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 Certiorari and Prohibition under and in terms of Article 140 of the Constitution.

CA/WRIT/465/2022

1. Capital Trust Holdings Limited
   No.42, Sir Mohammed Macan Marker Mawatha,
   Colombo 03.

2. Tushan Harsha Mendis Wickramasinghe
   Chairman and Executive Officer of
   Capital Trust Holdings Limited,
   No.42, Sir Mohammed Macan Marker Mawatha,
   Colombo 03.

PETITIONERS

Vs.

1. Securities and Exchange Commission of Sri Lanka (SEC)
   Level 28 & 29, East Tower,
   World Trade Center,
   Colombo 01.

2. Hon. Attorney General
   Attorney General's Department
   No.159, Hulftdorp,

Colombo 12.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Sanjeewa Jayawardana P.C. with Suren Gnanaraj and Rukshan Senadeera for the Petitioners
Vikum de Abrew P.C. with Manohara Jayasinghe D.S.G. for the Respondents

Argued on: 23.03.2023, 02.05.2023, 16.05.2023, 28.06.2023, 08.09.2023, 04.10.2023

Written submissions: Petitioners - 15.11.2023
4th Respondents - 03.11.2023

Decided on: 12.12.2023

Sobhitha Rajakaruna J.

The Director (Legal and Enforcement) of the Securities and Exchange Commission of Sri Lanka ('SEC'), by way of a Notice of Action dated 05.09.2022 ('P10') informed the 2nd Petitioner that the members of the SEC had made a direction to take steps to initiate legal proceedings against the 2nd Petitioner for alleged market manipulation. The 'P10' further elaborates that Rule 12 of the SEC Rules forbids such market manipulation and the decision to institute legal proceedings was taken after due consideration of how the 2nd Petitioner traded on behalf of the 1st Petitioner, concerning the shares of Browns Investments PLC ('BIL') between the period of 08.12.2020 to 04.01.2021. The 1st Petitioner is the holding company of several subsidiaries including the Capital Trust Securities Pvt. Limited which is a stock brokerage firm. The said 'P10' discloses that the SEC has requested the Attorney General to initiate legal proceedings against the 2nd Petitioner. The SEC by a letter dated 26.10.2022 marked 'P17' has reiterated its decision to institute criminal proceedings against

the 2nd Petitioner. The Petitioner primarily challenges the decisions reflected in both the above 'P10' and 'P17'.

The SEC Rules which have been published in Gazette Extraordinary No. 1215/2 on 18.12.2001 are marked as 'P4'. Both parties unmistakably rely on the said 'P4'. The Rule 12 of the SEC Rules reads:

> "No person shall create, cause to be created or do anything that is calculated to create a false or misleading appearance or impression of active trading, or a false or misleading appearance or impression with respect to the market for or the price of any securities listed in a licensed stock exchange."

Surveillance was done by the Colombo Stock Exchange('CSE') and the SEC into the trading activity of shares of BIL during the period 01.12.2020 to 12.01.2021. As a consequence of the said examination, it was revealed that, during the said period, the trading pattern engaged by the 2nd Petitioner and connected parties of BIL created a false sense of activity around the said stock and influenced its price. The SEC has demanded the 2nd Petitioner to show cause by a letter marked 'P3'. It is stated that the 2nd Petitioner's conduct spelled out in 'P3', allegedly created a false market for the respective security in contravention of Rules Nos. 12 and/or 13 of the said SEC Rules. The SEC, again by way of a letter marked 'P8' has requested the 2nd Petitioner to show cause in respect of several accounts related to the Capital Trust Group ('CTG') which supposedly have traded significantly in the shares of BIL wherein certain abnormalities had been detected on trading in some identified Accounts. The 2nd Petitioner has responded to the both above show cause letters by 'P7' (dated 27.01. 2021) and 'P9' (dated 05.10.2021).

In terms of section 147 of the Securities and Exchange Commission of Sri Lanka Act, No. 19 of 2021, ('Act') a person who contravenes its sections 128, 129, 130, 131, 132 or subsections (2) and (3) of section 137 commits an offence and shall be liable on conviction to a fine of not less than ten million rupees or to imprisonment for a term not exceeding ten years or to both such fine and imprisonment. Further, any person who abets or conspires to commit an offence under subsection (1), commits an offence and shall be punishable in the same manner as provided for in subsection (1).

By virtue of section 148 and section 149 of the Act, every offence committed under Chapter II shall be triable upon indictment by the High Court and every prosecution in respect of such an offence shall be instituted and conducted by the Attorney General. The said Act was certified on 21.09.2021. By the said Act the Securities and Exchange Commission of Sri Lanka Act No.36 of 1987 was repealed. The mode of prosecution prescribed in the said Act No.36 of 1987, in respect of any person who is found guilty of an offence under the previous Act (for which no penalty is expressly provided for under the said Act) by way of a summary trial by a Magistrate. Anyhow, the duty of prosecution of offences under the current Act is bestowed on the Attorney General. Section 187(2) (k) of the current Act stipulates that all offences under the provisions of the repealed Act, shall be offences committed under the said repealed Act and be tried accordingly. It is observed as per the letter of the Attorney General marked 'R5' that the SEC has sought legal assistance from the Attorney General to institute criminal proceedings and that was after certifying the said Act No.19 of 2021.

The Attorney General possesses a wide range of powers in respect of prosecutions under the law and some of such powers are described in section 393 of the Code of Criminal Procedure Act No.15 of 1979 ('CCPA'). In addition to presenting an indictment to the High Court, the Attorney General also enjoys exclusive powers when entering a *nolle prosequi,* withdrawing an indictment or suspending prosecutions. Section 193 of the CCPA stipulates that in every trial before the High Court, the prosecution shall be conducted by the Attorney General. In cases where a magistrate is required to hold a preliminary inquiry under section 145 or section 136(e) of the CCPA, the Magistrate, if he is satisfied with the sufficient evidence commits the accused to stand trial in the High Court and forwards to the Attorney General a copy of the proceedings, together with other relevant documents.

Therefore, the Attorney General will initiate criminal proceedings only if he is independently satisfied with the sufficiency of evidence and also based on the provisions of the CCPA. In this backdrop, it cannot be assumed that the Attorney General must follow a mere request of the SEC to file an indictment under section 148 of the aforementioned Act or to initiate any criminal proceedings against the 2nd Respondent without the Attorney General arriving at an independent finding upon the alleged offences.

However, for reasons not known to this Court, the Attorney General represents the SEC in the instant Application. It is noted that this Application for Judicial Review deals not with any delictual offence relating to damages but directly with framing criminal charges against the 2nd Petitioner. Anyhow, I do not doubt that the Attorney General is privileged to defend himself independently, if he wishes, in the instant Application. The Attorney General has indeed expressed his opinion by 'R5', that there is evidence to establish a prima facie case against the 2nd Petitioner to charge him in the Magistrate's Court.

Due to the above circumstances, I am compelled to assess whether substantial grounds exist to frame charges against the 2nd Petitioner, without limiting my examination only to the decision-making process of the SEC in view of the impugned decisions. Therefore, now I need to advert to the principle facts and circumstances of this case. The SEC has primarily made four observations against the 2nd Petitioner as reflected in the 2nd show cause letter marked 'P8'.

Such first observation is about the SEC's point of view that it is irrational to have commissioned another brokerage firm when the relevant trades could have been facilitated via CTG's own brokerage firm and avoided cash flows to another broker. The contention of the Petitioner in respect of the said alleged misconduct is that the trading rules of the CSE do not prohibit an investor from executing trades through several stock broker firms and such conduct cannot constitute a violation of Rule 12 of the SEC Rules.

The second observation made against the 2nd Petitioner is that he had executed nine transactions which appeared to be 'Wash Trades' between the CTG-related Accounts. It was submitted that Wash Trades refer to trades where the buyer and the seller are both the same person making it so that there is no change in beneficial ownership when shares change hands between the seller and the buyer. The Petitioners assert that although the 'Wash Trades' are expressly prohibited only under Rule 13 of the SEC Rules, the Notice of Action marked 'P10' indicated that the 2nd Petitioner would be subject to legal action for violation of its Rule 12. The Petitioners further argue that the price of a share did not artificially increase or decrease as a result of the said alleged nine Wash Trades. The Petitioners pointing to each transaction

referred to in 'P21'[1] demonstrates that the alleged 9th Wash Trade constitutes less than 4.88% of the total quantity of BIL shares traded on 12.12.2020 whilst the other eight purported Wash Trades constitute less than 2.05 of the total quantity of BIL shares traded on the relevant days. Thus, the Petitioners contend that such transactions cannot be construed as a grave act of market manipulation.

Likewise, the 2nd Petitioner asserts that the reason for his conduct which allegedly resulted in raising the allegations of a 'Wash Trade' was due to receiving 'Margin Calls' from his bank and it was not an act done to manipulate the market. In contrast, the Respondents argue that when the SEC contacted the relevant banks they had confirmed that no Margin Calls were made at the time to the Petitioner. Thus, the Respondents emphasize that the Petitioners have provided a false response to the second show cause letter. Further, the Respondents assert that Wash Trade transactions bear a strong potential to distort the stock market as it indicates a high value of trading concerning a particular stock when in actuality the ownership of the shares remains with the same person.

It is significant to note that the Respondents acknowledge that these unusual activities did not necessarily cause the sudden surge in the price of stocks and admit that it may have been largely or wholly attributable to the "corporate announcement" by BIL of their affiliation with a Port City Project. Nonetheless, the Respondents are of the view that these trading operations are against the aforesaid Rule 12 because the 2nd Petitioner's activity was "calculated" to distort the market. Be that as it may, the learned President's Counsel appearing on behalf of the Petitioners, through strenuous argument, clarified that there has been no significant increase in the value of the respective shares as an immediate aftermath of the said nine transactions. Therefore, following a careful analysis of the document marked 'P21', and based on the limited material available to this Court, I am unable to find any compelling reason to refute the stand taken by the Petitioners that the aforesaid nine transactions do not violate Rule 12 of the SEC Rules.

[1] The 'P21', a document annexed to the Counter Affidavit of the 2nd Petitioner illustrates (i) transaction dates (ii)the time the respective transaction was taken place (iii) respective trade ID (iv) respective security code (v) respective price (vi) and quantity.

The third and fourth observations of the SEC are predicated on the purported allegations that the 2nd Petitioner has fabricated a demand and that there is an abnormal number of 'cell trades' that could have given the CTG an undue benefit. The Respondents have not adequately answered to the proposition of the Petitioners that the third observation was in reference to an act that had occurred on 19.01.2021 and it falls outside the show cause period specified in the Notice of Action which raises demands only in respect of the period between 08.12.2020 to 04.01.2021. Similarly, I take the view that the Respondents have not submitted sufficient material to Court to substantiate the move of the SEC to formulate a criminal charge against the 2nd Petitioner based on the said fourth observation.

In a nutshell, the arguments of the Respondents is that a sudden surge in the share value of the Company is unusual and that led the SEC to commence investigations which revealed unusual trading activity amounting to the manipulation of the market or the price of the BIL share. What is important to learn through the submissions made on behalf of the Respondents is that the conduct of the 2nd Petitioner amounts to manipulation of the market in terms of Rule 12, even if it did not per se contribute to the dramatic surge in the stock price. The Respondents contend that the said dramatic appreciation of the share price of BIL was largely the result of the corporate announcement regarding their affiliation with the Port City Project. The Respondents further contend that the SEC's investigations demonstrated that the 2nd Petitioner had in fact engaged in unlawful and irregular trading activity, even though the Respondents acknowledge that this appreciation was not always the consequence of any manipulative conduct on the part of the 2nd Petitioner. Moreover, the Respondents argued that such trading activity constituted an act of manipulation of the stock market not necessarily on the basis that it caused a distortion of the market but because it was "calculated" to cause such a distortion.

Hence, the Respondents submit that the 2nd Petitioner's unusual trading actions, even if they did not directly affect BIL's share price or the volume of shares purchased, violated the aforementioned Rule 12. This is because Rule 12 prohibits a person from creating, causing to be created or doing anything that is 'calculated' to create a false or misleading appearance or impression of active trading. Nonetheless, in these circumstances, it is important to consider the fact that the 2nd Petitioner has provided detailed explanations to each of the two show

cause letters through the subsequent two documents marked 'P7' and 'P9', where he has even provided an explanation about some of the alleged unusual trading activities being a genuine mistake on his part, which occurred due to the 2nd Petitioner placing a BUY order in place of a SELL order.

In light of the above, it is difficult to arrive at a conclusion without substantial and stable evidence as to whether the actions of the 2nd Petitioner were done in a calculated manner, as required under Rule 12 to distort the stock market. As such, an additional issue arises in whose favour the burden of proof would lie. This is because the Respondents assert that an attempt at market manipulation has been made, especially when there is seemingly no clear impact by the actions of the 2nd Petitioner on the price of the relevant shares.

Anyhow, the Respondents stand firm on their argument that causality between conduct and outcome is not necessary for the 2nd Petitioner to violate the said Rule 12. This is further emphasized by the learned Deputy Solicitor General drawing an analogy through his own creative words as mentioned below:

> *"Assume, one shoots a man at point-blank range with the intention to cause his death, but he misses, and at the next moment, the intended victim is gunned down by a sniper acting independently. Can the fact that the shooter's objective (of causing the man's death) was realized through an external agency excuse the malevolent behavior? The answer of course is an emphatic NO!"*

However, in the event that the 2nd Petitioner may have made a genuine mistake in carrying out the trading activities, the respondent shall have an obligation to reinforce their stand by presenting the Court with sufficient proof. The aforesaid analogy in fact helps me to come to a clear understanding of the complexity of issues in this case which can only be resolved with clear and consistent information. This is a key element to conclude that an accused party or the 2nd Petitioner must know without any ambiguity the case against them to formulate their defense effectively.

For the reasons explained above, the notion of 'right to know the opposing case' is crucial when determining the questions of this case. Accordingly, at this stage, I need to draw my attention to the submissions made on behalf of the 2nd Petitioner on the perspective of the

violation of the Rule of Natural Justice stemming from the show cause letters issued against the said 2nd Petitioner.

The Petitioners, referring to several communications between the SEC and the 2nd Petitioner, contend that the SEC has failed to provide necessary clarifications as to the specifics of the allegations against the Petitioners. For instance, the following paragraph in the letter marked 'P7' (written in response to the first show cause letter 'P3') is highlighted:

> *"You have not given any evidence or facts that even remotely suggest that I have had any direct or indirect arrangement with "connected parties of Browns Investments PLC". Without at least some details of such persons and without you specifying the transactions which have created a false sense of activity around the stock, it makes it impossible for me to provide you with "cause" as to why action should not be instituted against me."*

The Petitioners complain that, for over 9 months they have not received any response to the letters marked 'P6' and 'P7'. Instead of providing additional information, the SEC has served the second show cause letter marked 'P8' against the 2nd Petitioner. By the letter marked 'P3', the 2nd Petitioner was required to show cause as to why no action should be taken against him for violation of Rule 12 and/or Rule 13 of the SEC Rules during the period 01.12.2020 to 12.01.2021 whereas in 'P8' the 2nd Petitioner is required to show cause for a period from 01.12.2020 to 15.01.2021. The Petitioners continue to maintain their stand even with the letter marked 'P8' that the SEC has failed to provide adequate details of the purported transactions in violation of the Rule of Natural Justice. The SEC's failure to detail the eight purported 'Wash Trades' out of the nine stipulated in 'P8' is given as one occasion where the Rule of Natural Justice has been violated by the SEC. In response to 'P8', the 2nd Petitioner has submitted a detailed analysis in his reply letter marked 'P9' wherein he has reiterated, inter alia, the inadequacy of information as follows:

> *"No references are made to transaction dates, times or details. It is therefore extremely unfair to make such a vague and unsubstantiated allegation and to expect me to provide an explanation without any specific indication of your concern, particularly given that I routinely transact several thousands of trades."*

In light of the above, the crux of the argument of the Petitioners is that impugned Notices of Action marked 'P10' and 'P17' have been issued without providing relevant details/information pertaining to the alleged charges against the 2nd Petitioner and thereby curtailing a proper and fair hearing to the Petitioners. Similarly, the Petitioners assert that the decision of the SEC that an offence has been made out against the 2nd Petitioner and criminal proceedings should be instituted accordingly was a mere predetermined *fait accompli.*

I take the view that this Court should be guided with the following words of Lord Denning reflected in the ***Writ Remedies; Remediable Rights Under Public Law (by Justice B.P. Banerjee, 7th Edition, at page 1093)*** upon which the Petitioners have placed reliance:

> *"One of the requirements of natural justice is that the objector should have the opportunity to know and meet if the case made agaisnt him. Lord Denning in Kanda v. Government of Malaya, (1962) AC 322 observed that if the right to be heard is to be a real right which is worth anything it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and the statement has been made affecting him and then he must have been given a fair opportunity to correct or contradict the same."*

Now I need to elaborate further on the observation made by this Court in the case of ***Free Trade Zone and General Services Employees Union (FTZGSEU) and Others v. B.K.P. Chandrakeerthi, the Commissioner General of Labour and Others CA/WRIT/303/2022 decided on 04.10.2023.*** which reads as follows:

> *"if any litigant makes an allegation that a person who has been entrusted to conduct an inquiry has not considered the relevant facts, he should at least outline to Court at the review stage about such alleged facts that were ignored or disregarded by the respective inquiry officer. This is because, Court finally decides a writ application on an overall consideration of the facts and law relating to the questions before Court."*

Stemming from the above dicta, I take the view that when evaluating a defense on the 'right to know the opposing case', it is necessary to revisit the traditional approach taken by review courts, which is highly technical in nature. The 'right to know the opposing case' can be considered as an illustrated dimension under the Rules of Natural Justice. To my mind, the

review court before making an order on such an aspersion/defense should deviate to a certain extent from the customary process and assess whether the objector is in a position to establish a sufficient defense at least during the review proceedings based on the fresh material provided to Court by the opponent. This is due to the reason that if the opponent presented the necessary details/information to Court during the review phase, satisfying the Rules of Natural Justice, the Court would be empowered to utilize its inherent power to reach a fair judgment concerning the objector's grievance. When considering the facts and circumstances of this case, I am unable to deliver a fair determination focusing only on the material presented to Court by the Respondents justifying the decision taken to initiate criminal proceedings against the Petitioners.

On an overall consideration of the whole matter, I take the view that the 2nd Petitioner must know the case against him without any suppression by the officials of the SEC. The Court needs to give due effect to the norm 'right to know the opposing case', especially when the final step is criminal prosecution[2] against the suspected person. Thus, I am inclined to conclude that the SEC has failed in its duty to disclose fully the allegations against the 2nd Petitioner in the show cause letters ('P3' & 'P8') and to enable him to show cause on charges supported by clear and consistent information. Hence, I hold that the SEC has issued the said Notices of Actions marked 'P10' and 'P17' violating the rights of the 2nd Petitioner to know his case substantially and such failure of the SEC eventually amounts to a violation of the Rule of Natural Justice. My such findings should not be a grand license for the 2nd Petitioner or any brokerage firm to engage in market manipulation hiding behind a shield called "no evidence" to evade the prosecution prescribed by the Act. It needs to be stressed that my above conclusion is limited only to the unique circumstances of this case and there should not be

[2] In this regard the Petitioner relies on the findings of B.P Aluwihare, PC, J. in the case of **Ganeshan Samson Roy v. M.M. Janaka Marasinghe and Others S.C (F/R) 405/ 2018 decided on 20.09.2023** which states: *"The decision to prosecute is a serious step that affects suspects, victims, witnesses and the public at large and must be undertaken with the utmost care. Many common law jurisdictions apply a two- stage test in deciding whether or not to initiate a prosecution; that is evidential sufficiency and the public interest. In assessing the sufficiency of evidence, the prosecutor should consider, the admissibility, the reliability and the credibility of the material. The evidence of the defence and any argument which might be put forth should be weighed before asking whether it is more likely than not a court would convict the accused. There must be a rigorous examination of the case to ensure that indictments are not made prematurely. Before indictments are filed, the Attorney General should consider if there are reasonable grounds to suspect that the person to be indicted has committed the offence, or if further evidence can be obtained to provide a realistic prospect of conviction, or if the seriousness or the circumstances of the case justifies the making of an immediate decision to file indictments or if it is in the public interest to file indictments against the suspect."*

the slightest hindrance to the statutory power of the SEC to give vibrant effect to the provisions of the Act which encompasses a wide spectrum of laws governing the capital market.

In the circumstances, I proceed to issue a mandate in the nature of a Writ of Certiorari quashing the Notice of Action dated 05.09.2021 marked 'P10' and the letter dated 26.10.2022 marked 'P17' as well as the decision to institute criminal proceedings against the 2nd Petitioner as reflected in the said 'P10' and 'P17'. I am not inclined to grant any other reliefs as prayed for in the prayer of the Petition since I am satisfied that the above relief granted addresses the Petitioner's main grievance and this Court should not unnecessarily prevent the SEC from taking action against the Petitioners in a lawful manner and according to the Principles of Natural Justice.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal