive range of interim orders from this Court, including an interim order staying further proceedings of the inquiry bearing No. 20/2020, before the Commission.

The said CA/WRIT/167/2020 was taken up for support on 27.07.2020, together with the connected Application bearing No. 166/2020, and the Counsel appearing for the Petitioners in both cases made submissions in support of the said Applications, both for Notice and for interim relief. But due to paucity and constraints of time, when Mr. Uditha Egalahewa, learned President's Counsel appearing for the 1st to the 4th respondents in the said case, was inquired from as to whether he can give an undertaking, in as much as, the Case needs to be postponed for further support, the learned President's Counsel chose to record only the following very limited undertaking, in very clear and unequivocal words: -

“wish to give an undertaking that both the Petitioners in CA (Writ) Application No. 166/2020 and 167/2020 respectively will be dispensed with their presence until this court decides on the question of notice and interim order and their absence will not be held against them ..”

It is very clear from the aforesaid wording that the meaning of the said undertaking is that the petitioners will be dispensed with their presence (they will not be required to be present at the inquiry), until this court decides on the question of notice and interim order, and that when the Petitioners are not present, as a result of the said dispensation, their absence before the commission will not be held against them, and thereafter, the matters were refixed for further support for 29.09.2020.

The learned President's Counsel appearing on behalf of the 1st to 4th respondents argued that the aforesaid undertaking is a well thought-out undertaking given to this Court by a very responsible senior President's Counsel, Mr. Egalahewa, and hence, recorded the same very clearly, using very clear terms. No party can go beyond the clear, palpably plain meaning contained in the same.

In this connection, this Court's attention is invited to the wide array of specific interim orders that had been prayed for by the petitioner in that writ application, and which could have been insisted upon, if the petitioner had wished to obtain the result, that he is now, circuitously and most conveniently contriving to attempt, through a collateral sidewind to now achieve, under the threat of contempt. Learned President's Counsel for the respondents says that this is elbow twisting by the petitioner in a most obvious and unconscionable way.

This Court has easy recourse to the specific wordings that the petitioner had chosen to articulate in his formal interim orders and those interim orders are also demonstrative that he had failed to obtain an undertaking from Mr. Egalahewa, that approximates to those interim orders or which had the effect of preventing the commission from making any findings against him. It is important to note that nowhere in the said undertaking has the learned President's Counsel for the 1st to the 3rd respondents, agreed to suspend or discontinue the proceedings of the inquiry bearing No. 50/2020, emanating from the complaint made by the complainant dated 31-01-2020.

If one peruses the petition that the Petitioner filed in Application No. CA/WRIT/167/2020, dated 10-07-2020, he prayed specifically for a stay order to stay and suspend the proceedings of the inquiry bearing No. 50/2020, emanating from the complaint dated 31-01-2020. He must have well aware at the time the Learned President's Counsel recorded the aforesaid specific undertaking that was clearly limited in scope, that he was not securing or obtaining the prayer that the proceedings would be stayed and suspend.

In view of the limited nature of what Mr. Egalahewa was willing to furnish in the form of an undertaking, the Petitioner had to settle for the said limited undertaking which was only that the Petitioner's presence will be dispensed with. However, despite the clear wording contained in the undertaking, the learned Counsel appearing for the Petitioner, made a misconceived submission that by the aforesaid undertaking the 1st to the 3rd respondents or the learned President's Counsel appearing for the said Respondents undertook that "no adverse orders will be made against the Petitioner".

Even though the Learned Counsel repeatedly made the said misleading submission, he failed to draw attention to an undertaking or portion thereof given by the 1st to the 3rd respondents or their counsel in the said Application No. CA/Writ167/2020, where the respondents have agreed to "not make adverse findings/recommendations against the Petitioner, Mr. Gnendra Shani Abeysekara."

Thereafter, and upon drawing the attention to the clear wording of the said undertaking, the Learned Counsel appearing for the Petitioner submitted that he agreed for the said undertaking assuming that no proceedings will be held against the Petitioner and no

findings will be made against him, in as much as, the scope of the Application No. CA/Writ/ 167/2020, not only covers the summons, but also the proceedings of the inquiry as a whole.

However, as was submitted by the learned President's Counsel appearing for the 1st to 3rd respondents, during the course of the oral submissions, which was that in the event of the learned President's Counsel who appeared for the 1st to the 3rd respondents in Application No. CA/Writ/ 167/2020, meant to give an undertaking to stay the proceedings of the inquiry, until the stage of support is concluded, he being a very senior practitioner in the Court of Appeal and Supreme Court of Sri Lanka would have instead recorded something much wider.

In all probability, he would not have been successful in securing such an undertaking in any event, but he, having failed to secure such an undertaking, cannot now seek to smuggle in such an undertaking under the guise of interpreting the very limited undertaking that Mr. Egalahewa gave with regard to only dispensing with the petitioner's presence.

The 1st to the 3rd Respondents submits that, had the learned President's Counsels recorded any of the above undertakings in the manner and form of any one of the formulations that have been identified above and thereafter, if the 1st to the 3rd Respondents proceeded to continue the inquiry against the Petitioner and made recommendations or adverse findings and orders against the Petitioner. Then it could be contended that the 1st to the 3rd Respondents is in violation of an undertaking given to this Court.

Considering the circumstances of the case we are of the view that there is a *prima facie* case against the respondents. Therefore, we decide to issue summons against the Accused-Respondents.

Registrar is directed to issue summons to all Respondents.

Summons returnable on 11.09.2023.

President of the Court of Appeal

R. Gurusinghe J.

I agree.

Judge of the Court of Appeal