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

In the matter of an application for the issue of a Writs of Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

Nawaloka Polysacks (Private) Limited.,
No: 42, Negombo Road, Peliyagoda,
Sri Lanka.
and another

Petitioners

C. A. Writ Application No. 401/2018

Vs.

Mrs. D. R. Karunaratne,
Director,
Department of Foreign Exchange,
Central bank of Sri lanka,
No.30, Janadipathi Mawatha,
Colombo 01.

1st Respondent

And eight others

Before: Hon. D.N. Samarakoon J.,

Hon. Neil Iddawala J.,

Counsel: Chandaka Jayasundare, P. C., with Chandimal Mendis and Chinthaka Fernando instructed by Paul Ratnayake Associates for the Petitioners.

Manohara Jayasinghe, D. S. G., for the 01st and 02nd Respondents.

Ruwantha Coorey instructed by Sarath Wijewardane for 03rd and 04th Respondents.

Written Submissions on: 28.07.2023 by the Petitioners

27.07.2023 by the 01st and 02nd Respondents

28.07.2023 by the 03rd and 04th respondents

Date: 31.08.2023

D.N. Samarakoon, J.

O R D E R

The written submissions of the 01st and 02nd respondents, (*Director, Department of Foreign Exchange, Central Bank of Sri Lanka and the Monetary Board, represented by 2A to 2E respondents in the amended caption dated 16.05.2023*) filed, dated 27.07.2023 based on the oral submissions made by the learned Deputy Solicitor General, particularly a sentence thereof brings the question to be determined by this order into a narrow compass.

It must be said, that, the question to be determined is issuing notice in this Writ application instituted on 14.12.2018, which was supported (and opposed) on 16.05.2023 and 22.06.2023 by learned counsel appearing for all parties, followed by respective written submissions.

The petitioner's (*Nawaloka Polysacks (Private) Ltd. and H. K. Upali Dharmadasa*) application is based on section 10 (1) of the Foreign Exchange Act No. 12 of 2017, which says,

> "10. (1) The Central Bank may, at any time, cause an investigation to be made, of foreign exchange transactions or foreign assets of any authorized dealer or a restricted dealer or any other person, class or classes of persons as the case may be, by an officer of the Department of Foreign Exchange authorized in writing by the Central Bank (hereinafter referred to as an "authorized person") in that behalf".

The above passage in the written submissions of the 1st and 2nd respondents says,

> "The situation does not involve a cross border transfer of money on any occasion, nor does it involve a situation where there is any contemplation of money moving out of the country and thus for these reasons, the existing state of affairs quite obviously does not come within the term "foreign exchange transaction". Furthermore, it is imperative to highlight that the words "…cause an investigation to be made of foreign exchange transactions…of any other person" as espoused in section 10 cannot be considered to be equivalent nor could it be interpreted to reflect the words "…cause an investigation to be made of financial matters of any person".

The above passage is preceded by the following sentence,

> "The transaction in question is not a matter involving a foreign exchange transaction, but rather is a situation where the Central Bank of Sri Lanka has merely granted permission to Nawaloka Construction Company for a bank guarantee to be issued in favour of the financial institution in Sharjah".

Therefore, the position of the official respondents, the 01st and 02nd respondents, is that, there was nothing "involving a foreign exchange transaction", or, that there was no remittance of foreign exchange.

The position of the petitioners is that the 01st petitioner was granted approval in 1999 by the Exchange Control Department (*the predecessor of the Department of Foreign Exchange*) to establish s branch in Sharjah, due to ill health of the 02nd petitioner the 04th respondent (H. K. Jayantha Dharmadasa) was granted authority by way of a Power of Attorney bearing No. 1761 dated 05.05.2005 to manage affairs of the Sharjah branch, the petitioners have brought to the notice of the 01st respondent and its predecessors that on or about 07.10.2009, the financial controller of the 3rd respondent (*Nawaloka Construction Co. Ltd.,*) had sought approval of the Central Bank for a bank guarantee amounting to US $ 550,000/- and that the petitioners are seeking the 01st and 02nd respondents to have an inquiry into the complaint of the petitioners to ascertain if there has been a violation of Exchange Control Regulations by the 3rd and 04th respondents.

But, the document P.07, is one that is pleaded by the petitioners in their written submissions, as well as, the petition.

It is a letter dated 10.10.2017 written by the Controller of Exchange to the 02nd petitioner.

It says, that, the Central Bank of Sri Lanka (CBSL) has granted permission for Nawaloka Polysacks (Pvt.) Ltd., (NPPL).....**to remit USD 1.5 Mn. To invest in a manufacturing unit to be established as a branch of NPPL in Sharjah...and subsequently to make an additional investment of USD 356,948**..."

This alone shows that there could be a "foreign exchange transaction" too, not only, "a financial matter", within the above compass delimited by the Exchange Controller himself.

It is hence, a matter that should be fully investigated by this court in a full hearing of the present writ application.

It may also be noted, that, in the Bill to amend the Foreign Exchange Act dated 24th March 2017, the clause 10 read,

> "10. (1) The Central Bank may, at any time, cause an investigation to be made, of foreign exchange transactions or foreign assets of any authorized dealer or a restricted dealer or any other person, class or classes of persons as the case may be, **by a person authorized in writing by the Central Bank** (hereinafter referred to as an "authorized person") in that behalf".

However, as referred to above, section 10 reads,

> "10. (1) The Central Bank may, at any time, cause an investigation to be made, of foreign exchange transactions or foreign assets of any authorized dealer or a restricted dealer or any other person, class or classes of persons as the case may be, **by an officer of the Department of Foreign Exchange authorized in writing by the Central Bank** (hereinafter referred to as an "authorized person") in that behalf".

The words, "**by a person authorized in writing by the Central Bank"** in the Bill was changed to "**by an officer of the Department of Foreign Exchange authorized in writing by the Central Bank",** in the Act.

This shows the intention to have the direct control of the investigation to the "Department of Foreign Exchange" which is the 01st respondent in this writ application.

In the special determination in respect of the Bill dated 28.04.2017, the Supreme Court observed, that,

> "The Bill in hand is with regard to foreign exchange, **which is a source of public finance**".

This shows the basis for having a strict control over foreign exchange.

The preamble to the Bill said, among other things,

> "to provide for the promotion and regulation of Foreign Exchange; to vest the responsibility for promoting and regulating Foreign Exchange in the Central Bank as the agent of the Government;..."

The same part has come to the preamble of the Act too.

Therefore, it is a public duty vested in the Central Bank as the agent of the Government. Whether the petitioners have a right to enforce that public duty is a matter to be decided at the end of a full hearing.

Referring to the Exchange Control Act No. 24 of 1953, the Supreme Court said,

> "The existing law has not been successful in preventing the outflow of foreign exchange out of the country through legal and non legal channels.... The Bill in hand contains provisions..... as well as intervention by the Government if any outflows of foreign exchange becomes a threat to the national economy".

The 03rd and 04th respondents, by their written submissions dated 28.07.2023 have raised several preliminary objections as well.

As recorded in the proceedings of 16.05.2023, the learned counsel for 03rd and 04th respondents has submitted that he is not taking up the objection of lashes at this stage, but he has also taken up several objections with regard to the caption.

The objections with regard to the caption have not been raised in the above written submissions. For the 01st and 02nd respondents, it was informed on 16.05.2023, that, no objection is taken for the amended caption. What has been done in the amended caption is, instead of the "Monetary Board", the 2nd respondent, the amended caption includes, the "Monetary Board" (still the 02nd respondent) as well as its "Govenor" and other members under 02A to 02E, which

is a rectification which does not cause prejudice, but removes any would be prejudice of not being heard. Hence the amended caption has been accepted.

One of the objections of the 03rd and 04th respondents is that there are factual disputes, which cannot be decided in a writ application. The petitioners have also disclosed that there is a case No. DSP/131/2014 in the District Court of Colombo instituted by the 03rd and 04th respondents seeking to transfer the ownership of shares from Nawaloka Polysacks Limited Sharjah to Nawaloka Construction Company (Pvt) Ltd. The case No. WP/HCCA/COL/173/2014/LA in the Civil Appellate High Court, Colombo is pending in respect of an interim injunction granted in that case. It is stated in the above written submissions of the 03rd and 04th respondents, that, the petitioners merely hold the branch in Sharjah in trust for the 03rd and 04th respondents, since they are the beneficial owners. This is not a question required to be decided at this stage. There could be factual disputes, which do not go to the root of the matter at hand. In other words, there can be no dispute whatsoever without a bearing to some facts, which could be raised as a preliminary objection, but the real question for determination is whether the resolution of that purported factual dispute is a sine qua non of granting relief in a writ application. This is not a question that could be decided in the present stage of this application. Hence this court distinguishes the case of Hettiarachchige Jayasooriya vs. N. M. Gunawathie Divisional Secretary, C. A. Writ 63/2015 dated 26.09.2019 and the cases referred to in that case.

Furthermore, the 03rd and 04th respondents have submitted that relief (d) is premised on obtaining relief (c) and if the petitioner fails to demonstrate prima facie their entitlement to prayer (c), there is no entitlement to prayer (d) as well as the court will not issue notice.

Prayer (c) is for a mandamus to direct the commencement of an inquiry (*prayer (d) being a request for a prohibition*) and on the facts adduced above it is the

decision of this court that the petitioners have established a prima facie entitlement in respect of which the court must look into.

In this regard, this court also wishes to refer to a part of the Key Note speech delivered by His Lordship Justice Priyantha Jayawardena, P. C., at the National Law Conference, held at Nuwara Eliya on 04th June 2023, where it was said,

> "Another contributing factor is the raising of preliminary objections on….resulting in the delay of disposing of cases. In this regard, it is worthy of mention that there is currently a new trend of going before the Court of Appeal and objecting to the issuing of notices on the Respondents. Sometimes even the Respondents file limited objections in support of their preliminary objections. Thereafter, both parties file written submissions on the matter.
>
> I am at a loss to understand as to how anyone can object to the issuing of notices in such circumstances, because the Respondents are present in court having taken notice of the case.
>
> The situation worsens if the Court of Appeal issues notices on the Respondents, as they then come to the Supreme Court challenging that order".

While this court respectfully agrees with the above on principle, this court is constrained to observe that the above situation arises, mostly, due to strict adherence to Rule No. 02(1) of the Supreme Court Rules of 1990, which says,

> "Every application for a stay order, interim injunction or other interim relief (hereinafter referred to as "interim relief") shall be made with notice to the adverse parties or respondents (hereinafter in this rule referred to as "the respondent") that the applicant intends for such interim relief; such notice shall set out the date on which the applicant intends to support such application and shall be accompanied by a copy of the application and the documents annexed thereto…"

The present application too, when filed on 14.12.2018 contained prayers for two interim reliefs and, as per the above rule, the petitioners' counsel on 21.02.2019 moved to support with notice to respondents. The proceedings dated 25.11.2019 speaks of an order to file limited objections. Thereafter supporting has been re fixed for various reasons up to 25.09.2020 when a final date was given for 16.12.2020. It has been postponed due to indisposition of counsel as well as indisposition of Judges (see., journal entries dated 25.09.2020 and 16.06.2022) It came up before the present Bench on 23.02.2023 and on the next date, i.e., 16.05.2023 it was supported.

It may be observed, however, that Rule 02(1) is having the following provision too.

"Provided that –

(a) Interim relief may be granted although such notice has not been given to some or all the respondents if the court is satisfied that there has been no unreasonable delay on the part of the applicant and that the matter is of such urgency that the applicant could not reasonably have given such notice; and

(b) In such event the order for interim relief shall be for a limited period not exceeding two weeks sufficient to enable such respondents to be given notice of the application and to be heard in opposition thereto on a date to be then fixed".

It is the respectful observation of this court, that, the following of the procedure in Proviso (a) and (b) has two theoretical advantages, which are,

(i) That the court has to satisfy (not prima facie, but satisfy) at the very beginning that there is no unreasonable delay (hence this objection cannot be taken up later) and

(ii) That the court issues (formal) notice (paragraph (b) says "such respondents to be given notice of the application") at the first instance

and the respondents who come within two weeks cannot take up objection to notice.

Practically too, it is observed, that, the respondent who comes to court, burdened with an interim order takes immediate steps to get rid of it. Sometimes he comes to court ready with papers to vacate the interim order, of which a minimum of 48 hours' notice could be given to the petitioner, to show cause, as to why the interim order should not be vacated. Although parties in such cases also try to file "limited objections", they can be encouraged to file the objections proper and the enthusiasm of the petitioner to keep the interim order and the equally strong enthusiasm of the respondent to get it vacated could be utilized to place parties within a strict time frame to argue the entire matter.

While that was an observation of this court, this court decides to issue notice on all the respondents.

Judge of the Court of Appeal

Neil Iddawala, J.

I agree.

Judge of the Court of Appeal