

**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, Mandamus  
and Prohibition under and in terms of Article  
140 of the Constitution of the Democratic  
Socialist Republic of Sri Lanka.*

**CA/WRIT/95/2021**

1. Simmet (Private) Limited  
Lot #9 & 10,  
B.O.I., Export Processing Zone,  
Horana.
2. Shah Rohit Vrajlal  
Chairman  
Simmet (Private) Limited  
Lot #9 & 10,  
B.O.I. Export Processing Zone,  
Horana.
3. Rajendra Choudhary  
Managing Director
4. Kishan Lal Kumar  
Director
5. Mangal Singh Balla  
Director

All of

Simmet (Private) Limited  
Lot #9 & 10,  
B.O.I., Export Processing Zone,  
Horana.

**PETITIONERS**

Vs.

1. J.A. Ranjith  
Former Secretary  
Ministry of Industries and Supply  
Chain Management,  
No.73/1, Galle Road,  
Colombo 03.
2. Major General (Retd) G Vijitha  
Ravipriya  
Director – General  
Sri Lanka Customs,  
No.40 Main Street,  
Colombo 11.
3. T.V.D. Damayanthi S. Karunaratne  
Import and Export Controller General  
Department of Imports and Exports  
Control  
No. 75 1/3,  
1<sup>st</sup> Floor,  
Hemas Building,  
York Street,  
P.O. Box -559  
Colombo 01.
4. Board of Investment of Sri Lanka  
Level 24,  
West Tower,  
World Trade Center,  
Colombo 01.
5. Sanjaya Mohottala  
Chairman  
Board of Investment of Sri Lanka  
Level 24,  
West Tower,  
World Trade Center,  
Colombo 01.
6. Pasan Wanigasekara

Director - General  
Board of Investment of Sri Lanka  
Level 24,  
West Tower,  
World Trade Center,  
Colombo 01.

7. Upasena Dissanayake  
Chairman  
Industrial Development Board  
No. 615, Galle Road,  
Katubedda, Moratuwa,  
Sri Lanka.
8. Susantha Ratnayake  
Former Chairman  
Board of Investment of Sri Lanka  
Level 24,  
West Tower,  
World Trade Center,  
Colombo 01.
9. Wimal Weerawansa  
Minister of Industries  
Ministry of Industries  
No.73/1, Galle Road,  
Colombo 03.
10. V.P.K. Anusha Pelpita  
Secretary  
Ministry of Industries  
No.73/1, Galle Road,  
Colombo 03.
11. Director – General  
Department of Commerce  
4<sup>th</sup> Floor,  
“Rakshana Mandiraya”,  
No. 21, Vauxhall Street,  
Colombo 02.

12. Devinda  
C/O Major General (Retd) G Vijitha  
Ravipriya  
Director – General,  
Sri Lanka Customs,  
No.40, Main Street,  
Colombo 11.

13. W.A.Chulananda Perera  
Former Secretary  
Ministry of Industries  
No.73/1, Galle Road,  
Colombo 03.

14. S.H. Ashoka Kumara  
Director (Development Section –II)  
Ministry of Industries and Supply  
Chain Management,  
No.73/1, Galle Road,  
Colombo 03.

**RESPONDENTS**

**Before:** Sobhitha Rajakaruna J. (Acting P/CA)

Dhammika Ganepola J.

**Counsel:** Manohara De Silva PC with Harithriya Kumarage for the Petitioners.

Suranga Wimalasena DSG with Amasara Gajadeera SC and Shemanti Dunuwille  
SC.

**Written submissions:** Petitioners - 01.11.2023  
1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 9<sup>th</sup> and 11<sup>th</sup> to 15<sup>th</sup> Respondents - 28.11.2023  
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**Decided on:** 05.04.2024

**Sobhitha Rajakaruna J. (Acting P/CA)**

This is a matter in which both parties agreed that the instant Application would be dealt with and determined solely on the basis of written submissions.

The 1<sup>st</sup> Petitioner- Company ('Company') entered into an agreement bearing No. 362 with the 4<sup>th</sup> Respondent- Board of Investment of Sri Lanka ('BOI') on 19.07.2001 following section 17 of the Board of Investment Law No. 04 of 1978 ('BOI Law'). The said agreement is annexed and marked as 'P6'. Before entering into the said agreement, the Company by way of the application marked 'P7,' sought approval for an investment in a project manufacturing old non-ferrous metals such as copper, wire bars, brass ingots, tin ingots, zinc ingots, gunmetal ingots from imported scrap and expanding to value-added products such as copper and brass rods, wires, etc. Subsequently, the Company and the BOI entered into three supplementary agreements on 17.06.2009, 12.03.2010, and 29.04.2010 respectively.

The Petitioners contend that the Company has set up and commenced operations under the said agreement 'P6' and engaged in the export of copper wire, rods and ingots between the years 2001 and 2014. Upon requests made by the Company, the BOI has permitted the Company to import PVC-insulated copper cable scrap as raw material. The Ministry of Industry of Commerce and Ministry of Traditional Industries and Small Enterprise Development by way of letters marked 'P22' and 'P23' have informed the Company that they did not have any objection subject to relevant laws and regulations, to the importation and/or sourcing of copper scrap locally and, exporting finished products in accordance with the agreements between the BOI and Company. The Company took further steps to import and install machinery for producing copper, copper alloy and brass sheets. Accordingly, the Company commenced producing copper, copper alloy, and brass sheets and exporting such goods.

In the meantime, the BOI requested the Company on 13.10.2014 ('P20') to submit the source of raw material and the finished products to be exported. Such request was made in response to a plea made by the Company to export machinery and raw materials to produce more value-added products (such as aluminium plate, sheet and circle, brass plate, sheet n circle and copper plate, sheet and circles) out of imported and local raw material in phase wise

manner. Following the approval of the BOI on 06.01.2015, the Company proceeded to engage in an additional agreement with the BOI on 18.02.2015 ('P29') and the said agreement allowed for the duty-free importation of machinery, enabling the initiation of manufacturing processes for value-added products.

However, it is noted that the BOI granted the said approval subject to the condition that reconciliation of utilization of imported and locally procured raw materials should be submitted at the time of importation/ purchase to the Investment Appraisal and the Investor Services Departments of the BOI. The BOI by its letter dated 05.01.2017 ('R3') permitted the Company to purchase the required raw materials subject to such terms and conditions in the agreements 'P6' and 'P29'. Accordingly, the Company is bound to submit individual requests for all purchase of raw material from the local market for approval of the Investment Department of the BOI along with the reconciliation of utilization of both imported and local raw materials.

By letter dated 14.10.2014 ('R2'), the Company has provided details to the BOI including the raw material quantities required per annum through local purchase and importation. As per the declaration made by the Company in 'R2' only 1200 MT were to be sourced through local purchase whereas 1800 MT were to be sourced through import. Significantly, the Company has categorically intimated to BOI that it will not purchase the total requirement of copper scrap locally.

Subsequently, the Minister of Development Strategies and International Trade made Regulations under section 20 read with subsection (3) of section 4 and section 14 of the Imports and Exports (Control) Act No. 1 of 1969. Such Regulations were published in Gazette Extraordinary No. 2044/40 on 09.11.2017 requiring an export license from the Department of Import and Export Control for the Export of items mentioned in the Schedule III of the said Regulation. It appears that the HS codes 7409.19- Copper sheet and 7409.2900- Copper alloy sheet, Brass sheet are included in Schedule III of the above-referred export Regulation. The Regulations provide that they shall also apply to the business entities established under the BOI Law. The BOI issued a letter on 10.01.2019 ('R5') to the Department of Import and Export Control recommending that the companies who have

signed agreements with the BOI after 11.03.2009 may follow the provisions of the Gazette Notification No. 1592/10 dated 11.03.2009 and obtain the necessary import and export licenses.

In this backdrop the Petitioners contend that the supplementary agreement marked 'P13' permitted the Company to manufacture value-added products imported and/or sourced locally in addition to the activities already permitted under the principal agreement 'P6'. The Petitioners further contend that the supplementary agreement 'P16' also provides for the manufacture of non-ferrous metal products such as sheets and plates out of scrap and prime metal imported and sourced locally. By supplementary agreement marked 'P18' manufacturing out of scrap and prime metal imported and/or sourced locally was also permitted.

Nevertheless, the government implemented restrictions on utilizing locally sourced copper scrap to manufacture their products. Such decisions are reflected in the documents marked 'P35', 'P38', 'P40' and 'P41'. Thus, the Petitioners challenging those prohibitions imposed by the authorities, seek a writ of certiorari quashing the decisions contained in those documents 'P35', 'P38', 'P40' and 'P41'.

The said 'P35' includes the minutes of a meeting chaired by the Minister of Industry and Supply Chain Management, held on 21.02.2020 at which the Company was also represented. During the said meeting, a resolution has been reached to restrict the export of value-added copper wire and plates after a period of six months. Such a decision has been communicated to the Controller General of the Department of Import and Export Control by letter dated 09.07.2020 marked 'P39'. The Secretary to the above Ministry, in 'P39', has divulged that companies registered under the BOI, when exporting their metal-related products, should provide sufficient written evidence from the Ministry of Industry and Supply Chain Management with its recommendation to prove that materials used for such products are imported. In addition to the above, the Company was also informed interalia by way of a letter dated 13.07.2020, marked 'P40', that the manufacturers of value-added copper wire and the copper plate will be granted only 6 months up to 25.08.2020 to export as value-added copper wire and copper plate. Similarly, in furtherance to the discussions had with the BOI,

a letter dated 23.07.2020, marked 'P41', has been sent to the Company by BOI advising it not to purchase copper scrap or any other metal scrap from the local market to utilize for the manufacturing process from the date of the said letter.

The Petitioners submit that there is no rational basis to differentiate between producing copper metal sheets/ plates and manufacturing other products. Further, it is submitted that only BOI companies such as the 1<sup>st</sup> Petitioner be affected by such orders and thus, such prohibition is targeted to discriminate against the Company in violation of Article 12 (1) of the Constitution.

The Petitioners further challenge the decisions contained in the documents marked 'P65', 'P66', 'P75', 'P76' and 'P77'. Those documents seemingly relate to the refusal by Sri Lanka Customs to export the products of the Company and it may be based on imports and exports control license issued (by the Department of Imports and Exports Control) in respect of the exportation described in those respective documents. The Petitioners argue that the imposition of the condition mandating approval from the Industrial Development Board ('IDB') for exporting copper-based products by Sri Lanka Customs is unlawful, as the IDB lacks the authority to grant export approvals under the Industrial Development Act.

As opposed to the Petitioner's arguments the Respondents contend that the Company sourced all its copper scrap locally and only imported Zinc for its manufacturing process and such process has involved transforming locally sourced copper scrap into various forms without substantial value addition. The Secretary to the Ministry of Industries affirming an Affidavit submits that the Company sourced all copper scrap from the local market and the only material imported for the process was Zinc and was merely transforming copper scrap, materials sourced locally into different forms of scraps which does not involve a substantial value- addition. His affidavit is annexed to the Statement of Objection filed on behalf of the 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, and 9<sup>th</sup> to 15<sup>th</sup> Respondents. The said Secretary has further affirmed that;

- i. "the amount of copper scrap that was exported for a long period of time has deprived the local metal industry of adding any substantial value which resulted in a massive loss to the country's economy;



ii. the exportation of copper scrap in the particular form was observed to have rendered the objectives of the BOI agreement nugatory; in view of gaining maximum benefit to the local economy by enhancing value addition of products and processes of the exporting facilities and strengthening the local industries, the Industrial Development Board recommended a regularized monitoring mechanism to address the development of local products.”

The 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 9<sup>th</sup>, and 11<sup>th</sup> to 15<sup>th</sup> Respondents aver that due to numerous complaints from local copper industrialists regarding a shortage of raw materials in the local market, the IDB investigated manufacturing facilities involved in exporting copper scrap-based products. The minutes of the meetings with the participation of the local copper industrialists, where these concerns were raised, are marked as ‘R1’, while the IDB Report dated 12.02.2020 is marked as ‘R2’. According to these Respondents, the said inspection has revealed that the Company procured all its copper scraps from the local market and imported only zinc for the manufacturing process, essentially converting locally sourced copper scraps into various forms without significant value addition.

The said Respondents further contend that following a complaint from the Casting Industries Owners Association of Sri Lanka urging against granting approval for purchasing Copper and Brass from the local market, an operational audit was conducted by the Department of Commerce and the BOI, on 07.08.2019. The inspection report was then forwarded to the Ministry of Industry on 16.09.2019. Subsequently, the Ministry of Industries requested the BOI to provide a breakdown of the annual production of each product manufactured by the Company. The BOI communicated via a letter dated 03.02.2020 to the company that such information should be submitted to the Ministry of Industries.

Both the Petitioners and the Respondents have drawn the attention of this Court to the Cabinet decision taken on 09.11.2020, marked ‘P80A’. The following paragraphs of ‘P80A’ are noteworthy:

“07. Supplying the necessary Scrap Metal for the Local Small Scale Industrialists

The Inter Ministry Task Force on Industry and Enterprise and the Task Force on Economic Rehabilitation and Poverty Alleviation had discussed the issues relating to the metal industry in their meetings and as determined in those discussions, steps have been taken to make restrictions to the export of scrap Copper, Aluminium, Stainless Steel, High Carbon Iron, Brass, Tints, Scrap Aluminium blocks and zinc blocks with immediate effect with the view to providing sufficient raw material for the Local Small Scale Industrialists.

According to a research conducted by Sri Lanka Industrial Development Board and University of Moratuwa, it has been proved that the demand for scrap Iron, Tints, Aluminium, Copper and Brass has been increased by the Local Industrialists and the demand for Zinc, Manganese, High Carbon Iron and Stainless Steel has being increased. Demand for Scrap Metal is expected to be increased further in line with policies of the government to promote Local Industries. Therefore, it is appropriate to reconsider the current permission for the export of copper wire in order to use more value added products.

As per approval was granted by the Cabinet of Ministers to use scrap Iron, Copper, Aluminium, Stainless Steel, High Carbon Iron, Brass and Tints and scrap Aluminium blocks and zinc blocks only for the local use and export of unusable scrap metal only on the recommendation of the Sri Lanka Industrial Development Board and the other relevant institutions.”

However, the Petitioners claim that the above decision will not have any effect on the Petitioners in as much as they are not exporting scrap metal and are only engaged in the export of finished high-value-added products locally.

Now I must examine whether the fundamental rights of the Petitioners have been infringed by executive or administrative action of any one or more of the Respondents as the Petitioner's primary claim in the instant application clung on the alleged infringement of fundamental rights. The Petitioners challenge the decisions reflected in ‘P35’, ‘P38’. ‘P40’ and ‘P41’ on the footing that their rights under Article 12 (1) of the Constitution have been violated by imposing restrictions for the use of locally sourced copper scrap to manufacture their products

and differentiate the production of copper metal sheets/ plates and the manufacture of other products. The Petitioners based their argument on the precedent set by *W. K. C. Perera v. Prof. Daya Edirisinghe (1995) 1 SLR 148*, which revitalized the judicial review process by prioritizing the protection of the fundamental rights of those affected. In this instance, Fernando J. emphasized the necessity for administrative decisions to align with Article 12 of the Constitution and adhere to broader standards of review.

I have decided in *R.A. Piyaratna and Others v. Buddhist and Pali University of Sri Lanka and Others CA/WRIT/133/2022 decided on 10.06. 2022* that the public trust doctrine, violation of fundamental rights, or any other grounds established through judicial innovation should only be considered in judicial review applications as a means to reach a determination by the court 'in accordance with the provisions of the Constitution' and 'according to law'. I have determined that the grounds for review in writ applications are closely intertwined with the fundamental rights recognized by the law, and any adoption of such grounds should be cautiously undertaken by Review Courts, adhering to the limitations mentioned above and based on the respective jurisdiction of the Court

The progression of jurisdiction over 'Fundamental Rights' and the evolution of 'Rights-Based Judicial Review' needs to be taken into consideration when reviewing a writ application in which the respective petitioner seeks relief in an alleged infringement of fundamental rights described in Chapter III or Chapter IV of the Constitution. However, within this evolution, a significant ambiguity emerges about whether the principle of public trust or the clear acknowledgement of Fundamental Rights recognized in the Constitution serves as direct grounds for judicial review within the writ jurisdiction of the Court of Appeal. This lack of clarity raises concerns about the integrity of the distinctions between writ jurisdiction and jurisdiction over fundamental rights, which could be made worse by judicial activism.

The law concerning the doctrine of ultra vires has evolved considerably over time. The courts have progressively shifted their stance from historical doctrines and expanded the scope of statutory interpretation to ensure adherence to constitutional principles and protection of fundamental rights. The evolving role of the Court of Appeal exhibits a unique change in addressing grievances stemming from the actions of public authorities. This transformation

may suggest an expanded mandate for the Court of Appeal to offer solutions for breaches of fundamental rights. As noted by the Supreme Court in the cases of *Heather Therese Mundy v Central Environmental Authority and others, SC Appeal 58/2003 (SC Minutes of 20.01.2004)* (Judgment by Mark Fernando J.) and *Sri Lanka Telecom Ltd. vs. the Human Rights Commission of Sri Lanka and Others (2017) SC Appeal No. 215/12 (SC Minutes 01.03.2017)* it can be assumed that the Constitutional principles and provisions have reduced the scope of administrative discretion and immunity. In other words, the latest tendency shown by superior courts in a few cases is that the actions of public authorities must not infringe upon any fundamental rights. Failure by public authorities to meet this requirement may warrant any individual a remedy under Article 140 of the Constitution.

Anyhow, the practice of litigants pursuing parallel legal proceedings in both the Court of Appeal and the Supreme Court raises questions about the necessity and fairness of such actions. While litigants have the right to explore different legal avenues, engaging in multiple proceedings without adequate justification can be seen as an abuse of the process of the court, burdening judicial resources and prolonging litigation unnecessarily. Similarly, the exploration of forum shopping, bench hunting, and the principle of res judicata within the context of fundamental rights jurisdiction and rights-based writ jurisdiction underscores significant challenges to the integrity and fairness of the legal system.

In light of the above, I take the view that the Court of Appeal needs to strike a proper balance when considering an alleged infringement of Fundamental Rights described in Chapter III or Chapter IV of the Constitution in a judicial review application. Irrespective of judicial activism in writ applications the Court of Appeal will be bound by the provisions in Article 126 (3) of the Constitution and accordingly, the Court of Appeal should forthwith refer a writ application if it appears to Court that there is prima facie evidence of an infringement or imminent infringement of the provisions of Chapter III or Chapter IV of the Constitution.

Thus, I need to consider whether the aforesaid Company experienced discrimination and was deprived of equal protection of the law. It is noted that the business identified in the principal agreement 'P6' that has been entered into between the BOI and the Company is to set up/ conduct and operate a business for the manufacture and export of non-ferrous metal products

in the export processing zone at Horana. In my view, the alleged disputes disclosed in the Petition commenced after the BOI permitted the company to purchase raw materials locally.

The BOI may permit investors to purchase raw materials from local sources as part of their investment activities, depending on the specific regulations and guidelines in place at the time. These permissions may vary based on factors such as the type of investment, industry sector, and government policies regarding local sourcing and foreign investment. Investors should consult with the BOI or should obtain legal instructions on the law relating to BOI agreements and the general law of the country.

In *Ace Healthcare (Pvt) Ltd v. Major General (Retired) Vijitha Ravipriya, Director General of Customs and Others- CA/ Writ/ 171/ 2022 (decided on 30.05.2023)* I have observed that several clauses of the Agreement subjected to that case, tend to provide that all other taxes and levies related to importing items other than the customs duty are payable as applicable by the respective investor. Thus, any investor (the Enterprise) who enters into an agreement under the BOI Law shall be subject to all other laws, not referred to in Schedule 'B' of the said BOI Law, save and except any exemptions and/or benefits and/or privileges specifically granted to it by such other laws and/or orders and/or regulations framed thereunder.

Dr. Shirani A. Bandaranayake CJ. in *Ceylon Quartz Industries (Private) Limited vs. The Director General of Customs, S.C. Appeal No. 79/2002 decided on 04.10.2012* stated;

*“The position therefore is quite clear. Business Enterprises were invited to enter into agreements with the BOI offering different types of concessions for them. This included in terms of Clause 10(ix) concession from export duty and any custom or export control. To obtain such concessions, it would be necessary that the relevant goods and articles are manufactured or produced in accordance with the Agreement. It is also necessary to refer to the provisions of Clause 10(ix). It provides for any Governmental authority to examine the correctness of any declaration made. However, this is subject to the condition that such authority should be exercised in the manner as directed by none other than the BOI.” (Emphasis added)*

In light of the above, I take the view that the legal obligations binding investors, including the said Company, extend to all regulations and laws not exempted by the BOI Law. Despite the authorization from the BOI for local raw material procurement within specified parameters,

adherence to broader National regulations and laws remains imperative. This underscores the importance of meticulous legal compliance and ongoing diligence in navigating regulatory frameworks for both investors and regulatory bodies alike.

Based on the overall circumstances of this case and the material made available to this Court, it is evident that the Company primarily sourced its copper scrap locally and imported only Zinc for its manufacturing process, which was essentially transforming locally sourced copper scrap into various forms without substantial value addition. The concerns raised by the Secretary to the Ministry of Industries regarding the exportation of copper scrap and its impact on the local metal industry highlight the economic implications at stake. Moreover, the investigation conducted by the IDB in response to complaints from local copper industrialists further corroborates the Company's procurement practices. The operational audit conducted by the Department of Commerce and the BOI, followed by the request for production breakdowns by the Ministry of Industries, reinforce the regulatory scrutiny surrounding the Company's operations. Therefore, considering these factors, it is imperative to note that the Company has failed to comply with some important provisions of the agreements entered into between the BOI. Furthermore, I am of the view that the conduct of the Company has affected the broader regulatory objectives to ensure the promotion of local industry and value addition as intended by the regulatory framework.

The BOI has authorized the Company to purchase raw materials locally in addition to the terms and conditions of the principal agreement 'P6' and subject to the provisions in the supplementary agreements and more importantly subject to other Regulations and Laws of the Country. Changing the policy by the relevant Authorities according to law in respect of the matters which are governed under the laws, other than the BOI Law is a factor that the Company should oversee at the time of entering into the principal agreement or the supplementary agreements with the BOI. Substantial evidence has been tendered to this Court that the Company has purchased raw material locally exceeding the limitations agreed upon by both the Company and the BOI.

These circumstances do not suggest this Court to observe any prima facie infringement of the fundamental rights under Article 12 (1) of the Constitution. Moreover, I am not satisfied that any lawful right of the Company or other Petitioners have been substantially affected. Further,

I take the view that no substantial prejudice has been caused to the Petitioners due to the decisions reflected in the impugned documents. It is observed, as per the Journal Entry dated 09.03.2022, that the 1<sup>st</sup>, 3<sup>rd</sup>, 7<sup>th</sup>, 9<sup>th</sup>, and 11<sup>th</sup> to 15<sup>th</sup> Respondents had no objection for this Court to make an order enabling the Petitioners to export the products described in ‘P65’, ‘P75’, ‘P76’ and ‘P77’. Likewise, the Petitioners have failed to disclose effectively any blatant miscarriage of justice warranting this Court to invoke its inherent jurisdiction in order to issue writs as prayed for in the prayer of the Petition. Thus, I proceed to dismiss the instant Application of the Petitioners.

*Application is dismissed.*

**Acting President of the Court of Appeal**

**Dhammika Ganepola J.**

I agree.

**Judge of the Court of Appeal**