

**PERERA AND OTHERS**  
**v**  
**HON. TILAK MARAPONA, MINISTER OF TRANSPORT**

COURT OF APPEAL  
UDALAGAMA, J.  
SRIPAVAN, J.  
CA 477/2003  
JULY 11, 24, 28, 2003  
AUGUST 8, 2003

*Writ of Certiorari – Transferring of Shares of Bus Company – Quash extension of time granted to pay the initial payment – Is there a binding Agreement? Invitation to treat – payment through Letter of Credit not by Bank Draft – Is it a violation? Locus standi? Non-joinder of necessary parties – Fatal?*

The Consortium made a bid at the Colombo Stock Exchange for 39% of the Equity Capital in the 4-9th respondents Companies and had to pay 60% of the purchase price within 30 days of the date of bidding. The consortium requested the extension of time and was granted same.

Employees and shareholders of the 4th respondent Company sought to quash the extension of time granted by the respondents, restrain the respondents from transferring the shares, and to cancel the offer to sell 39% of the share equity.

**Held :**

- (i) The document relied upon by the petitioner, is only a request for proposals and it could not form a binding written agreement or an offer legally valid as it is manifestly only an invitation to the private sector to participate in the proposed project with no legally binding objection – it does not consist of a legally binding agreement but at most an invitation to treat.

- (ii) A letter of credit although not a Bank draft imposes on the issuing Bank an absolute and irrevocable obligation to pay and could be held to be an equivalent to payment in cash.
- “It is a false belief to think that a Bank draft is irrevocable, it can be stopped just like any ordinary cheque though immediately debited to the customer’s account.”
- (iii) The letter of credit was issued to the credit of the 3rd respondent representing the Government of Sri Lanka, and is a transaction between the 3rd respondent and the 10-12th respondents which could be rejected by the 3rd respondent – and no substantial prejudice is caused to the petitioners in accepting the letter of credit, submitted by the Consortium instead of a Bank Draft.
- (iv) Petitioner are not mere strangers or busy bodies but persons having interest to pursue this application.
- (v) The Cabinet of Ministers should have been made a party.

#### **APPLICATION for a writ of certiorari.**

#### **Cases referred to:**

1. *Hard Bottle Ltd., v National Westminster Bank Ltd.*, - 1978, QB 146.
2. *Torapore & Co, v Tractor Export Moscow and another* 1970 AIR (SC) 891
3. *Environmental Foundation Ltd., v Ratnasiri Wickremanayake* – 3 1996 South Asian Environmental Law Reporter 103
4. *R v. Paddington Valuation Officer* – 1956 1 WB 380
5. *Chandrasena v Dahanayaka* – 1985 2 Sri LR 151

*Ms Ruwana Rajapakse with Ms Shamila Daluwatte* for petitioners.

*L.C. Seneviratne P.C.*, with *V.K. Choksy* for 2nd and 3rd respondents.

*Srinath Perera P.C.*, for 4th respondent.

*Romesh de Silva P.C.*, with *Nihal Fernando* for 10–12 respondents.

*Uditha Egalahewa S.C.* for Attorney-General

*Cur.adv.vult*

September 3, 2003

**UDALAGAMA, J.**

The 1 and 2 petitioners admittedly employees and shareholders of the 4th respondent Company, the Colombo Metropolitan Bus Company Limited, by this application prays, *inter alia*, for a

Mandate in the nature of a *writ of certiorari* quashing the latest extension of time granted by the 1st respondent and/or 2nd respondent and/or 3rd respondent to the 10th to 12 respondents for the initial payment of the 39% of equity capital, a Mandate in the nature of writ of prohibition restraining the Government of Sri Lanka and the 1st- 3rd respondents from transferring any shares or the management to the 4th-9th respondents and also for a writ in the nature of *mandamus* directing the Government of Sri Lanka to cancel its offer to sell 39% of the share equity of the 4th-9th respondents to the 10th-12th respondents. 10

The Counsel for the petitioners on 28.07.2003 informed court that she was not pursuing the relief sought in paragraph (e) of the prayer to the petition as admittedly the petitioners had received the share certificates (vide notice 2R3).

The crux of the case for the petitioners appears to be that the consortium which made a bid at the Colombo Stock Exchange for 39% of equity capital in the 4th-9th respondent companies also referred to as the cluster bus companies were bound in law to pay 60% of the purchase price within 30 days of the date of bidding. The petitioners further state that the prospective bidders were bound by the conditions set out between the Government of Sri Lanka in the draft of the shareholders agreement and draft management agreement appearing in document P6. 20

Evidently the purported shareholders agreement and draft management agreement are significantly unsigned. Hence P6 by itself is clearly a request of a proposal published by the 2nd respondent.

Most significantly it is to be noted that the Cabinet of Ministers who represent the Government of Sri Lanka have not been made parties although the relief prayed for include the issue of a writ against the Government of Sri Lanka. 30

Having considered the oral submissions made on behalf of the parties and the subsequent written submissions filed, firstly this court is of the view that document P6 which is basically and evidently only a request for proposals could not form a binding written agreement or an offer legally valid as it is manifestly only an invitation to the private sector to participate in the proposed project with no legally binding obligation. P6 is merely a guide to make propos- 40

als for the acquisition of shares in the proposed management of the 4th-9th respondent Companies. Of importance to this application is part II of P6 which clearly sets out the time frame and selection process with an absolute discretion given to the 2nd respondent "PERC" to amend the time frame or the selection process and if necessary to amend the draft shareholders agreement and draft management agreement. By reason of the above, this court is also of the view as stated above that P6 does not consist of a legally binding agreement but at most an invitation to treat. The above conclusion is irresistible and inexorable from a plain reading of P6. Secondly para 4 of part II of P6 containing the draft shareholders agreement and management agreement which only request investors to make proposals and provide any amendments, also indicates that no determination or finality had been arrived at. In such circumstances this court would not issue a writ in the nature of *Certiorari* to quash a decision or a determination which is obviously not final.

Apart from the above it is apparent that only the 10th-12th respondents as a consortium had placed a bid. There appears to be no other bidders. The 10th-12th respondents had by making the only bid admittedly (vide X2) paid, the consideration for shares of the 4-9 respondents (cluster bus company). The payment referred to above in any event formed only one part of the invitation to bid. The handing over of the management of the Companies and the execution of the shareholders and management agreement are also integral parts of the transaction which is admittedly ought to be finalized. In the above context this court is unable to determine that P6 is in fact as stated above a binding obligation entitling the parties for relief.

The direction for the payment of 60% of the purchase price by the investors also appears to have been made by the Cabinet of Ministers consequent to the only bid made on 31.10.2002 having also approved the aforesaid bid. That the same Cabinet of Ministers permitted the only bid made on 31.10.2002 having also approved the aforesaid bid. That the same Cabinet of Ministers permitted the only successful bidder to pay the purchase price on or before 13.02.2003 is also apparent. The only bidders being the 10-12 respondents had by a letter of credit dated 07.02.2003 which

date is prior to 13.02.2003 referred to above to its Bank in the United Kingdom transmitted the total consideration for the purchase of the aforesaid 60% of the allotted shares to the Bank of Ceylon vide document X2 referred to above. It is also evident from X2 that the beneficiary is the 3rd respondent, the Secretary to the Treasury. This letter of credit importantly is valid till 30.09.2003.

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It is the view of this court that a letter of credit although not a bank draft imposes on the issuing bank an absolute and irrevocable obligation to pay and could be held to be an equivalent to payment in cash. (S.M. Gupta, "The Banking Law in Theory and Practice" 2nd Ed. p.251).

Letter of credit as held in *Hard Bottle Ltd. v National Westminster Bank Ltd.*<sup>(1)</sup> "is the life blood of international Commerce"

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In the Indian case *Torapore Co. v Tractor Export Moscow & another*,<sup>(2)</sup> "a letter of credit was held to impose upon a Banker an absolute obligation to pay irrespective of any dispute that may arise between the parties".

The court also held in the same case a letter of credit is "independent of and unqualified by the contract of sale of underline transactions. The autonomy of the letter of credit is entitled to protection".

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In any event, the letter of credit X2 issued to the credit of the 3rd respondent representing the Government of Sri Lanka is a transaction between the 3rd respondent and the 10th-12th respondents which could be rejected by the 3rd respondent representing the Government of Sri Lanka and as such is not a document that this court could reject or invalidate.

The submission of the learned Counsel for the petitioners that a letter of credit is invalid as same could be liable to default unlike a bank draft is untenable as even a bank draft is described as a cheque drawn by a clearing bank on itself. But as seen in the definition found in X3 filed by the petitioners in respect of the provisions of the Bank Act of 1979 and appearing in "the Economist" publication, "it is a false belief to think that a bank draft is irrevocable. It can be stopped just like any ordinary cheque even though immediately debited to the customer's account.

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On the facts as stated above this court is of the view that the 10th-12th respondents admittedly been the only bidders and payments made even though by a letter of credit had paid the consideration due by placing the said amount due to the credit of the Bank of Ceylon and thereby securing the funds to the 3rd respondent on behalf of the Government of Sri Lanka. In any event, no substantial prejudice has been caused to the petitioners in accepting the letter of credit, submitted by the consortium instead of a bank draft. The petitioners are not parties to a transaction between the consortium and the Cabinet of Ministers. In the circumstances, this court is of the view that it ought not interfere in the matter in the interest of administrative justice. 120

Finally in respect of the contentious issue of Locus Standi of the petitioners, the court is of the view that considering the test of Locus Standi it is necessary in an application such as this as stated by Wade on Administrative Law, 8th Edn. P.680, the test to be "as to whether the applicant can show a strong enough case on the merits judged in relation to his own concern with it". 130

Considering the merits of the complaint itself this court is of the view that the interest of the two petitioners do appear to be affected in that the relief as prayed for in prayer "e" to the petition for the issue of share certificate had been admittedly complied with. The issue of shares subsequent to filing of this application satisfied their interest.

In any event as held by Dr. Ranaraja, J. in *Environmental Foundation Ltd. v Ratnasiri Wickremanayake*<sup>(3)</sup> the petitioners "as a party genuinely interested in the matter complained of, has the locus standi to make the application. 140

The petitioners are admittedly citizens of this country and admittedly shareholders of the 4th respondent company and also appear to be users of the public bus service. They are also persons connected to the Court of Appeal case No. 1406/2002 which case appears to have been settled vide document P9.

Lord Denning, M.R. in *R v Paddington Valuation Officer*<sup>(4)</sup> observed as follows: "Nevertheless the court would not listen to a mere busybody who was interfering in things which did not concern him but will listen to anyone whose interests are affected". 150

This court is of the view that the petitioners are not mere strangers or “busybodies” but persons having interest and that they deserve to receive this court’s discretion to pursue their application although for other reasons as stated above they are not entitled to relief as prayed for.

In all the attendant circumstances this court would refuse to issue a writ in the nature of *Certiorari* to quash a purported extension of time granted for the reasons as stated above in addition to the absence of any specific document forthcoming from the petitioners to confirm granting of such extension and also for the reason that a letter of credit as described earlier had been issued within time specified by the Cabinet of Ministers. The relief prayed for an issue of a Writ of Prohibition restraining the Government of Sri Lanka and the 1st-3rd respondents from transferring shares to the 10th-12th respondents or the grant of the management of the Company is also refused for the aforesaid reasons, in addition to the fatal omission of not making the Cabinet of Ministers representing the Government of Sri Lanka a party.

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This court is also prevented from issuing a Writ in the nature of *Mandamus* to the Government of Sri Lanka to cancel the offer to sell 39% of the shares to 4th–9th respondent Company for the same reasons as stated above and additionally as admitted to by the petitioners themselves that the sale of shares had been already accomplished by the Colombo Stock Exchange.

A writ of *mandamus* would not lie to undo a thing which has already been done. (Vide *Chandrasena v Dahanayaka*..<sup>(5)</sup>)

Accordingly this application is dismissed, however without costs.

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**SRIPAVAN, J.** – I agree.

*Application dismissed.*