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

In the matter of an application for a Writ of Certiorari in terms of Article 140 and 145 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. W.M. Mendis & Co. Ltd,
   No.390/5,
   Negombo Road,
   Welisara.

2. Anthony Randev Dinendra John
   No.01,
   Havelock Place,
   Colombo 05

CA/WRIT/704/2024

PETITIONERS

Vs.

1. I.M.S.Bandara Illangasinghe
   Hon. Additional Magistrate
   Magistrate's Court of Colombo,
   Colombo 12.

2. The Registrar
   Magistrate's Court of Colombo,
   Colombo 12.

3. Commissioner General of Inland Revenue,
   No 81,
   Sir Chiththampalam A. Gardiner Mawatha,
   Colombo 02.

4. The Attorney General
   Attorney General's Department
   Colombo 12.

5. K. Prasanna Kumarasiri De Silva
   No.56, Police Bungalow Road,
   Moragalla, Beruwala.

6. Arjun Joseph Aloysius
   Prince Alfred Tower,
   No.10,
   Alfred House Gardens,
   Colombo 03.

RESPONDENTS

Before: Sobhitha Rajakaruna J.

Mahen Gopallawa J.

Counsel: Razik Zarook, PC. with Chanakya Liyanage for the Petitioners.

Anoopa de Silva, DSG for the 1st to the 4th Respondents

Supported on: 08.11.2024

Decided on: 12.11.2024

Sobhitha Rajakaruna J.

The 3rd Respondent, Commissioner General of Inland Revenue ('Commissioner General') instituted proceedings in the Magistrate's Court of Colombo for recovery of tax in default against the 1st Petitioner Company under section 43(1) of the Value Added Tax Act No.14 of 2002 ('VAT Act'). According to the certificate dated 11.06.2020 filed by the Commissioner General, the 1st Petitioner Company has defaulted a sum of Rs.3,555,488,597/- in tax. Summons were issued against the Directors of the 1st Petitioner Company including the 2nd Petitioner who is also a Director of the said Company.

The learned Magistrate of Colombo delivering the Order dated 14.11.2023 decided that the 1st Petitioner Company is liable to pay the defaulted sum in tax as per the amended certificate dated 25.04.2023 marked 'P5'. The learned Magistrate has decided that the Directors of the 1st Petitioner Company are solely and severally liable to pay the said amount in default and if the Directors fail to settle the amount, a sentence of 6 months simple imprisonment will be imposed on the said Directors.

Among several reliefs sought by the Petitioners, the learned President's Counsel who appears for the Petitioners wishes to concentrate his submissions upon the relief in paragraph 'e' of the prayer of the Petition. As per such relief, the Petitioners seek a mandate in the nature of a writ of Certiorari to quash the order made on 16.10.2024 ('P12') by the 1st Respondent (learned Magistrate of Colombo), in refusing to enlarge the 2nd Petitioner on bail and suspending the proceedings before the said court. The primary argument of the Petitioners revolves around the fact that the learned Magistrate has imposed a jail term against the 2nd Petitioner not on an application filed directly under the relevant provisions of the Code of Criminal Procedure Act but, based on a certificate filed under the VAT Act. Therefore, the Petitioners contend that they have a right of appeal against the respective orders of the learned Magistrate despite such right of appeal not being expressly provided by a statute.

The Petitioners place reliance on the judgement of Buwaneka Aluwihare PC J. (with the concurrence of Nalin Perera J. and Prasanna S. Jayawardena PC J.) in ***M. Kanishka Gunawardena v. H.K. Sumanasena and Others SC Appeal No.201/2014 decided on 15.03.2018***. It is a case where the Magistrate has imposed a conviction under the provisions of the Sri Lanka Bureau of Foreign Employment Act No.21 of 1985 ('SLBFE Act'). The Attorney General in the said case has contended that the accused Appellant has no right of appeal and there can be no inherent right of appeal from any judgement for determination unless an appeal is expressly provided for by the law itself. The Supreme Court in the said case has answered the following questions of law in the affirmative;

1. Whether the accused Appellant was entitled to file an appeal against the conviction?

2. In instances where there is no right of appeal from a conviction, whether the court is required to consider the existence of exceptional circumstances as a threshold issue in reviewing a judgment of an original court?

Aluwihare J. when answering the above issues of law has held that violation of section 64(a) of the SLBFE Act can be visited with penal sanctions and thus falls within the scope of "criminal offences under any written law" referred to in section 4(2) of the International Covenant on Civil and Political Rights Act No.56 of 2007 ('ICCPR Act'). He has further observed that the SLBFE Act does not carry a specific provision ousting the right of appeal against a conviction and a sentence imposed for a violation under the Act.

The learned Deputy Solicitor General ('DSG') who appears for the 1st to 4th Respondents, in the instant Application, raises preliminary objections on the a.) availability of an alternative remedy, b.) locus standi and c.) suppression of material facts. She argues that the question raised by the Petitioners has been resolved already by the Court of Appeal in the case of ***Muthumadinage Ranjit Perera v. H.S. Fonseka, Assistant Commissioner, Department of Cooperative Development, CA(PHC) APN 170/2010 decided on 21.10.2021***. The Court of Appeal in the said case has decided that section 4(2) of the ICCPR Act is based on Article 41 of the Covenant and accordingly, the appealable right of a person is guaranteed by the convention subjected to the law of the land in the particular country. The Court of Appeal has not drawn its attention to the above Supreme Court judgement in ***M. Kanishka Gunawardena*** when arriving at the final determination.

This Court is aware that the Superior Courts in several cases including ***Martin v. Wijewardena (1989) 2 Sri L.R 409, Bakmeewena v. Raja (1989) 1 Sri L.R 231, Gamhewa v. Magi Nona (1989) 2 Sri L.R 250, Gunaratne v. Alan Thambinayagam and Others (1993) 2 Sri L.R 355, Malegoda v. Joachim (1997) 1 Sri L.R 88*** have decided that a right of appeal is statutory and must be expressly created as well as granted by a statute. Anyhow, it is noted that the Supreme Court in the said ***M. Kanishka Gunawardena*** case has focused on the right of appeal against a 'conviction/sentence'. The question raised in the instant Application is whether the right of appeal is available against a conviction/sentence imposed under a specific law enacted for the imposition and collection of value added tax on goods and services supplied in Sri Lanka or imported into Sri Lanka.

Based on such circumstances, this court takes the view that the question that needs to be resolved in the instant Application is whether the Petitioners of the instant Application have the right of appeal against the conviction and a sentence imposed for a violation under the VAT Act although such right of appeal has not been secured by way of a written law. Therefore, such a question of law has to be fully assayed and evaluated at the merit stage. The right of appeal mentioned here should not be viewed as an appeal per se but rather as a request to revise the order's accuracy, legality, or appropriateness issued by the original court while exercising its revisory powers. Thus, formal notice of the instant Application should be issued on the Respondents. The Respondents may pursue with their preliminary objections at the final hearing of the instant Application. However, this Court is reluctant to consider the relief sought to challenge the validity of the amended certificate of Tax in default marked 'P5' due to lack of promptitude of the Petitioners in invoking writ jurisdiction to get the said certificate quashed.

Having considered the issuance of notice the question arises whether this Court can grant an interim relief that the Petitioners have sought. An interim order is prayed for by the Petitioners staying the proceedings before the Magistrate's Court of Colombo and the orders of the 1st Respondent dated 14.11.2023 and 14.10.2024 (marked 'P7' and 'P7a'). The Petitioners seek a further interim order to be operative until the final determination of the instant Application releasing the 2nd Petitioner on bail on conditions deemed by this Court. The 1st Respondent has imposed a sentence by his order dated 14.10.2024 marked 'P10'.

This Court in ***Warnakulasuriya Wijesinghe Chathura Manaram Perera Gunathilake v. Officer in Charge, Public Complaints Division, CID CA/WRIT/518/2024 decided on 09.08.2024*** has decided that;

> "The judicial process concerning judicial review must be approached with responsibility and should not be misused by filing Review Applications without merit, thereby transforming the Review Court into a de facto Bail Court. Judicial review, especially in respect to prevent arrest or to quash judicial orders, should only be sought where there is a clear and blatant error in the discretion of the decision-making process or when the authorities have acted beyond their jurisdiction."

A purported petition of appeal bearing Case No. HCM CA 150/23 has been lodged in the High Court of Colombo by the 1st Petitioner against the aforesaid order dated 14.11.2023 issued by the learned Magistrate. Similarly, another purported petition of appeal bearing case No. 40045/08/20 has been lodged by the 2nd Petitioner and two others in the High Court against the order dated 14.10.2024 marked 'P10'. It is observed that the Petitioners have not taken adequate steps to obtain an interim order from the High Court, suspending the proceedings of the Magistrate's Court case. The learned Magistrate has observed in the said order marked 'P10' that an adequate period of time had been granted to the 1st Petitioner to obtain an interim order from the High Court, however, the Petitioners have failed to do so. Moreover, it is important to note that no interim order suspending the proceedings of the Magistrate's Court has been prayed for in both the above-purported petitions of appeal.

The alleged primary basis for seeking an interim relief by the Petitioners is that the learned Magistrate has not suspended the proceedings considering the appeal filed in the High Court. Now I need to consider whether the mere filing of a petition of appeal tends to suspend the proceedings of the original court or the court of first instance automatically. There is a slew of cases including the case of ***Nandawathie and Another v. Mahindasena [2009] 2 Sri L.R 218*** which reiterate the principle that the mere filing of an appeal does not ipso facto stay the execution of the judgment or order unless the law provides otherwise. Even in the Civil Procedure Code only sections 761 and 763 deal with a stay of execution of orders, judgments, or decrees. The Supreme Court Rules dealing with appeals, also do not provide for an automatic stay of execution. However, the Supreme Court Rules provide for stay orders in applications such as revision applications and leave to appeal applications.

In light of the above, I take the view that the failure of the Petitioners to seek and obtain a stay order from the High Court should not be a ground to invoke the inherent jurisdiction of this Court to get the proceedings of the relevant Magistrate's Court stayed or to release the 2nd Petitioner on bail. It is merely because such an application will amount to abuse of the due process of the Court. Moreover, the learned Magistrate has not erred in law by not suspending the proceedings merely considering the filling of a purported appeal in the High Court. However, due to the reasons given above the decisions of the learned Magistrate on

the question whether the right of appeal is available for Petitioners should be assayed and evaluated at the merit stage of this Case.

I am not inclined to intervene with the powers of the Magistrate Court and the High Court in granting bail as it will eventually affect the due process of Court. Section 19(2) of the Bail Act No. 30 of 1997 provides that when an appeal has been preferred from a conviction by a Magistrate's Court the court from which the appeal is preferred may having taken into consideration the gravity of the offense and the antecedents of the accused, refuse to release the appellant on bail.

In the circumstances, I proceed to refuse the application for interim orders as prayed for in the prayer of the Petition of the Petitioners. Nevertheless, this order refusing the interim relief should not be an impediment for the Hon. Judges of the High Court to entertain and decide the purported petitions of appeal currently filed by the Petitioners or any such future applications.

Judge of the Court of Appeal

Mahen Gopallawa J.

I agree.

Judge of the Court of Appeal