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

In the matter of an application for a writ of Certiorari under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S. A. Harriett Chandrika
Mudunkotuwa West
Kiriella.

PETITIONER

Vs.

CA/WRIT/301/2024

1. K. S. Abeynayaka,
   Deputy Director,
   National Gem and Jewellery Authority,
   Regional Office,
   Eheliyagoda.

2. Viraj De Silva,
   Chairman and Chief Executive Officer,
   National Gem and Jewellery Authority,
   No. 12, Macksons Tower,
   Alfred House Garden,
   Colombo 03.

3. National Gem and Jewellery Authority,
   No. 12, Macksons Tower,
   Alfred House Garden,
   Colombo 03.

4. P. D. S. Madushanka
   Assistant Divisional Secretary
   Divisional Secretariat
   Kiriella.

5. B. M. B. M. E. Batugedara
   Former Divisional Secretary
   Kiriella.

6. Divisional Secretary,
   Divisional Secretariat,
   Kiriella.

RESPONDENTS

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

Counsel: Dr. Sunil F. A. Cooray instructed by Nadeesha Fernando for the Petitioner.

Shemanthi Dunuwille, SC for the Respondents.

Supported on: 27.08.2024

Decided on: 02.09.2024

Sobhitha Rajakaruna J. (Acting P/CA)

This is a matter where this Court has decided that the Petitioner has submitted a prima facie case warranting this Court to issue formal notice to the Respondents. Accordingly, formal notice of this application has been issued to the Respondents and this order is in respect of the issuance of interim relief sought by the Petitioner.

The primary question which needs to be resolved at the merit stage is whether it is lawful for the 3rd Respondent- National Gem and Jewellery Authority ('Authority') or any other officer of the Authority in terms of Section 48 and 49 of the National Gem and Jewellery Authority Act No.50 of 1993 ('Act') to suspend the license marked 'P3' and/ or 'P4' by which the Petitioner was allowed to carry out mining in the land specified in such permits.

The Respondents' contention is that the relevant license has been suspended as there was prima facie evidence that the Petitioner was mining within the reservation of the river ('Kuru' river). The Respondents complain that the Petitioner has violated Clause 6 of the license marked 'P3'. Moreover, the Respondents argue that the license granted to the Petitioner was

suspended without being revoked, allowing them to decide whether or not to do so after an inquiry. In the meantime, the Petitioner contends that no provision in the said Act confers the Authority to suspend a license due to a conditional violation and it could only impose a fine specified under circular No.121(8) 2023 for any offence committed under section 52 of the said Act. Anyhow, a final decree is yet to be made by the Authority about revoking or cancelling of such license.

The first interim relief prayed for by the Petitioner is an order to prevent or restrain the 1st to 6th Respondents from taking further steps to sell the gem gravel piled up on the subject land. In response to this request, the 1st to 6th Respondents have already given an undertaking not to take steps to sell the said gem gravel until the following date of this case. The other interim relief sought by the Petitioner is to suspend the decision reflected in the document marked 'P11' by which the mining license issued to the Petitioner has been suspended. It is important to note that the primary relief prayed for in the prayer of the Petition is also to issue a writ of certiorari quashing the decision reflected in the said document marked 'P11'.

The learned State Counsel asserts that a grave prejudice would be caused to the public interest if the Petitioner continues to mine within the said reservation of the river which is completely outside the Petitioner's private property. Although the Court identifies that a prima facie question exists which needs to be resolved by this Court, there is no mandatory duty for this Court to issue an interim order to suspend the impugned order. It is necessary to consider to a considerable extent the usual rules applicable to the grant of an interim relief.

An interim stay order in a writ application is an incidental order made in the exercise of the inherent or implied powers of the Court and the Court should generally be guided by the following among other established principles;

(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?

In ***'Principles of Administrative Law', by M. P. Jain and S. N. Jain, 9th Edition, (2022), LexisNexis, Volume 2, at p. 2404*** it is stated that;

"The Supreme Court has emphasized upon the High Courts that there are no hard and fast rules in the matter, but that they should exercise "prudence, discretion and circumspection" in granting stay orders. The High Court must consider several vital considerations other than the existence of a prima facie case, e.g., balance of convenience, irreparable injury, public interest."

This Court in many instances has refused to issue interim orders even after being satisfied that the Petitioner has submitted a prima facie case. At this stage, the Court is tasked with assessing whether the potential damage that may be caused to the public interest by issuing a stay order in respect of the instant Application will outweigh the potential loss that may be caused to the Petitioner if the stay order sought in the Petition is not granted.

The learned State Counsel tendered in open court the Report of an inquiry conducted after filing the instant Application. The learned Counsel for the Petitioner strongly argues that the suspension of the license was done without holding an inquiry and the outcome of the inquiry conducted subsequently should not be considered at this stage by this Court. The learned State Counsel contends that compelling evidence was presented at the inquiry, indicating that the Petitioner was involved in mining within the river reservation. This raises an additional challenge of how this Court will distinguish the boundaries between the river reservation and the Petitioner's property. According to the learned State Counsel, the Petitioner has participated at the said Inquiry.

Technical objections at the inception of a case often emerge in routine court proceedings. With the development of Fundamental Rights, Writs and Appellate jurisdiction, higher courts have increasingly tended to evaluate such objections by considering the unique circumstances of each case rather than adhering strictly to established traditional theories. For thorough and equitable adjudication, courts need to assess whether the legitimate rights of a person or the State have been affected.

The importance of considering all the circumstances of a case to arrive at a fair determination has been emphasized by the Court of Appeal in ***Capital Trust Holdings Limited and Another v. Securities and Exchange Commission of Sri Lanka and Another- CA/WRIT/ 465/2022 (Decided on 12.12.2023)*** as follows;

"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."

Therefore, all the circumstances of the instant application should be taken into consideration when making a fair order on issuance of interim relief. Based on the special circumstances of this case, particularly when dealing with the interim relief sought by the Petitioner, I take the view that the outcome of the inquiry held by the Authorities needs to be taken into consideration. I cannot possibly overlook the purported wrongdoing revealed in the respective report although the impugned decision has been made prior to a proper and fuller inquiry. Anyhow, it is noted that the Authority has taken cognizance of the contents of the letters marked 'P7' and 'P8' addressed to the Authority by the relevant Divisional Secretary.

Similarly, I need to take into consideration the potential irreparable damage that may be caused by depleting all resources within a public area before this Court reaches a final determination. While the Petitioner may challenge the report or the way the said inquiry was conducted in due course, there cannot be any obstacle preventing the Authority from investigating the complaint that the Petitioner was mining in the river reservation. Therefore, I need to exercise the inherent powers of this Court to take into consideration the findings of the said Inquiry although the Court under usual circumstances is compelled to consider a writ application according to the facts and circumstances that prevailed at the time such application was filed.

The observations of His Lordship Justice Janak De Silva reflected in the following paragraph in ***Nuwara Eliya District Housing Development Co-operative Society Ltd v. Kelani Valley Plantations PLC (formerly Kelani Valley Plantations Limited) and Another- SC Appeal No. 70/2015 (decided on 03.04.2024)*** needs to be adopted in arriving at a decision whether the outcome of the said inquiry should be taken into consideration or not.

> *"Although in Sri Lanka, formal pleadings must be filed in an application for judicial review in accordance with the applicable rules, the issue of a writ of Certiorari will not oust the jurisdiction of the statutory authority to make a fresh determination. For example, where the decision of a statutory functionary is quashed for the failure to follow the rules of natural justice, a fresh decision can be taken after following the rules of natural justice."*

Moreover, the Petitioner has not submitted adequate evidence to establish that he hasn't engaged in mining in the reservation of the river even at the Inquiry held in this Court to consider whether an interim relief sought by the Petitioner should be issued. For the reasons enunciated above I take the view that this Court should be guided by the principle on balance of convenience in respect of the interim reliefs that the Petitioner has prayed for in the prayer of the Petition. In the circumstances the application for an interim order as mentioned in paragraph 'G' of the prayer of the Petition is refused. However, in order to safeguard the alleged rights of the Petitioner an interim order is issued preventing the 1st to 6th Respondents taking steps to sell the gem gravel piled up on the subject land until the date of hearing the instant Application.

Acting President of the Court of Appeal