

SAMARAWEERA AND ANOTHER
V.
SUNPOWER SYSTEMS (PVT) LTD., AND ANOTHER.

COURT OF APPEAL.
DR. GUNAWARDENA, J. AND
DE SILVA, J.
REVISION APPLICATION
NO. 101/96
D.C. COLOMBO CASE NO. 4523/SPL.
20 AND 22 FEBRUARY, 1996.

Company Law- Memorandum of Understanding not signed by all parties to the Consortium- The effect of authorisation by resolution - Holding Company distinct and separate entity from its subsidiary company- Interpretation Ordinance, section 23 - Whether a declaration can be asked for, against the Director General of Telecommunications when acting as empowered under Sri Lanka Telecommunications Act, - Interpretation Ordinance, section 24- Whether an injunction would lie against a Minister or a public officer?

In response to an advertisement by the Ministry of Posts and Telecommunications, calling for proposals leading to the issue of wireless-local loop licences, the respondents have submitted a proposal along with NTTI Corporation of Japan. The said Ministry required that such proposal should be in conformity with the requirements of the Final Franchise Document. The respondents' proposals had been disqualified, for alleged non-conformity with the requirements, specified in Clause 2.3. (1) of the Final Franchise Document which stipulated that, "The applicant may be a single company or a consortium of companies". The Memorandum of Understanding (M.O.U.) submitted along with the said proposal was signed only by Directors of NTTI Corporation and Sun Power System (Pvt) Ltd. The MOU was entered into on an exclusive basis. A resolution had been passed by the Maharajah Organisation Ltd., authorising the Sun Power System (Pvt) Ltd., to submit the said proposal.

Held :

(1) That Maharajah Organisation Ltd., has not signed the said M.O.U. and therefore is not a party to the said M.O.U. Hence the M.O.U. is not "legally enforceable" against Maharajah Organisation Ltd., as required under the said Final Franchise Document.

(2) That the resolution passed by the Maharajah Organisation Ltd., did not have the legal effect of making Maharajah Organisation Ltd., a member of the said Consortium.

(3) A holding Company is a distinct and separate entity, from its subsidiary companies, and therefore a holding company is not liable for any obligations incurred by the subsidiary companies.

(4) In view of the provisions of section 24 of the Interpretation Ordinance the respondents have no right to ask for a declaration against the Director-General of Telecommunications, as he was acting, as empowered by the Sri Lanka Telecommunications Act.

(5) It is apparent that the petitioners have acted in their official capacity, in calling for proposals for manifestly a public service. Hence the provisions of section 24 of the Interpretation Ordinance would apply, and no injunction would lie in the circumstances.

APPLICATION for Revision of the order of the District Court.

A.S.M. Perera, Additional Solicitor-General with Chanaka Perera S.C. for the Defendant-Petitioners.

Romesh de Silva, P.C. with Geethaka Gunawardena and Hiran de Alwis for Plaintiff-Respondents.

Cur.adv.vult.

22 February, 1996.

DR. GUNAWARDENA, J.

This is an application to revise the order of the learned District Judge dated 06.02.96, wherein he has extended an enjoining order already granted, to be effective till 20th February. This order had been further extended, to be effective till 22nd February, as the application for interim injunction was fixed for that day, with the consent of the parties.

In response to an advertisement by the Ministry of Posts and Telecommunications, calling for proposals leading to the issue of wireless local loop licences, the respondents have submitted a proposal along with NTTI Corporation of Japan, on 30.11.95. The said Ministry required that such proposal should be in conformity with the require-

shows that the Maharajah Organisation Ltd. was an active partner, in the consortium that submitted the said proposal.

It is to be observed that Maharajah Organisation Ltd. has not signed the said M.O.U. and therefore not a party to said M.O.U. Hence the M.O.U. would not be "legally enforceable" against Maharajah Organisation Ltd., as required under the said Franchise Document. The said resolution passed by the Maharajah Organisation Ltd., will also not have the legal effect of making Maharajah Organisation Ltd. a member of the said consortium. Furthermore the submission of the statement of annual turnover of S-Lon Lanka (Pvt.) Ltd. would not satisfy the requirements of clause 2.3. (i) of the said Franchise Document, as that subsidiary Company is a distinct and separate legal entity and not a partner of the said consortium which submitted the said proposal.

Thus on a consideration of the submissions made by the Counsel, we are of the view that, *prima facie*, it cannot be said that the Maharajah Organisation Ltd. is a partner in the consortium that submitted the said proposal to obtain a licence for Wireless Local Loop telephone system, in terms of clause 2.3. (i) of the said Franchise Documents. Therefore we are of the view that the finding of the learned District Judge that the Respondents have *prima facie* satisfied the requirements under the said clause 2.3. (i) of the said Franchise Document, is erroneous.

The Counsel for the petitioners pointed out that the Respondents in their plaint have prayed that a declaration be made, that the petitioners have no right in law to grant a licence on the basis that the respondents' proposal is disqualified, in terms of the said Final Franchise Document. The Counsel for the petitioners submitted that, it is not permissible in law to seek such a declaration from Court, in view of the provisions of section 23 of the Interpretation Ordinance. Section 23 of the Interpretation Ordinance states as follows :-

"Subject to the provisions of section 24, where a Court of original civil jurisdiction is empowered by any enactment, whether passed or made before or after the commencement of this Ordinance, to declare a right or status, such enactment shall not be construed to empower such Court to entertain or to enter decree or make

any order in any action for a declaration of a right or status upon any ground whatsoever, arising out of or in respect of or in derogation of any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under any written law."

He also submitted that, the decision that the Director of Telecommunications had made, that the said proposal of the Respondents was not in conformity with the said Franchise Document, is a decision empowered by law. He pointed out that section 17 (5) of the Sri Lanka Telecommunications Act No. 25 of 1991, stated as follows :-

17. (5) "Before recommending the grant of a licence, the Authority shall satisfy himself that the applicant is capable of operating the telecommunication system for which licence is being applied for".

The Counsel for the petitioners submitted that, requirements in the Franchise Document have been included by the Director-General of Telecommunications, who is the "Authority" referred to, in the said provision, in order to satisfy himself that, "the applicant is capable of operating the telecommunication system for which licence is being applied for. " Hence the Respondents have no right to ask for a declaration against the Director- General of Telecommunications as he was acting, as empowered by the said Act.

The Counsel for the Respondents submitted that, the provisions of the said section 23 is subject to the provisions of section 24 as stated therein, and that section 24 (5) states as follows :-

"The preceding provisions of this section shall not be deemed to affect the power of any Court to make an order declaratory of the rights of parties".

On a careful examination of the provisions of the said section 23, it is clear that the legal effect sought to be given is to prevent a Court from entertaining an action for declaration of a right, on any ground whatsoever in respect of an order or determination made by a person or tribunal, empowered by law, to make such order or determination.

This Court is of the view that, *prima facie*, the decision of the petitioners to disqualify the said proposal by the Respondents, appear to fall within the provisions of the said section 23.

The Counsel for the petitioners submitted that under section 24 of the Interpretation Ordinance no injunction would lie against a Minister of State or a public officer. He pointed out that according to paras 3 and 4 of the plaint, the Petitioners have been used in their official capacity, as averred therein. The calling for proposals leading to the issue of wireless local loop licences was clearly an act in their official capacity and for an official purpose. He submitted that therefore, the provisions of sections 24 would apply, and no injunction would lie in such a situation.

The Counsel for the Respondents submitted that the procedure followed by the Petitioners is not provided for by the law and therefore they were liable to be restrained by an injunction.

On a consideration of the facts and the circumstances in this case, it is apparent that the Petitioners have acted in their official capacity, in calling for proposals for manifestly a public service. In no way can they be said to have acted in their private capacity. Therefore, *prima facie*, it appears that they have acted in their official capacity as empowered by law. Hence an injunction would not lie in the circumstances.

In view of the reasons set out above we hereby suspend the enjoining order issued in this case on 6.2.1996 till the final determination of this revision application. We also make order that no further enjoining orders be made against the Petitioners in this case pending the final determination of this revision application. There will be no order for costs.

The application for interim injunction may be taken up for inquiry and every effort should be made to dispose of it expeditiously.

Objections of the Respondents on 02.04.96.

J.A.N. DE SILVA, J. – I agree.

Enjoining Order Suspended.