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 Procedendo
under and in terms of
Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA WRIT APPLICATION NO :

CA/WRIT/810/2023

Fredrick Christopher Jerome Fernando,
Hydepark Residencies,
Apartment No. 4/2,
No.79, Hydepark Corner,
Colombo 02.
(Currently remanded and held in the Welikada remand prison)

PETITIONER

-Vs-

1. **Deshabandu Thennakoon**
   Acting Inspector General of Police,
   Police Headquarters,
   Colombo 01

2. **Prasad Ranasinghe**
   Deputy Inspector General of Police,
   Criminal Investigation Department,

Colombo 01.

3. **Kavinda Piyasekara**

   Senior Superintendent of Police,
   Director,
   Criminal Investigations Department
   Colombo 01.

4. **B.M.A.S.K. Senaratne**

   Chief Inspector of Police,
   Officer in Charge,
   Digital Forensic Laboratory And Training Unit,
   Criminal Investigations Department,
   Colombo 01.

5. **The Hon. Attorney General**
   Attorney General's Department,
   Colombo 12.

6. **Hon. Thilina Gamage**
   Magistrate-Fort

RESPONDENTS

Before: Hon. D.N. Samarakoon, J.

Counsel: Ronald Perera P.C., with Chandimal Mendis and Sharfi Mohideen instructed by Sanath Wijewardane for the Petitioner.

Shaminda Wickrema, Senior State Counsel with Shemanthi Dunuwille

State Counsel for the Attorney General.

Supported on: 18.12.2023

Synopsis of Oral Submissions tendered on: 19.12.2023

Decided on: 22.12.2023

D.N. Samarakoon, J

The 05th respondent, the Attorney General has submitted, among other things, in the synopsis of oral submissions, that,

> **"The petitioner should not be treated thus as a privileged suitor, but should be equally treated as any other citizen before the law." (paragraph 06(ii))**

As this Court already indicated at the oral hearing too, at this stage, this Court will not consider the merits of the application. The purpose of this Order is to decide on the preliminary objections raised for the 05th respondent and by permission of Court by the individuals represented by Mr. Sanjeewa Jayawardane P. C. and his junior. Both the above parties and the petitioner have tendered synopsises. The learned President's Counsel for the petitioner was only heard in reply to preliminary objections and not on merits of the application. If there were at the oral submissions and also in this Order, any reference to facts, it is only in so far as related to the extent to which they were referred to by opposing learned counsel and replied by the petitioner's counsel. Even then, this Court at the oral hearing informed learned counsel not to go into the main allegations of the merits. **The petitioner has come before this Court in Judicial Review and the 05th respondent and other individuals above referred to say the application of the petitioner should not be entertained. This Order is on that question.**

The 05th respondent in no less than 11 places in his synopsis has referred to "Bench Hunting/Forum Shopping" and as this Court indicated at the

oral hearing, that was the main reason the Court wanted to make this Order without delay. Since the frequent reference to this allegation by the 05th respondent shows that it is the main allegation much of this Order is devoted to discuss it.

It is also submitted by the 05th respondent, that,

> "The respondent contends that obvious irregularities in the conduct of the Illegal Assets Investigation Division of the CID in these investigations point to the presence of other factors in addition to those seen on the surface. Therefore there is an enhanced need for thorough scrutiny and absolute transparency in determining even this matter and also to ensure that not only is justice done, but "justice is seen to be done". Therefore if this case continues, it would be much more suitable and justiciable for all parties concerned that this matter is taken up before a 2 Bench as submitted to Court in detail during oral submissions and also in this synopsis". (paragraph 05(v))

It is said,

> "In 1924, Lord Hewart famously commented "it is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done." Lord Hewart considered his catch-phrase aspirational rather than mandatory. In that same year, Chief Justice William H. Taft, the primary drafter of the first ABA Model Code of Judicial Conduct, made sure that the Model Code held to the theme that judges must do justice and appear to do justice. But Taft also recognized the Code's hortatory[1] nature. In 1954, Justice Felix Frankfurter, borrowing from Lord Hewart, suggested that "justice must satisfy the

[1] Tending or aiming to exhort

appearance of justice." Like Lord Hewart and Chief Justice Taft, Justice Frankfurter considered the adage aspirational[2]."

Although there could be various views, this Court thinks, that, the adage is important in the administration of justice.

(A) How this case came before this Court:-

In view of the above submission, it must be placed on record as to how this case came up before this Court and the circumstances upon which it was heard in respect of preliminary objections on 18th December 2023, which was also referred to by the 05th respondent in his oral submissions as the **First Day of the Court Vacation** and stated at paragraph 11(ii) of the synopsis as,

> "If there was an urgency as claimed by the petitioner, he need not have waited for almost two weeks and file the instant application the day before the commencement of Court Vacation."

The Proxy of the petitioner is dated 13th December 2023. The petition is also dated the same day. It has been filed, according to the Frank of the Court of Appeal at 9.30 a.m. on 14th December 2023.

The new Writ Applications after institution in the Application Branch are sent to Court No. 301 in which Hon. President of the Court of Appeal presides. His Lordship has minuted, "Support 14.12.2023 in Court 108 at 11.00 a.m." On that day at 12.30 p.m. being the Presiding Judge, I have recorded that at 12.30 p.m. this case was mentioned in my Court and although the learned President's Counsel appearing for the petitioner said that he has served notices through

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[2] The Overarching Legal Fiction: 'Justice Must Satisfy the Appearance of Justice', Ray McKoski University of Illinois Chicago School of Law, Date Written: June 11, 2017 The Overarching Legal Fiction: 'Justice Must Satisfy the Appearance of Justice' by Ray McKoski :: SSRN

Courier, there being no appearance for the respondents and Hon. Justice Iddawala who sat with me having also not received a copy of the docket the matter cannot be supported on that day whereupon the learned President's Counsel for the petitioner has moved to support the matter on the following day, i.e., on 15th December 2023, which was allowed by the Court.

On 15th December 2023, the Court commenced at 10.20 a.m. and before the Court Stenographer called any of the cases, the learned Senior State Counsel representing the 05th respondent brought to the notice of the Court, that, he is unable to appear in Court on that day as he is held up before the Supreme Court. It has been also recorded, that, "Both counsel agree that this matter can be supported on 18.12.2023 at 10.00 a.m. before Court No. 108".

The learned Senior State Counsel when making lengthy oral submissions on 18th December 2023 queried the Court whether his oral submissions are (audio) recorded and the Court replied, that, as a matter of practice, proceedings in respect of all cases in this Court are audio recorded and that I obtain a copy of the audio recording from the Stenographer's Recording Machine, which I also listen to when necessary in making judgments and orders. **The said audio recording, shows that the learned Senior State Counsel making the above application saying that both counsel jointly make that application and the learned President's Counsel for the petitioner mentioning, that, it is very urgent and praying for the indulgence of the Court to sit on Monday, the 18th whereupon I inform the learned counsel that the Court is sitting on Tuesday 19th December 2023.** However, the learned Senior State Counsel informing that on 19th he is not available at all, I decided to sit on 18th. The learned President's Counsel for the petitioner has then apologized that he is interfering with the vacation and I informed him that, in any event, I am working that week. Certain views expressed in relation to "Court Vacation" too are referred to below.

Whereas it was always my belief, that, the vacation of the court must be taken causing least inconvenience and hardship to litigants, for whose benefit courts are established and run, there was another reason why I said so from the Bench on 15th morning.

It was because on 14th morning the Hon. President inquired from me whether I can sit on Monday, 18th December to take a few urgent matters. I replied that while it is possible, for I never had the temperament and practice of declining to work, my brother Judge will be coming only on the 19th and if I can sit alone on Monday I am ready to do that. The Hon. President then informed me that from next Monday (i.e., Monday the 18th December) onwards I can sit alone until the new appointments of judges to the Court of Appeal are made. It is also heard on the audio recording of Court Proceedings on 15th that I mention to my brother Justice Iddawala that the Hon. President wanted me to sit on Monday, when both counsel could not agree on 19th. Therefore I sat alone on Monday and although Justice Iddawala earlier said that he would be coming on Tuesday, on that morning upon his informing me that he is out of Colombo, I sat on 19th too alone and took up 09 cases and got down from the Bench at 12.45 p.m. Although this case was the only case that came up on Monday the hearing of this case took more time (until about 1.45 p.m.) on Monday.

There was a basis for what the learned President of the Court inquired from me as above on 14th morning too. Justice Iddawala has tendered his resignation from the Court of Appeal effective from 31st December 2023. The learned President has informed me sometime prior to 14th December that since there are already two vacancies of Judges in the Court of Appeal cadre and with the resignation of Justice Iddawala it will be three vacancies, that, I will have to sit alone for sometime. While acceding to this and as when my Court started in early January 2021, it was designated by the then Hon. President of the Court of Appeal as "**Tax Court No. 02**" and I was hearing tax appeals since then, making certain landmark determinations too; and under section 11A(6) of the Tax

Appeals Commission Act there should be two Judges to hear a tax appeal, I requested the learned President to give me another Judge, who can come to my Court in the afternoons so that I can continue to hear tax appeals, in the afternoons, to which the learned President of the Court consented. Hence I knew that except for tax appeals, in all other categories of cases coming up before my Court I have to sit alone from Monday, 18th December as the learned President directed and authorized, whether my brother who intended to sit on 19th December only comes or not.

The relevant section of the Tax Appeals Commission Act No. 23 of 2011 says,

> "**Any two or more Judges of the Court of Appeal** may hear and determine any question of law arising on the stated case and may in accordance with the decision of Court upon such question,…"

Article 146(2) of the Constitution says,

> "(2) **The jurisdiction of the Court of Appeal may be exercised in different matters at the same time by the several judges of the Court sitting apart**:
>
> Provided that –
>
> (i) its jurisdiction in respect of –
>
> **(a) judgements and orders of the High Court pronounced at a trial at Bar, shall be exercised by at least <u>three</u> Judges of the Court; and**
>
> **(b) other judgement and orders of the High Court, shall be exercised by <u>at least two</u> Judges of the Court;…"**

Except in tax appeals, appeals from Criminal High Courts and PHC cases, a single Judge can sit.

It is stated at the part under "Background" in 05th respondent's synopsis, that, on 15th the learned Senior State Counsel appeared before a "two Bench", which

should correctly be “a two Judge Bench”. It has also submitted but both Judges postponed it for 18th. The circumstances under which it was refixed for 18th which was recorded in the audio recording was narrated above.

It is also stated in that part of the synopsis, that,

> “At the commencement of submissions, for the purpose of clarity, the Senior State Counsel for the respondent respectfully queried Your Lordship at the outset, on whether a nomination had been made by the President Court of Appeal, for a single Bench to hear this case and having established that such a nomination had not been made, commenced submissions on the Preliminary Objections, as directed by Your Lordship.”

This is also recorded in the audio recording pertaining to 18th. The learned President’s Counsel for the petitioner wanted to briefly outline his case prior to the Preliminary Objections of the learned Senior State Counsel. But the Court decided to hear the Preliminary Objections at first and give a ruling on them. The learned Senior State Counsel having commenced to make his oral submission with regard to the **Notice of the Court of Appeal No. 08/2023 published on 06th November 2023,** queried from me whether I have an especial nomination to hear this matter upon which I have told him, that, this is the regular Court which I sit and this matter was sent here by the President so therefore I am hearing the matter. Having said that, the Court did not make any direction as stated above; and the learned Senior State Counsel continued with his submissions on the Preliminary Objections. One reason I heard this case was because of the above direction given to me by the Hon. President of the Court on 14th that I will have to sit alone from Monday the 18th onwards, which covered not only this case but all cases that will come up before me; **and there was no specialty as to this case as far as this Court is concerned**. The learned Senior State Counsel who recommenced his oral submission after the aforesaid query referred to the Notice issued by the President of the Court of Appeal bearing No. 08/2023. Referring to clause (A) of the Notice he said, that, the Bench in this

Court should be constituted of the two Judges whose names are mentioned therein, i.e., myself and Justice Iddawala. Therefore he submitted, that, both Judges should hear this matter unless a nomination is otherwise made. Apart from that he did not dispute that a Single Judge can hear this matter. But his position was that it is unsuitable in this matter. Then he referred to clause (B) of the above Notice which said,

> "In all matters, the Rules of the Court of Appeal shall be applied and followed in a **uniform**, **consistent** and **fair** manner."

Immediately after referring to that clause (B) he said, (to record what was said verbatim)

> "The usual procedure is that when there is a Specially Constituted Bench, or when both Judges are not hearing it, the President Court of Appeal may have to authorize Your Lordship to sit by Your Lordship and decide on this matter. We are not contesting that, but that is the usual procedure and when that does not happen it lacks uniformity and also consistency. Now the issue here being that even today an application was made to intervene. Now this intervention application, I was there in the Court of Appeal case 377/2023 was allowed. **So what we are saying is not that this cannot be heard but we are saying it is unsuitable, because the necessary procedure has not been followed** and if Court fixes it even during the vacation where the necessary procedure can be followed then we are agreeable to come before Court on any day except the 20th when another bail application is being taken up in the High Court. My Lord, this is not being recorded?
>
> Court: Tape Recorded? Yes.
>
> Senior State Counsel: But in summary…
>
> Court: Not only this case, I must tell you that every matter in this Court is recorded and I get a copy.

Senior State Counsel: In summary may I outline it later so that it can be taken down at least on paper there will be a record of what has been said [*it is there on audio recording too*] Then my Lord so fair manner, number (B) is fair manner, so the intervention application has been made by the original complainants of this case. They have been allowed to intervene before Justice Karunarathne in C. A. Writ 377/2023 and sticking to the Rules of Natural Justice it would be way better in our humble submission to have all parties represented so that all parties can be heard on whether this matter should proceed or not. So I associate myself with the intervention application and state that for the Rules of Natural Justice to especially be dictated by Your Lordships under (B) the intervening petitioners can also be heard. Then my Lord we took up the same objection in C. A. Writ 377/2023. We said that necessary parties have not been made. Now these allegations were made by these complainants. Several paragraphs in the brief refer to these complaints what they have said. So I cannot assist your Lordship on that. Mr.…The learned President's Counsel cannot assist your Lordship on that. They will necessarily, even if intervention application is not made, they will necessarily have to be made parties."

(The learned Senior State Counsel's oral submission further continued, but the above part was reproduced in verbatim to clarify on his allegation based on "irregularity")

For example, he said,

" "The usual procedure is that when there is a **Specially Constituted Bench,** <u>or when both Judges are not hearing it,</u> the President Court of Appeal may have to authorize Your Lordship to sit by Your Lordship and decide on this matter. We are not contesting that, but that is the usual procedure and when that does not happen it lacks uniformity and also consistency…"

He refers to two matters above, (i) Specially Constituted Bench and (ii) when both Judges are not hearing it.

Therefore he has taken Court No. 108 in hearing this matter as a "**Specially Constituted Bench",** which is, with respect, incorrect. That is why when he queried about my nomination I said, that, this is the regular Court that I preside and hence I hear it.

As already said in this Order, the learned President has minuted "Support 14.12.2023 in Court 108 at 11.00 a.m."

It was a general reference to this Court but not a "Specially Constituted Bench."

For instance, in **Writ 685/2023** which was instituted by the President of Sri Lanka Cricket on or about 07th November 2023, which the learned President had to nominate the learned Judges in Court No. 303 to hear was not a general reference the learned President made to a Court other than which His Lordship presided in terms of the phrase "All writ applications transferred from Court No. 301 on the directions of His Lordship the President of the Court of Appeal whenever necessary", which phrase is included in respect of every Division at the end of the list that contains the categories of cases heard by that Division.

It was a Special Reference to a "Specially Constituted Bench" in Court No. 303 where the two Judges usually sitting there comprised the "Specially Constituted Bench", made because the learned President declined to hear that case. In Court No. 303, one of the nominated Judges declined to hear on personal reasons. Because it was a "Specially Constituted Bench," the other Judge, who was the Presiding Judge in Court No. 303 could not hear it. Therefore it was again sent before the learned President and then, on 14th November 2023, His Lordship nominated the two Judges sitting in my Court by name. The relevant part of that day's Journal Entry says,

"…and therefore, now this matter is transferred to Court No. 108 enabling H/L Justice D. N. Samarakoon and H/L Justice Neil Iddawala to hear and conclude this matter".

When that case was brought before my Court on 16th November 2023 Hon. Iddawala declined to hear on personal grounds. Now that is not a matter I could continue to hear by myself, although it was also a writ case like this case which a Single Judge can hear, **because, the nomination was by name,** that this and this Judge should hear. Therefore, on that day, without waiting for the stenographer to type the Journal Entry, for it takes time, having informed the learned counsel I myself wrote on the Journal Sheet as to what happened in my Court and I sent the docket immediately to Court No. 301 before the learned President. Then His Lordship nominated the Judge in Court No. 303 who did not decline to hear and myself to constitute the third "Specially Constituted Bench" for that case.

As I said earlier, this was not such a "Specially Constituted Bench" but a general reference of the case to Court No. 108. The Judges were not nominated by name. **Therefore if "both Judges are not hearing," as per the part (ii) of the submission of the learned Senior State Counsel, if the case, such as a tax appeal, does not require two Judges, could be heard and concluded by the remaining Judge, even without any authorization in that regard by the learned President.**

That was why I informed the learned Senior State Counsel, that, I regularly sit in this Court and since the case is before this Court I hear it. Hence there was no irregularity in hearing this case, in respect of preliminary objections, on 18th December 2023.

As aforesaid in fact I had the authorization of the learned President to take up cases sitting alone from Monday 18th December 2023. But without that too I can hear.

In fact **Dr. A. H. M. Marjan vs. Dr. A. A. A. Azwar and others, C. A. RII 06/2023** where two factions are having a dispute relating to the appointment of Trustees to the Mosque named Masjidul Abraar, Maradana, Beruwala, believed to be the first Mosque of Sri Lanka or Serendib and 1400 years old, whereas Court No. 108 constituted of two Judges, as the other Judge was not available I heard sitting alone and gave order extending the interim order until the final determination of the application on 02nd May 2023. Although this was on the Website of the Court of Appeal before its recent novation and also one of the most downloaded orders it cannot be found on the new Website. It is pertinent, that, the Registrar will look into the matter whether all judgments in the Old Website were not brought into the New Website.

Gonapinuwalage Suguna Manjula vs. Yasarathna De Silva Pinnaduwage, C. A. RII 11/2021 was another case which I heard alone on 28.02.2022 when the other Judge that constituted the Bench was absent and made order on 31.03.2023.

Rathnayake Mudiyanselage Abeysekara vs. R.M. Somapala C. A. RII 438/2015 was yet another judgment where I heard the matter sitting alone, on the same day 28.02.2022 and gave the judgment on 08.11.2022, whereas the Court constituted of two Judges. It contain 18 pages.

The above are a few examples.

Then in writ applications too, in **Sena Mills Refineries Pvt Limited vs. Ms. P. S. M. Charles and others, C. A. Writ 374/2018** and two connected cases, which is in respect of importing several tons of **Palm Oil** to this country which the respondents say injuries to human health, where Senior Counsel Mr. Nagananda Kodithuwakku also appears in person, I sat alone on 12th December 2023 and considered an application to dispose goods. At 3.55 p.m. it is recorded, that,

> "The Court suggested to Counsel that the Court can sit either 19.12.2023 or 20.12.2023 to expeditiously conclude this matter.

However all Counsel cannot attend on that day although some counsel are willing to attend on that day".

The date on which all Counsel could agree in that case was 29th February 2023.

Therefore, hearing cases other than tax appeals (for criminal appeals from the High Court and PHC cases which too require two Judges do not come to this Court) as Single Judge is nothing new in this Court and the petitioner alleged to have in his possession billions of rupees or the public attention this case has attracted were not seen by this Court as reasons to treat this case as a special case.

In fact, as said at the beginning the 05th respondent himself says that,

> " "The petitioner should not be treated thus as a privileged suitor, but should be equally treated as any other citizen before the law". (paragraph 06(ii))

In fact, on Tuesday, 19th December 2023 too there was a Restitutio in Integrum application **C. A. RII 55/2023** to question a decision which refused anticipatory bail, the petitioner's counsel himself said that the petitioner deals with billions of rupees and he has 1500 employees under him. Further supporting of that matter is fixed for 22nd December 2023.

Therefore I hold, that, there was no irregularity at all in as much as Notice No. 08 of 2023 is concerned or otherwise in taking up this matter for hearing on Monday 18th December 2023.

(b) **"Court Vacation":-**

The learned Senior State Counsel has said, as seen above, that if the correct procedure is followed he will appear during the period known as Court Vacation too. It was said in submissions, as referred to earlier too, that, 18th was the first date of the vacation and that the petitioner has waited to file this application until two days before the vacation.

87 years ago, which is almost a century ago, in Ceylon an Editor of a Newspaper commented on Court Vacation and was punished for contempt of court.

That was, “1936 Present : Abrahams C.J., Akbar S.P.J., and Koch J. **In the Matter of a Rule under Section 51 of the Courts Ordinance on H. A. J. Hulugalle, Editor, " Ceylon Daily News ", reported in 39 NLR 294.**

The case said,

> “The respondent, the Editor of the " Ceylon Daily News ", was charged with contempt of court in respect of certain passages appearing in a leading article, published in his newspaper. The article entitled "Justice on holiday" was in the following terms: **With all this talk of the law's delays it seems an ironical jest that the Supreme Court and the District Courts of Colombo should close for two weeks, presumably for the Race Meet in Colombo.** This fortnight's relaxation appears to be the special privilege of these Courts, for the other Courts in Colombo and the outstations, as well as the Legal Department are expected to perform their duties during that period. His Majesty's Judges in England are not off duty for the Derby or for the fasionable Ascot Meet. They do not obviously mix up sport with their judicial functions. Here in Ceylon Public Servants have a surfeit of holidays to make less fortunate members of the public grow green with envy. But when in addition to Christmas holidays, the long Easter vacation, and the other leave privileges the Supreme Court and the District Court of Colombo close shop during the August Race Meet, the public has a right, to question the propriety of this tradition. It is indeed a tradition of what old bureaucrats would call the halcyon days of the public service when Government servants did just as they liked. Now times have changed and especially in the case of the judiciary there is the greater necessity to speed up the administration of justice if the public grievance about the law's delay is to be redressed. But, instead of removing the obvious causes which lead to arrears of work, the tendency is to talk

glibly about lack of staff and the need for more officers to man the judiciary. The tax payer is always there to give his money to pay for more Judges, more Commissioners of Assize and other officers…"

Sir Sydney Abrahams, Chief Justice at the conclusion of His Lordship's judgment said,

"Herbert Alexander Jayatileka Hulugalle, the order of the Court is that you be imprisoned until the rising of the Court, and that you do pay a fine of Rs. 1,000 or suffer simple imprisonment for three months in default of payment".

That was a punishment of some severity.

With respect, one might argue, that perhaps Hulugalle was wrong when he said, the times have changed. However it appears that the Editor spoke on behalf of the public.

Rohit Pandey, Honey Secretary, Supreme Court Bar Association, writing on 10th June 2023 says,

"India gained its independence in 1947 and till that time the Britishers ruled the Country for a considerable period of time. They introduced their Judicial System in India which includes the Practice and Procedure, Laws, and the Hierarchy.

Even after over seven decades since India achieved its Independence, several remnants of colonial practices and laws remain. One such practice is court vacations. It was integrated in the Indian Judicial System by the British rulers to allow their judges enough time to travel back and forth between home and work.

……

> The Supreme Court Rules, 1950 were introduced and by virtue of those rules till 2014 the Supreme Court had an option of going for vacation for a period of 10 weeks. The Supreme Court amended its rules in 2013. In 2014 the then Chief Justice of India, RM Lodha, cut down this period to 7 weeks. He also wrote to the Chief Justices of the High Courts asking for their thoughts on the possibility of the courts operating year-round. Lodha suggested the vacation time allotted at the same time to all judges be scrapped. Instead, each judge could signify beforehand when they would take a vacation[3]."

Writing on the Topic, "Do Supreme Court, High Court Judges Vacation Too Much," it was said on 14th August 2023,

- "Terming court vacations a "**colonial legacy**", a parliamentary committee has recommended that High Court judges should take turns going on vacation to tackle the mounting pendency of cases.

The Sri Lanka Cricket writ application No. 685/2023 was instituted on 07th November 2023. This case writ application No. 810/2023 had been instituted on 14th December 2023. That is 125 cases in 38 days.

(c) **Indian Cases on Bench Hunting and Forum Shopping:-**

The 05th respondent's synopsis has cited several Indian cases on "Bench Hunting and Forum Shopping". These cases are also cited in paragraph 06(v) of the synopsis where reference was made to the composition of this Court, which was referred to above in regard to the circumstances under which this matter was heard in respect of the Preliminary Objections on 18th December 2023.

However, as already said, as the 05th respondent has raised the allegation of Bench Hunting and Forum Shopping in several places in the synopsis, it has

[3] The Law Advice - Articles - Is Vacation necessary for judges and Lawyers?

been raised mainly under paragraph 06 of the synopsis where the heading is "**The petitioner has engaged in/ is engaging in Bench Hunting/Forum Shopping tactics and Court should "deal with it with a heavy hand"**. It was at the end of this part at paragraph 06(v) the Indian cases are cited. The 05th respondent has in paragraph (06) connected the above allegation with multiplicity of applications allegedly instituted by the petitioner.

As the 05th respondent has cited 09 Indian cases on Bench Hunting and Forum Shopping, it is appropriate to examine them.

The 05th respondent says, that, in **Dr. Kahir un Nisa and others vs. UT of Jammu and Kashmir and others 2023**, a cost of Rupees one lackh was imposed on the petitioners for indulging in forum shopping by filing multiple petitions before different wings of the court despite having the same cause of action.

The 05th respondent has not attached a copy of this judgment or order. What is available in the Indian Kanoon Website in which most Indian judgment and orders are reported is **Dr. Khair Ul Nisa And Ors vs Ut Of Jammu And Kashmir And Ors on 12 August, 2022.**

This is an order made by the same Court, which is Jammu and Kashmir High Court in the same case.

Mr Sheikh Feroz, Dy.AG, has appeared for the respondent whereas **Mr Z. A. Shah, Sr. counsel** has appeared for the petitioner. The Court has said,

> "**Mr Sheikh Feroz, Dy.AG**, present, enters appearance on behalf of the respondents and while opposing the contentions raised by **Mr Shah**, would submit that the petitioners have no right, much less one recognized under law to remain in place and to hold the positions upon coming into force of the Jammu and Kashmir Juvenile Justice (Care and Protection of Children) Act of 2015 and Rules of 2016 framed thereunder, whereunder the impugned advertisement notices have been issued.

Heard **Mr Z. A. Shah, Sr. counsel** for the petitioners and **Mr Sheikh Feroz, Dy.AG**, on behalf of caveators.

Having regard to the nature of controversy involved in the petition, coupled with the submissions made by the appearing counsel for the parties, there appears to be substance in the submissions made by **Mr Z. A. Shah, Sr. counsel** for the petitioners at this stage carving out a case for grant of indulgence.

Notice in the main petition as well as CM. Notice waived by **Mr. Sheikh Feroz, Dy.AG**, on behalf of respondents. Reply/objections by or before the next date of hearing.

List on 18.10.2022.

In the meanwhile, subject to objections and till next date of hearing, respondents shall refrain from proceeding ahead with the process of selection pursuant to the advertisement notices 01 SC(MV) of 2022 dated 01.08.2022 and 02 SC(MV) of 2022 dated 01.08.2022".

Therefore, if at all, the forum shopping allegation has been considered at a later stage of the case. In the above order the Court has stayed the filling of the vacancy for which the petitioner sought herself to be appointed.

Next the 05th respondent says, that, in **Vijay Kumar Ghai vs. State of W. B. 2022**, the Supreme Court termed forum shopping as a "disreputable practice by courts" that "has no sanction and paramountcy in law".

This is a judgment of the Supreme Court of India. The allegation of forum shopping was against the respondent No. 02. The Court said,

"38. Respondent No. 2 filed a complaint u/s 156(3) Cr.P.C on 06.06.2012, wherein his prayer for registration of an FIR was rejected vide

order dated 28.02.2013 by the MM, Tis Hazari Court, immediately after which he filed his complaint on 28.03.2013 at P.S Bowbazar, Calcutta. **The timeline of filing complaints clearly indicates the malafide intention of Respondent No. 2 which was to simply harass the petitioners so as to pressurise them into shelling out the investment made by Respondent No. 2".**

The Supreme Court has granted relief claimed by the petitioner.

This shows two things, viz., (i) the forum shopping allegation was based on the intention of the respondent No. 02 to harass and pressurize the petitioner and (ii) that was decided in the judgment.

The next case cited for the 05th respondent is **Dhanwantri Institute of Medical Science vs. The State of Rajasthan 2022**.

The 05th respondent says, that, the Court upheld an order imposing costs worth of Rupees ten lackhs for engaging in forum shopping.

Rajasthan High Court said,

"**The reasons, which forced the petitioner-institution to file this writ petition, though the earlier writ petition filed by it before the Jaipur Bench is pending, are not known to this Court, as the same have not been disclosed by the petitioner-institution. This may lead to the only conclusion that the petitioner-institution was apprehensive that he may not get a favorable order from this Court at Jaipur Bench.**

Now-a-days, the practice of bench hunting is often noticed, however, it is least expected from the institute providing education for the higher courses to the students to involve in such practice. It is a very sorry state of affairs and the conduct of the petitioner- institution is highly condemnable and contemptuous too. It is not expected from any person

approaching the Court to conceal the relevant facts and to make an attempt of mislead the Court".

The words, "**This may lead to the only conclusion that the petitioner-institution was apprehensive that he may not get a favorable order from this Court at Jaipur Bench**," shows that the reliefs prayed from both courts are similar.

It is a question, therefore, whether the petitioner in this case also prays for the same relief in C. A. Writ 377/2023 and in this case (for it is the position of the 05th respondent, that, another writ application C. A. Writ 308/2023 was withdrawn) Although this Court will not consider the merits of the petitioner's application, which was stated in this Order at the very outset, for this purpose, this Court has to compare the reliefs prayed in C. A. Writ 377/2023 and in this case. However, C. A. Writ 377/2023 or a certified copy of it are not before this Court. But as mentioned at another place in this Order, the petitioner makes the present application in regard to an order made by the learned Magistrate on 01.12.2023 and the number of the case C. A. Writ 377/2023 itself shows that at the time that application was made the said order dated 01.12.2023 has not come into existence.

The next case cited by the 05th respondent is **Union of India and others vs. Cipla Limited 2017**.

Here the 05th respondents says, "The Supreme Court laid down a functional test" to be adopted for forum shopping. **The "functional test" laid down by the Supreme Court was to determine whether a litigant is genuinely seeking justice or engaging in manipulative tactics through forum shopping."**

This is what this Court also said above in relation to the previous case Dhanwantri Institute of Medical Science vs. The State of Rajasthan 2022, that,

the Court must see that whether the reliefs are similar, for if not there could be a genuine reason for the petitioner to file more than one case.

Writing for the Supreme Court of India Madan B. Lokur J., said,

> "157. The decisions referred to clearly lay down the principle that the Court is required to adopt a functional test vis-à-vis the litigation and the litigant. **What has to be seen is whether there any functional similarity in the proceedings between one Court and another or whether there is some sort of subterfuge on the part of a litigant. It is this functional test that will determine whether a litigant is indulging in forum shopping or not.**
>
> 158. Keeping all these examples in mind with several other nuances and also keeping the functional test in mind, we have examined the relief claimed by Cipla in the different High Courts and find that they have no substantive connection whatsoever with the relief claimed in the Allahabad High Court".

The Supreme Court of India also said,

> "167. **The proceedings in the Allahabad High Court were initiated as a result of a show cause notice issued to Cipla. No similar show cause notice and no similar factual circumstances existed in any of the other High Courts in which Cipla had initiated proceedings. It cannot, therefore, be said that Cipla had indulged in forum shopping in any manner whatsoever."**

This confirms what this Court said above, that, if reliefs prayed are not similar it prima facie shows that before punishing the petitioner for Bench Hunting and Forum Shopping the Court must consider the matter in the petition.

The next case cited for the 05th respondent is **Rosmerta HSRP ventures Pvt Ltd vs. Government of NCT of Delhi and another 2017**.

In that case Delhi High Court said,

> "27. This Court is also of the, prima facie, view that the present petition lacks bonafides; any clarification as to the order passed by this Court on 07.10.2016 ought to have been obtained by filing an application in the disposed of appeal [Arb.A.(Comm) 33 of 2016]. **However, it appears that the endeavour of Rosmerta was to avoid approaching the concerned bench by way of a clarification and it does appear that this is a case of forum hunting."**

The Court has deprecated the failure of the petitioner to approach the bench which has made the order for clarification. **It is convenient to consider this question, whether on the basis of relief claimed by the petitioner in this case, not approaching the bench that made the order for clarification could be termed as forum hunting with the Preliminary Objection at paragraph 09 of the synopsis which says, "The petitioner is abusing the legal process and procedure when an alternate remedy is available to him".**

The next case cited for the 05th respondent is **Kamini Jaiswal vs. Union of India 2017**.

The 05th respondent says, that, the Supreme Court said that "unscrupulous elements" are always on the hunt to find a court or forum of their choice but are not permitted to do so by law.

The Supreme Court of India said,

> "14. **Shri Tushar Mehta, learned Additional Solicitor General, appearing on behalf of the Government of India, has submitted, that it was wholly improper to file two successive petitions in this Court**

seeking similar relief. No disclosure has been made in the second petition <u>about filing of the earlier petition for the same cause of action and reliefs</u>. Similar petitions with the same set of Advocates were filed and unfortunately the prayer was made on both days by Shri Dushyant Dave, learned senior counsel of this Court to list the matters, and such successive petitions identically worded could not have been filed in this Court. **It was clearly a case of forum hunting.** The fact that case of CJAR was already listed before a Bench presided by Hon'ble A.K. Sikri, J., it was highly improper to file another petition and seek its hearing by Court No.2 on the said very day i.e. 9.11.2017 at 12.45 p.m. There was no tearing urgency in the matter to do so. Unnecessarily, the Institution has been brought to be scandalized for no good cause. The petition and entire conduct aims at bringing disrepute to this Court without any rhyme or reason. The President of the Supreme Court Bar Association (SCBA), Mr. Suri, was also present. They have submitted that the SCBA has already placed its point of view while its case was heard by a Constitution Bench of this Court, in that they have opposed filing of such petitions. That petition brings disrepute to this Court, and it was a contemptuous act. Their stand was that, such petition ought not to have been preferred and, action be taken against the concerned individuals."

What the Supreme Court has said,

"Shri Tushar Mehta, learned Additional Solicitor General, appearing on behalf of the Government of India, has submitted, that it was wholly improper to file two successive petitions in this Court seeking similar relief. No disclosure has been made in the second petition about filing of the earlier petition for the same cause of action and reliefs. Similar petitions with the same set of Advocates were filed and unfortunately the prayer was made on both days by Shri Dushyant Dave, learned senior counsel of this Court to list the matters, and such successive petitions identically worded

could not have been filed in this Court. It was clearly a case of forum hunting,"

clearly shows that not only the reliefs claimed, but also the wording of the petitions too, were identical.

This too confirms what this Court said above, that, it was where the reliefs are similar the petitioners have been accused of forum shopping. The functional test laid down by the Supreme Court of India in Union of India and others vs. Cipla Limited, 2017, considered above shows, that, if it were not, the Court recognized the genuine right of a petitioner to institute more than one application.

The next case cited for the 05th respondent is **Chetak Construction Ltd. vs. Om Prakash 1988**.

The 05th respondent says, that, the Supreme Court emphasized that litigants should not have the freedom to choose the court for their convenience and that any attempt at forum shopping should be strongly discouraged.

The judgment of Dr. Anand J., in the Supreme Court said,

> "This judgment will dispose of the appeal arising out of S.L.P. (C) NO. 13190 of 1997 and an `order' made by a learned single Judge (Mr. Justice R.D. Vyas) of the High Court of Madhya Pradesh (Indore Bench) in Miscellaneous Appeal 143 of 1994 directing the appeal to "be referred to" this Court for deciding it "finally" since both matters arise out of the same order".

Hence both appeals arose out of the same order.

The Supreme Court also said,

"Indeed, no lawyer or litigant can be permitted to brow beat the court or malign the presiding officers with a view to get a favourable order. Judges shall not be able to perform their duties freely and fairly if such activities of justice would become a casualty and Rule of Law would receive a set back. The Judges are obliged to decide cases impartially and without any fear or favour. Lawyers and litigants cannot, be allowed to "terrorize" or "intimidate" judges with a view to "secure" orders which they want. This is basic and fundamental and no civilised system of administration of justice can permit it. We certainly, cannot approve of any attempt on the part of any litigant to go "forum shopping". A litigant cannot be permitted `choice' of the `forum' and every attempt at "forum shopping" must be crushed with a heavy hand.

At the same time, it is of utmost importance to remember that Judges must act as impartial referees and decide cases objectively, uninfluenced by any personal bias or prejudice. A Judge should not allow his judicial position to be compromised at any cost. This is essential for maintaining the integrity of the institution and public confidence in it. The credibility of this institution rests on the fairness and impartiality of the Judges at all levels. It is the principle of highest importance, for the proper administration of justice, that judicial powers must be exercised impartially and within the bounds of law. Public confidence in the judiciary rests on legitimacy of judicial process. Sources of legitimacy are in the impersonal application by the Judge of recognised objective principles which owe their existence to a system as distinguished from subjective moods, predilections, emotions and prejudices. Judges must always ensure that they do not allow the credibility of the institution to be eroded. We must always remember that justice must not only be done but it must also be seen to be done."

Therefore the consideration of the above 07 cases cited for the 05th respondent shows, that,

(a) The Courts held that there was forum shopping or hunting when the relief claimed from one Bench is same as that from another Bench,
(b) The Courts also held that there was forum shopping when a party institutes multiple litigation to harass or pressurize another party,
(c) The Supreme Court of India laid down a functional test to see whether, "…whether there any functional similarity in the proceedings between one Court and another or whether there is some sort of subterfuge on the part of a litigant. "**Subterfuge" is "deceit used in order to achieve one's goal.**"
(d) That in almost all cases, this allegation has received mature considerations in a judgment, because, as the functional test also shows, the Court has to balance between the right of a litigant to institute more than one case and whether the litigant has attempted to circumvent one court and to seek his remedy in another.

On the face of it, as merits are not considered by this Court at this stage, the reliefs claimed by the petitioner in C. A. Writ 377/2023 and in this case are not similar. One reason for this conclusion is that this case being in regard to an order made by the learned Magistrate on 01.12.2023 itself shows that C. A. Writ 377/2023 has been instituted prior to that.

The 05th respondent has cited two more Indian cases on forum shopping which are,

(i) Vikramjit Singh vs. State of Madya Pradesh on 10th September 1991

There is a judgment under the same reference dated 20th December 2018 too.

The former one is a brief order and the latter is an order which allows a writ petition. In both of them the part the 05th respondent reproduces, which he says was submitted in C. A. Writ 377/2023 are not to be found.

But according to the reproduction by the 05th respondent, it says,

> "…otherwise a party aggrieved by an order passed by one bench of the High Court would be tempted to attempt to get the matter reopened before another bench and there would be no end to such attempts".

Hence it is clear, that, what was deprecated by the court was the reopening of the same matter or question.

(ii) **Jagmohan Bahl vs. State (Nct of Delhi) decided on 18th December 2014**,

The 05th respondent has reproduced the following part,

> "Needless to say, unless such principle is adhered to, there is enormous possibility of forum-shopping which has no sanction in law and definitely, has no sanctity. If the same is allowed to prevail, it is likely to usher in anarchy, whim and caprice and in the ultimate eventuate shake the faith in the adjudicating system. This cannot be allowed to be encouraged. In this regard we may refer to the pronouncement in Chetak Construction Ltd. V. Om Prakash and others, wherein this Court has observed that a litigant cannot be permitted "choice" of the "forum" and every attempt at "forum-shopping" must be crushed with a heavy hand".

The words, "**Needless to say, unless such principle is adhered to,…"** shows that there was an earlier part too. To quote the passage in full, it reads,

> "13. On a perusal of the aforesaid authorities, it is clear to us that the learned Judge, who has declined to entertain the prayer for grant of bail,

if available, should hear the second bail application or the 6 (2002) 1 SCC 649 7 AIR 1992 SC 474 successive bail applications. It is in consonance with the principle of judicial decorum, discipline and propriety. Needless to say, unless such principle is adhered to, there is enormous possibility of forum-shopping which has no sanction in law and definitely, has no sanctity. If the same is allowed to prevail, it is likely to usher in anarchy, whim and caprice and in the ultimate eventuate shake the faith in the adjudicating system. This cannot be allowed to be encouraged. In this regard we may refer to the pronouncement in Chetak Construction Ltd. V. Om Prakash and others , wherein this Court has observed that a litigant cannot be permitted "choice" of the "forum" and every attempt at "forum-shopping" must be crushed with a heavy hand. In Tamilnad Mercantile Bank Shareholders Welfare Association V. S.C. Sekar and others, it has been observed that the superior courts of this country must discourage forum-shopping".

So it shows, that, there were two successive bail applications containing the same question for adjudication. This was what this Court said earlier, that, in considering whether there is forum shopping, this Court has to consider whether the reliefs prayed are similar or whether the petitioner has a different grievance in the subsequent application. As this Court already said whereas this needs mature considerations, at this stage, without going into merits, but looking at the relief prayed, it is the decision of this Court that there is no Bench hunting or forum shopping attributable to the petitioner.

(d) Not making necessary parties:-

Then there is a Preliminary Objection, that, the petitioner has not named necessary parties and breached the Rules of Natural Justice.

The history of litigation in connection with the present question is given in the synopsis filed for the individuals represented by Mr. Sanjeewa Jayawardane P.C.

Accordingly, the initial Fundamental Rights application has been filed by the individuals named in that synopsis as several inter religious leaders; which bears the number S. C. F. R. 141/2023 and the Attorney General has given an undertaking, that, the police will conduct investigations in terms of the International Convention on Civil and Political Rights Act, Prevention of Money Laundering Act and the Penal Code.

Thereafter the present petitioner has filed the fundamental rights application S. C. F. R. 144/2023. One of the petitioners in S. C. F. R. 141/2023 has then intervened in S. C. F. R. 144/2023. It is said, that, when both cases came up before the Supreme Court on 27th October 2023, Mr. Jayawardane P.C. got it recorded, that, "all necessary steps should be taken and full force of the law applied on the return of the 14th respondent". Those two cases are to be mentioned again on 14th March 2024.

Thereafter the present petitioner has filed writ application No. 308/2023 without making the petitioners in S. C. F. R. 141/2023 parties. Whereas the said petitioners made an application to intervene, the present petitioner had withdrawn writ application 308/2023.

Thereafter the present petitioner has filed writ application No. 377/2023 making (it appears some of the inter religious leaders) 06th to 08th respondents.

The synopsis filed by Mr. Sanjeewa Jayawardane P.C. says that in writ application 377/2023, the prayer (D) was,

"Grant a mandate in the nature of a writ of certiorari quashing the proceedings in Magistrate Court of Fort case bearing No. MC/B/25599/2023, impugned in the present application".

He also submits, that, the prayer (C) in the present application are identical and or substantially similar. The prayer (C) of the present application reads,

"Grant a mandate in the nature of a writ of certiorari quashing the proceedings dated 01.12.2023 in Magistrate's Court of Fort case bearing No. MC/B/25599/2023 impugned in the present application; and or in so far as it relates to the reliefs prayed for in this application by the petitioner".

Hence it appears, that, the prayer (C) of the present case is directly concerned with an order made by the learned Magistrate on 01.12.2023, which was not in existence when Writ 377/2023 was instituted. Therefore, it appears prima facie, that, it can be that the petitioner is seeking a different relief, although connected with the same case, in this application, for which a cause of action was not accrued to him on the date he filed Writ 377/2023.

Since the main relief the petitioner is claiming before this Court being the quashing of an order made by the learned Magistrate on 01.12.2023, it is pertinent to observe, that, the synopsis filed by the petitioner states at paragraphs 13 and 14 above,

"(13) The learned Senior State Counsel similarly took up the objection where he challenged that necessary parties have not made party to this application.

(14) Answering the above objection on behalf of the petitioner it is respectfully submitted that this application of the petitioner is matter seeking Your Lordship's to Judicial Review the said order dated 01st

December 2023, thus this is an application seeking for a writ of certiorari and writ of procedendo where the petitioner has made all necessary persons a party to this application".

Therefore it appears that there is a basis for the petitioner to make respondents in so far as the impugned order dated 01.12.2023 is concerned. The individuals represented by Mr. Jayawardane P.C. have been informed by this Court that they can file papers to intervene if they so desire. **The basis for intervention itself, if allowed by the Court, is that the intervenient was a necessary party which has not been made a party in the petition. Therefore it does not seem to this Court, that, non making of those parties respondents is a reason to dismiss the petition in limine.**

(e) Suppression of material facts:-

It is submitted in the synopsis of the 05th respondent, that, the petitioner has from the outset suppressed and or misrepresented material facts, among other things, stating from the very date of filing of the instant application and proof of delivery of the documents to the respondents.

In this regard, it must be observed, that, on 14th December as well as on 15th December the Court informed the learned President's Counsel for the petitioner to issue direct notices. The 05th respondent's position is that except him, the other respondents have not received them. Although this is raised in the synopsis under Suppression and Misrepresentation, in oral hearing this was referred to in connection with paragraph (F) of the Court of Appeal Notice No. 08 of 2023.

It reads,

"All new applications filed on extremely urgent basis will be accommodated at the discretion of the Hon. President of the Court of Appeal or the Hon. Presiding Judge of the relevant court and may be

mentioned/supported on a desired day (after 03 working days from the date of filing) only if such application is duly filed (with proof of dispatch of notice to the respondents) at least before 10 a.m. on the day prior to such desired date".

Therefore it was argued, that, it cannot be supported on Monday the 18th as the case was instituted on 14th and only 15th was a working day since 16th and 17th were the weekend. It was also argued, that, it could be supported only from 20th or thereafter. However this matter has not been supported yet. The Order on Preliminary Objections is on 22nd December and it has to be supported on a day after that. At present the 03 days referred to in paragraph (F) have lapsed. What is required is for the petitioner to file proof of dispatch of notice, not proof of service of notice, unless this Court directs the petitioner otherwise.

It is also submitted under the heading on Suppression, that, the petitioner has suppressed about his previous and or pending cases on the same matter.

But paragraph 29 of the petition says,

> "The petitioner has filed several applications in this Court, namely case Nos. C. A. Writ 308/2023 and 377/2023. The petitioner reserves his right and seek leave to file certified copies and or make an application for Your Lordship to call for the record of the said cases if and when necessary or as directed by Your Lordship".

Hence the petitioner has, as it appears to this Court at this stage, has not suppressed or misrepresented any material fact. However, as the Preliminary Objection on "Bench hunting and forum shopping," this too is a matter to be considered if the petition is supported with reference to attached documents.

This Court is respectfully of the view, that, the case cited, Fonseka vs. Lt. General Jagath Jayasuriya and five others, C. A. 679/2010 (DB) [2011] 2 SLR part 14,15 per Salam J., that,

> "In other words, so rigorous is the necessity for a full and truthful disclosure of all material facts that the Court would not go into the merits of the application, but will dismiss it without further examination,"

is too strict a consideration at this stage in which the petitioner has not yet commenced supporting.

On the other hand, no one can say that the petitioner has not disclosed about other cases either concluded or pending, material to this application.

(f) Abusing legal process when alternative legal remedy is available:-

It was said above, that,

> "It is convenient to consider this question, whether on the basis of relief claimed by the petitioner in this case, not approaching the bench that made the order for clarification could be termed as forum hunting with the Preliminary Objection at paragraph 09 of the synopsis which says, "The petitioner is abusing the legal process and procedure when an alternate remedy is available to him".

Under this heading on abuse of process, the 05th respondent contends, that, as per Article 3(4) of the ICCPR the proper forum to canvas bail and also to canvass the interim order of a learned Magistrate is the High Court. This itself shows, that, the petitioner cannot be required, as said in that case referred to in respect of forum shopping to approach the same bench that made the order for clarification.

Judicial Review is a relief a petitioner can seek when there is no right of appeal as well as when there is a right of appeal and in the latter case the question whether the petitioner can pass the threshold must be decided in connection with the merits of the application. As this Court does not consider merits at this juncture it cannot be decided that the petitioner has abused process.

(g) Prayer for relief that cannot be prayed for:-

Under this heading the 05th respondent submits that

> "**The petitioner has not demonstrated that the document he wished to quash by way of writ of certiorari is contrary to law.** In so much as the petitioner does not have the liberty to allege on a loosely based argument that a certain document is ultra vires or contrary to law. When such allegation is made to a court that offers discretionary remedies the threshold is high and the onus is on the petitioner to demonstrate with credibility that the Public functionaries conduct is subject to Judicial Review".

It appears to this Court, that, what is referred to in the above passage as the "document" is the order of the learned Magistrate dated 01.12.2023.

Now, the petitioner has come before this Court seeking to canvass the illegality, etc., of the said order, which are grounds for Judicial Review. The Court had not yet heard the petitioner in support of his application. At that stage too, according to the present practice, the respondents can oppose to the issuing of formal notice. The Court has not yet come to that stage. The 05th respondent insisted, that, he be heard before the petitioner and the petitioner was heard only in reply to Preliminary Objections. Hence how can the Court, at this stage, decide whether the order of the learned Magistrate is illegal, etc., or no? It would amount to deciding a question without a hearing.

It is appropriate to note, as I have done in certain other judgments too, that, on 04th June 2023, delivering the Keynote address at the National Law Conference held at Nuwara Eliya, His Lordship Justice Priyantha Jayawardane, Judge of the Supreme Court said,

> "Another contributing factor is the raising of preliminary objections on trivial matters resulting in the delay of disposing of cases. In this regard, it is worthy of mention that there is currently a new trend of going before the Court of Appeal and objecting to the issuing of notices on the Respondents. Sometimes even the Respondents file limited objections in support of their preliminary objections. Thereafter, both parties file written submissions on the matter.
>
> **I am at a loss to understand as to how anyone can object to the issuing of notices in such circumstances, because the Respondents are present in court having taken notice of the case.**
>
> The situation worsens if the Court of Appeal issues notices on the Respondents, as they then come to the Supreme Court challenging that order. Now see the predicament of the Petitioners and the courts. The courts are overburdened with writing judgments over frivolous objections and the litigants are saddled with unnecessarily protracted litigation. I recall when I was at the Attorney-General's Department, we were advised, not to take up technical objections. Even if the action was prescribed, we were advised not to take up the objection of prescription, unless, the facts of the case did not warrant adjudication by court.
>
> I think it is high time that we stop these new practices that are outside the law. In this regard I must mention that in developed countries, the courts award actual Costs. Further, if a lawyer files a frivolous case, the Costs should be paid by the respective lawyer."

Whereas this Court does not say that the Preliminary Objections raised by the 05th respondent are "trivial" or "frivolous" what His Lordship Justice Jayawardane said as reproduced above, with respect, must be given serious consideration by all concerned since certain Preliminary Objections cannot be considered, without a consideration of the merits.

(h) Not come with clean hands:-

Under this heading the 05th respondent submits, that, the bad faith of the petitioner is seen by suppressing or misrepresenting material facts and not naming necessary parties.

Both these allegations, regarding suppression and not naming necessary parties were already addressed. It was decided, that, there is no suppression of material facts, in any event at this stage and Courts allowing intervention applications itself showing that sometimes not all parties are made respondents (the petitioner's position was that as far as the order dated 01.12.2023 is concerned he had made all necessary parties) it is not a reason to dismiss the application in limine.

Hence there is no bad faith established on the petitioner.

The other thing mentioned under this heading is that the petitioner left the country on the day before facts were reported to Court and absconded for over 03 months. This has to be considered if this Court go into consider the merits of the petitioner's application only.

(i) The application is futile or functus:-

It is submitted, that, although the petitioner prays to stay the order of the learned Magistrate dated 01.12.2023 that order had run its course on 13.12.2023. The petitioner has instituted this case on 14.12.2023.

The question as to whether the order dated 01.12.2023 ran its course or whether the subsequent orders are based on that order must also be considered only if the Court considers the merits of the application.

(j) Slept on his rights:-

Comes connected to the above Preliminary Objection that the petitioner slept on his rights for almost two weeks. While two weeks is not a long period relatively; as the petitioner is presently under remand custody he cannot be expected to file any application just after the commencement of the custody period. Hence this Preliminary Objection has no merit.

(k) The investigation into money laundering:-

It is submitted under this heading, that,

> "The Senior State Counsel on behalf of the respondent (05th respondent) informed Court that despite the B reports filed by the Criminal Investigations Department indicating that a vast sum of Rupees Twelve Billion Two Hundred and Sixty Million (Rs. 12,260,000,000) had been transacted through the Bank Accounts of the petitioner and his wife (only the account details of two Banks had been received after many banks were requested) and commencing an investigation into Money Laundering the investigation had been laid by without any acceptable reason given and without even obtaining a specific statement in this regard from the petitioner".

It was already said in this Order, that, according to the synopsis filed by Mr. Sanjeewa Jayawardane P.C., that, the Attorney General has given an undertaking to the Supreme Court in S. C. F. R. 141/2023, that, the police will conduct investigations on Prevention of Money Laundering Act.

It is also submitted under this heading, that, the Illegal Assets Investigation Division of the Criminal Investigations Department had failed to report to the 05th respondent sufficient details on the status and or findings of the Money Laundering Investigation to date and no acceptable reason has been communicated for laying by the said case.

This Court notes, section 393 of the Code of Criminal Procedure, which says,

"…

(2) The Attorney-General shall give advice, whether on application or on his own initiative to State Departments, public officers, officers of the police and officers in corporations in any criminal matter of importance or difficulty.

(3) The Attorney-General shall be entitled- to summon any officer of the State or of a corporation or of the Police to attend his office with any books or documents and there interview him for the purpose of-

(a) initiating or prosecuting any criminal proceeding or

(b) giving advice in any criminal matter of importance or difficulty :…"

(l) The petitioner is not a privileged suitor:-

This was referred to at the beginning of this Order and at another place.

Under this heading the 05th respondent has also referred to the order in C. A. Writ 377/2023 preventing the arrest of the petitioner on his arrival and 48

hour time period given to him to report to the Criminal Investigations Department.

Both these are orders made in that case by another Division of this Court, which this Court cannot question.

While this Court agreeing with the submission of the 05th respondent, that,

> "The petitioner should not be treated thus as a privileged suitor, but should be equally treated as any other citizen before the law", (paragraph 06(ii))

it is stated, that, under Article 12(1) of the Constitution,

> "12. (1) All persons are equal before the law and are entitled to the equal protection of the law;"

and "FREEDOM, EQUALITY, and JUSTICE,.." are the "intangible heritage that guarantees the dignity and well-being of succeeding generations of the People of SRI LANKA".

The Preamble and Article 12(1) of Sri Lankan Constitution read together is similar to the Equal Protection Clause in United State Constitution.

The Equal Protection Clause is part of the first section of the Fourteenth Amendment to the United States Constitution. The clause, which took effect in 1868, provides "**nor shall any State... deny to any person within its jurisdiction the equal protection of the laws.**"

In **REYNOLDS, JUDGE, ET AL. v. SIMS ET AL. 377 U.S. 533 (1964)** argued November 13, 1963. Decided June 15, 1964 the **Supreme Court of United States said,**

> "**Our answer is this: a denial of constitutionally protected rights demands judicial protection;** our oath and our office require no less of us. As stated in *Gomillion* v. *Lightfoot, supra:*
>
> > "When a State exercises power wholly within the domain of state interest, it is insulated from federal judicial review. But such insulation is not carried over when state power is used as an instrument for circumventing a federally protected right." 364 U. S., at 347.

In the synopsis filed by Mr. Jayawardane P.C., the submissions contained at paragraphs 08,09,10 and 11 refer to the merits of the application, which is not considered at this stage. He also brought to the notice of the Court about what he called "the very heinous nature of the actions of the petitioner" which cannot be considered at this stage because the Court does not go into the merits.

Out of other submissions in that synopsis, the abuse of process, suppression of material facts, necessary parties not before Court and invocation of alternative remedy and forum shopping have been considered above.

The rest of the allegations therein, viz., abuse of the jurisdiction of this Court, which is a reference to availability or non availability of Judicial Review in regard to the Criminal Justice System, the futility of this application and

prayers in the petition being misconceived in law could be considered only with the merits.

In summary the decision of this Court is that there was no irregularity in the proceedings of this case so far taken in terms of Notice No. 08 of 2023 or any other rule and on the basis of what is before this Court at this stage there is no cause to hold that there was Bench Hunting or Forum Shopping.

Hence overruling the Preliminary Objections subject to what was said in regard to certain of them, that, they need mature consideration, but not at this stage, which is even prior to the threshold stage of the petitioner supporting his application for the issuing of formal notice, this Court wishes to refer to the judgment in the case of **Hattuwan Pedige Sugath Karunarathne vs. The Attorney General SC Appeal 32/2020 decided on 20.10.2020**, in which **Buwaneka Aluvihare P. C. J.**, referring to a judgment of the Supreme Court of India said, that,

> "2. The Indian Supreme Court in the case of **Zahira Habibullah Sheikh and Others v. State of Gujarat [Appeal (crl.) 446-449 of 2004]** held that: **"Right from the inception of the judicial system it has been accepted that discovery, vindication and establishment of truth are the main purposes underlying existence of Courts of justice. The operating principles for a fair trial permeate the common law in both civil and criminal contexts. Application of these principles involve a delicate judicial balancing of competing interests in a criminal trial, the interests of the accused and the public."**

Hence this Court fixes this matter for support on the matter in the petition. The 05th respondent or any other respondent may file limited objections, in which event the petitioner may file limited counter objections.

In conclusion, it must be said, that whereas it is the decision of this Court, as dealt with at the initial part of this Order, that, this Court has the jurisdiction and authority regularly and legitimately bestowed on it, to hear and conclude this matter, the Hon. President of the Court of Appeal, if His Lordship so wishes, may add any other Judge of this Court either with me (for my principle and practice is not to decline to hear a case) or without me (because I have no special reason to hear this or any case).

Judge of the Court of Appeal.