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 Prohibition, in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/518/2024

Warnakulasuriya Wijesinghe Chathura Manaram Perera Gunathilake
No. 364 M, Awariwatta Road,
Batagama North, Ja-Ela.

PETITIONER

Vs.

1. Officer in Charge
   Public Complaints Division,
   Criminal Investigations Department,
   Colombo 02.

2. Mr. Katukolihe Gamage Saman Avantha Kariyawasam
   No 171, Lake City,
   Ja Ela.

RESPONDENTS

Before: Sobhitha Rajakaruna J.

Counsel: Rajeev Amarasuriya, Chanaka Weerasekara with Subhani Hewapathirana, Yohani Yoharaja, Hana Hafface and Mathew David for the Petitioner

Dates Fixed for Support: 05.08.2024 and 07.08.2024

Written Submissions: Petitioners - 08.08.2024

Decided on: 09.08.2024

Sobhitha Rajakaruna J.

The Petition and the Affidavit of the Petitioner have been filed in the Registry of the Court of Appeal at 08.39 a.m. on 05.08.2024 as per the rubber stamp which appears on the motion by which the Petition dated 05.08.2024 has been tendered to the Registry of this Court. Two courier receipts dated 05.08.2024 issued by Prompt Xpress (Pvt) in Ratmalana are also annexed to the set of documents filed on 05.08.2024. Apart from the said Petition and Affidavit, the Petitioner has filed another motion annexing a document marked 'X' at 08:39a.m. on the same date; 05.08.2024.

The Registrar of this Court sent the docket relating to the instant Application with an endorsement made by His Lordship the President of the Court of Appeal, directly to the Bench while the proceedings of this Court were in progress on 05.08.2024. The reasons for forwarding the docket to Court in such an expeditious manner are not known to this Court.

However, it needs to be stressed that in view of Notice No. 01/2024 of the Court of Appeal issued by His Lordship the President of the Court of Appeal, all new applications filed on extremely urgent basis will be accommodated at the discretion of the presiding Judge of the relevant court and may be mentioned on a desired day only if such application is duly filed (with proof of dispatch of notice to the Respondents) at least before 10.00 a.m on the day before such desired date.

It is pertinent to note that the 1st Respondent has been named as the Officer-in-Charge of the public complaints division of the Criminal Investigations Department ('CID') whereas, the 2nd Respondent is a private individual. I have noticed a recent trend where the Attorney General is not being made a party in Review Applications filed in this Court that seek orders to prevent arrests. I believe this practice has led to significant delays in bringing the relevant public or police officers to court to address matters related to the writ applications. This situation ultimately benefits the Petitioners, allowing them to seek interim relief, such as preventing arrests, without the Respondents being present in Court. Such a practice cannot be endorsed to legitimize ex parte applications for interim orders and it affects the best interest of justice.

The learned Counsel for the Petitioner on 05.08.2024 urged that the instant Application be taken up for support and an interim order be issued preventing the arrest of the Petitioner. Respondents were absent and unrepresented on 05.08.2024. Anyhow, the learned Counsel for the Petitioner expressed his consensus to Support the instant Application on 07.08.2024 after serving direct notices on the Respondents. I have serious doubts in the manner in which the Petitioner has dispatched the notices of the instant Application on the Respondents via courier before 08:39 a.m. on 05.08.2024.

The grant of interim relief by Court of Appeal is dealt with in Clause 2 of the Court of Appeal (Appellate Procedure) Rules 1990. It is mandatory that every application for a stay order, interim injunction or other interim relief shall be made with notice to the adverse parties or respondents that the applicant intends to apply for such interim relief. However, in terms of Clause 2(1) of the said Rules, an interim relief may be granted for a limited period not exceeding two weeks, although such notice has not been given to some or all of the Respondents,

> (i) if the Court is satisfied that there has been no unreasonable delay on the part of the applicant
>
> (ii) and the matter is of such urgency that the applicant could not reasonably have given such notice.

The Respondents were absent and unrepresented even on 07.08.2024 when this matter was taken up for Support and nonetheless, the learned Counsel for the Petitioner moved that this matter be taken up for Support. This Court, having heard the learned Counsel for the Petitioner, decided to reserve the order on the issuance of notice and interim relief until 09.08.2024.

The officer in charge of the Public Complaints Unit of the Criminal Investigations Department ('CID') filed a 'B' Report bearing No. B/627/20 on 19.06.2020 against the Petitioner in the Magistrate's Court of *Welisara*. The learned Magistrate on 19.06.2020 has made an observation that no criminal case could be maintained upon the offences recorded in the said 'B' Report. The complainant (2nd Respondent in the instant Application) has lodged a Revision Application bearing No. HC/REV/03/2021 in the High Court of *Chilaw* against

the said order dated 19.06.2020 of the learned Magistrate. The Hon. High Court Judge delivering his order on 03.09.2021 has directed the learned Magistrate of *Welisara* to act in terms of section 124 of the Code of Criminal Procedure Act ('CCPA') in respect of the information filed by the CID on 19.06.2020 against the Petitioner of the instant Application. There is no evidence on record to ascertain as to whether the said order of the High Court has been read out in the relevant Magistrate's Court. Apparently, the proceedings before the said Magistrate's Court have not been recommenced against the Petitioner of the instant Application after 19.06.2020.

The Petitioner states that the 1st Respondent by way of the notices marked 'P11a' and 'P11d' summoned him to appear at the Public Complaints Division of the CID on 22.06.2024. The time gap between 22.06.2024 and the date of the Petition is over a period of one month. The Petitioner asserts that there is an imminent threat of arrest by the CID when the Petitioner reaches the CID to give a statement. An anticipatory bail application filed by the Petitioner has been refused by the learned Magistrate of *Welisara* on 19.07.2024.

The contention of the Petitioner is that the transaction that resulted in the above series of events are 'loans' obtained by the Petitioner from the 2nd Respondent, and as such were entirely civil in nature and do not embody any component of criminal law or encompass any offence punishable therein. The purported agreement entered into between the Petitioner and the 2nd Respondent is annexed marked as 'P8'. The said document 'P8' implies that the Petitioner has obtained a sum of Rs. 14,400,000 from the 2nd Respondent and it contains neither a default clause nor an alternative method to resolve the disputes among the parties resolved.

The Petitioner's main argument for invoking the jurisdiction of this Review Court is that the charges brought against them in the Magistrate's Courts under sections 388, 389, and 400 of the Penal Code, specifically for Criminal Breach of Trust and Cheating, are not applicable, as the contested transaction does not qualify as a criminal matter, as determined in the document marked 'P12'. Additionally, the Petitioner asserts that no criminal case can be maintained upon the assumption of the learned Magistrate made on 19.06.2020.

It is important to bear in mind that this is a Judicial Review Application. Judicial review generally focuses on the decision-making process, not the decision itself and accordingly, the role of this Court is to consider whether the Respondents have exceeded their powers. Therefore, there should be a blatant error made by the Respondents executing their duties or any abuse of power or authority in order to exercise the supervisory jurisdiction of this Court.

The only relief sought by the Petitioner is a writ of Prohibition preventing the 1st Respondent and/ or any officer acting under his direction from arresting the Petitioner on the ground that he has committed any offense as set out/alleged in the 'B' Report filed in the said Magistrate's Court of Welisara. The Petitioner seeks the same relief even as an interim order to be operative until the final determination of the instant Application. Therefore, a reasonable question arises as to what is the substantive relief the Petitioner seeks from this Review Court.

Atkin LJ in ***R v Electricity Commissioners ex p London Electricity Joint Committee Co. [1920] Ltd (1924) 1KD 171 at 206*** has stated that he can see no difference in principle between Certiorari and Prohibition, except that the latter may be invoked at an earlier stage.

'Although a prohibiting order was originally used to prevent tribunals from meddling with cases over which they had no jurisdiction, it was equally effective, and equally often used, to prohibit the execution of some decision already taken but ultra vires. So long as the tribunal or administrative authority still had some power to exercise as a consequence of the wrongful decision, the exercise of that power could be restrained by a prohibiting order.'[1] (Vide - **H.W.R.Wade and C.F.Forsyth, Administrative Law [11th Edition] p.511**). Therefore, I take the view that Prohibiting Orders need to be linked with an alleged wrongful decision which is disclosed in the writ application.

This Court has constantly decided that a decision made by an authority may be liable to be quashed by a quashing order if the said authority wholly or in part assumes a jurisdiction which he does not have or exceeds that which he has or acts contrary to principles of natural justice or pronounces an Award which is eminently irrational or unreasonable or is guilty of

[1] See Estate and Trust Agencies (1927) Ltd v. Singapore Improvement Trust (1937)

an illegality[2]. The Petitioner has not provided any decision taken by the learned Magistrate or the CID to arrest the Petitioner. The aforesaid 'B' Report filed in the Magistrate's Court of *Welisara* is not in active mode as no future date has been given to consider it and also the said order of the High Court has not been read out in the Magistrate's Court. The Petitioner filed the instant Application after a lapse of over one month from the notice of the CID, marked 'P11a' and 'P11d'.

Moreover, the learned Magistrate has refused the anticipatory bail application filed by the Petitioner after considering the detailed observations (marked 'X' - annexed to the motion dated 05.08.2024) provided by the CID. No Revision Application has been filed against the said order of the leaned Magistrate refusing anticipatory Bail. As such it is the Petitioner's burden to establish that filling a Revision Application against the decision to refuse anticipatory bail is not an adequate and efficacious remedy.

The trite law is that there should be (a) a reasonable complaint, (b) credible information or (c) a reasonable suspicion to arrest a person without a warrant. The said principle is embodied in Section 32(1) (b) of the CCPA. Hence, based on the circumstances of this case, I am of the view that it is not this Court but the prosecution or the learned Magistrate are the best persons to assay the document marked 'P8' by which the Petitioner has borrowed a large sum of money from the 2nd Respondent and the subsequent conduct of the Petitioner who has admitted his liability by making part payments to the said 2nd Respondent. Similarly, it is in the hands of the prosecution to ascertain whether credible information or reasonable suspicion exists against the Petitioner. It can be inferred that the learned Magistrate was likely persuaded to believe that a reasonable suspicion exists regarding the Petitioner's involvement in an offence, based on the observations ('X') made by the CID. The document marked 'P8' cannot be considered as a reasonable commercial agreement upon which the Petitioner could claim alternative remedies to resolve the disputes between the Petitioner and the 2nd Respondent. The judicial process concerning judicial review must be approached with responsibility and should not be misused by filing Review Applications without merit, thereby

[2] Also see; Kalamazoo Industries Ltd. and others v. Minister of Labour and Vocational Training and Others [1998] 1 Sri.L.R. 235 at p. 249.

transforming the Review Court into a de facto Bail Court. Judicial review, especially in respect to prevent arrest or to quash judicial orders, should only be sought where there is a clear and blatant error in the decision or the decision-making process or when the authorities have acted beyond their jurisdiction.

In ***Johnston Xaviour Fernando v. C. D. Wickramaratne, the Inspector General of Police CA/WRIT/200/2022 Decided on 21.06.2022,*** I have decided as follows:

> *"When issuing interim orders, we are guided by the Rules of the Court of Appeal and by the principle whether the Court's final order would, if the Petitioner is successful, be rendered nugatory. Judicial Review jurisdiction is not a discrete part of our legal system and its roots emerge from constitutional law which is enriched with constitutional theories. Although, there are classifications as civil law jurisdiction and the criminal law jurisdiction etc., when it comes to the concept of 'Rule of Law', there should be only one jurisdiction……. In a broader sense, Rule of Law means that Law is supreme and is above every individual; no individual whether if he is rich, poor, rulers or ruled etc. are above law and they should obey it."*

I take the view that the law identifies a significant difference between the 'despatch of notices' and the 'serving of notices' in applications for stay orders/ interim reliefs. There is no doubt that the phrase "giving notice" embodied in Clause 2 of the said Court of Appeal Rules always limits only to the 'despatch of notices' but certainly, it extends to the stage of physically 'serving notices' to the hands of the Respondents except in exceptional circumstances. It is the foremost duty of prerogative courts to take swift action at the first sign of any breach of the Rule of Law within the court. Thus, a petitioner's conduct in a writ application, where he attempts to exert undue pressure on the Court by seeking stay orders or interim relief only after dispatching notices probably by registered post on the day before or the same day, should be viewed as a compelling reason to reject such applications in limine. Petitioners who invoke the inherent jurisdiction of this court must act with due diligence, utmost transparency, and good faith, avoiding any abuse of the process of the court by ensuring proper service of notice to the Attorney General or other Respondents in applications for stay orders or interim relief. Any form of deceptive practices related to applications for stay orders or interim orders in a Review Court should be eradicated by identifying and addressing the underlying cause of such behaviour in the Review Court.

I see there is no reason to interfere with the discretion of the CID for the investigation process as there is no blatant error made by the 1st Respondent or the CID by issuing the notices marked 'P11a' and 'P11d' and prima facie, no evidence is available to show that the 1st Respondent or the CID have exceeded their powers.

In light of the above, I am not inclined to issue an interim relief at this stage due to the unreasonable delay on the part of the Petitioner and failure of the Petitioner to establish reasonable grounds for not duly serving notices of the instant Application on the Respondents. In summary, the Petitioner has not acted with due diligence, utmost transparency and good faith to avoid any abuse of the process of the Court when making an application for interim relief as prayed for in the prayer of the Petition.

However, I am of the view that the cumulative effect of all the circumstances and the consequences of the events taken place after filing the above 'B' Report will have to be taken into consideration when a person complains to the Review Court especially of an imminent threat of arrest. Hence, I take the view that an order on the issuance of notice and interim relief should be made after hearing the Attorney General, as I believe the full burden of abuse of process of court cannot be shifted completely to a litigant personally who seeks an order to prevent arrest. In light of the above, I decide to fix this Case for support on a date convenient to this Court.

The Registrar of this Court is directed to forward a certified copy of this order to the Hon. Attorney General himself, enabling the Attorney General to take appropriate steps to assist this Court in applications for stay orders/interim orders where no notices of such applications have been duly served on the Attorney General or the respective public officer/ Inspector General of Police

Judge of the Court of Appeal