

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

**In the matter of an application for
mandate in the nature of Writ of
Certiorari under and in terms of
Article 140 of the Constitution of
The Democratic Socialist Republic
of Sri Lanka**

D.S. Gunasekara Passenger Transport
Services (Private) Limited
No.38, Wimalawatta Road,
Mirihana,
Nugegoda.

Petitioner

CA (WRIT) 174/2017

Vs,

1. The National Transport Commission,
No.241, Park Road,
Colombo 05.
2. M.A.P. Hemachandra
The National Transport Commission,
No.241, Park Road,
Colombo 05.
3. Nihal Somaweera
Secretary,
Ministry of Transport and Civil Aviation,
7th floor, Sethsiripaya,
Stage 2,
Battaramulla.
4. A.M.R.J.K. Jayasinghe
Senior Assistant Secretary (Administration)
Ministry of Transport and Civil Aviation,
7th floor, Sethsiripaya,
Stage 2,
Battaramulla.
5. Sherine Dilrukshi Athukorale
Director (Quality Assurance and External
Relations)
The National Transport Commission,
No.241, Park Road,
Colombo 05.

Respondents

Before Counsel : **S. Thurairaja PC, J**
: Gamini Marapana PC with Keerthi Sri Gunawardane and Navin Marapana for the Petitioner
Maithri Amarasinghe Jayathilake, SC for the 1st, 2nd and 5th Respondents

Order on : **08th August 2017**

Order

S.Thurairaja PC J

According to the Petitioner, Petitioner is a company which owns and operates passenger transport buses. It had obtained a permit to ply from Galle to Kotawa and return in the southern expressway from the 21st January 2013. Due to violating the conditions in the permit namely plying out of turn of the schedules its licence was suspended.

The Petitioner had filed this application on the 23rd May 2017 and supported on the 7th June 2017 for notice and interim relief. Both parties agreed to file written submissions before the court grants notice. For easy reference, I reproduce the prayer of the Petitioner as follows:

- ii. *Issue a Mandate in the nature of a Writ of Certiorari on the aforesaid 1st Respondents and/or 2nd Respondents and/or the 5th Respondents quashing the decisions contained in letters marked X2, X8 and X12.*
- iii. *Forthwith issue an interim order suspending the aforesaid biased, illegal, capricious, arbitrary and ultra vires letters marked as X2 and X8, and the aforesaid illegal, capricious, arbitrary and ultra vires decisions/determinations contained therein until the final determination of this application*
- iv. *Forthwith issue an interim order direction the 1st Respondents commission and/or the 2nd Respondents and/or the 5th Respondents from carrying out any further biased, illegal. Capricious, arbitrary and ultra vires decisions with regard to the Petitioner's route permit X1 until the final determination of this application.*

The Petitioner claims that the Respondents had violated section 20(1) of the National Transport Commission Act by not providing an opportunity to show cause before they suspend the permit.

The Petitioner supports for interim relief on the basis, if the interim relief is not obtained, it will suffer grave and irremediable loss in the most unconscionable manner.

Further, the Petitioner submits that the interim relief sort is not identical to the final relief.

The 1st, 2nd and 5th Respondents were represented by the Hon. Attorney General and the State Counsel raised objection for issuance of notice and granting interim relief.

The Petitioner submits that the Respondents have violated provisions of section 20(1) of the National Transport Commission Act. The Respondents present her argument stating that there is no violation of provisions set out in the said law.

Therefore, it will be mandatory for the court to consider Section 20 of the National Transport Commission Act. I reproduce the section for easy reference.

(1) Where the Commission is satisfied that the holder of a passenger service permit issued by an Authorized Person has acted in contravention of the conditions subject to which such permit was granted, *it may, on its own motion and after affording such holder an opportunity to show cause as to why such permit should not be cancelled or suspended, cancel or suspend* such permit for a specified period. The Commission shall communicate its decision to the holder of the permit together with the reasons therefor with a copy of such decision to the Authorized Person, granting such permit. [Emphasis Added]

(2) Any person aggrieved by the decision of the Commission canceling or suspending under subsection (1), of a passenger service permit; may appeal against such decision to the Secretary to the Ministry of the Minister, within fourteen days of the date on which such decision was communicated to him.

(3) The Secretary may on an appeal made to him under subsection (2)

(a) allow the appeal and direct the Commission to annul the decision of cancellation or suspension; or

(b) disallow the appeal and confirm the decision of the Commission.

Petitioner submits, that the law makes the Respondents mandatory to provide an opportunity to show cause before cancellation or suspension of the permit. The Respondents submit that there are no mandatory provisions in the said law. It says 'it may' that gives discretionary powers to the National Transport Commission and not mandatory.

The Respondents submit that the final relief sought and the interim relief are identical, the Petitioner submits otherwise. Further the Petitioner relies on the Court of Appeal Judgment of **Shell Gas Lanka Ltd. Vs Samyang Lanka (Pvt) Ltd. (2005) 3 SLR 14** where his Lordship L.K. Wimalachandra, J. held,

"When it appears that there is no defence for the defendant and he is acting in breach of a covenant, it is not contrary to law to grant an interim injunction even if the granting of the interim injunction would give the plaintiff substantial relief claimed by him."

His Lordship L.K. Wimalachandra, J, in the above case also referred to the decision in the English case of **Manchester Corporation Vs Connoiy and others (1970) Chancery 420** quoting Lord Diplock stated,

"The question argued in the appeal in Heywood's case was whether it was permissible to grant interlocutory relief which gave substantially the whole of the relief claimed in that action. It was held that in a case where it was plain that there was no defence, it was permissible to do so. In so far as argument, in the present case is based on the ground that the injunction gives substantially the whole of the relief claimed in the action, that case in an answer to that contention."

In addition, the Judgment in **Shell Gas Lanka Ltd. Vs Samyang Lanka (Pvt) Ltd** was followed in the Supreme Court decision of **People's Bank and seven others Vs Yasasiri Kasthuriarachchi (2010) 1 SLR 227** where her Ladyship Shiranee Tilakawardane, J, upheld the position that "it is permissible to grant interim relief which gave substantially the whole of the relief claimed in the action, especially as the facts in this case disclose plainly that there is a strong prima facie case in favour of the party seeking relief."

The Respondents quote several cases and objects for the granting of interim relief. In **Billimoria V Minister of Lands, Land Development and Mahaweli Development and Two Others (1978–1979) 1 SLR 10**, where Neville Samarakone CJ stated that:

"in considering the question of interim order the Court must bear in mind that an interim order is made in the exercise of inherent or implied power of Court, in circumstances where the final order is, if the Petitioner is successful, be rendered nugatory and the aggrieved party will be left holding a decree worthless for all purposes."

Further at page 15 his Lordship observed that:

"the interest if justice therefore required that a stay order be made as an interim measure. It would not be correct to judge such stay order in the same strict manner as final orders by their very nature must depend a great deal on a judge's opinion as to the necessity for interim action."

In the case of **Deuwearchchi and another V. Vincent Perera and another (1984) 2 SLR 94**, Seneviratne J, while citing the above dicta to establish that a stay order should not be issued which renders a final order nugatory, further observed that to other principles come into play in considering if and whether a stay order should be issued in the court of appeal.

"A consideration of the authorities shows that two other principles or matters have been considered in the issue of interim stay orders. 'The balance of convenience' of the parties to the dispute has been considered."

Citing the case of **Mohamed Felumesh v. S. Mondale and others AIR 1960 Cal. 582** his Lordship stated that:

"it 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'."

His Lordship identifies the 3rd principal as the consideration if irremediable mischief or injury will be cause to a party. His Lordship cited the case of **State of Orissa V Madan Gopal (1932) S.C 12**

It is pertinent to note that these second and third principals have been identified as key elements in the consideration of injunctive relief resorted to for the same purpose as that of Stay Orders sought for the purpose of seeking temporary respite until the final determination of the case.

Your Lordship's respectful attention is drawn to the recent case of **Arthur Chamara Sampath Dissanayake Don Ellawala V M.P. Jayasinghe and 79 others [CA (WRIT) No. 114/2015]** decided on the 21st May 2015, V.K. Malalgoda, J whilst drawing extensively from the dicta of Samarakone CJ in the above **Deuwearchchi and another V. Vincent Perera and another** stated as follows:

"In the case of **Deuwearchchi V. Vincent Perera and Others** the court of Appeal whilst stressing that the interim orders are made in the exercise of inherent or implied power of court, laid down the following guide line when issuing interim relief:

- I. Will the final order be rendered nugatory if the Petitioner is successful?
- II. Where does the balance of convenience lie?
- III. Will irreparable and irremediable mischief or injury be caused to either party?

Considering all available materials before the court, I find the suspension was imposed on the 13th March 2017 and the Petitioner came to courts on the first instance on the 23rd of May 2017.

Further considering the fact that the final relief and the interim relief were similar if not identical, I rely on the **Billimoria case** and decide that granting of interim relief at this juncture is not suitable. Therefore, I refuse to grant interim relief.

Perusing the journal entry, I find that this court had not issued formal notice on the Respondents. The available material places a prima facie case before this court, hence, I decide to issue notice on the Respondents.

Issuance of interim relief is refused and formal notice is issued on the Respondents.

JUDGE OF THE COURT OF APPEAL