

**DISSANAYAKE**

vs.

**SAMURDHI AUTHORITY OF SRI LANKA AND ANOTHER**

COURT OF APPEAL

SRIPAVAN J.

DE ABREW J.,

CA WRIT APPLICATION 1939/2004

FEBRUARY 15, 2005

MAY 18, 23, 2005

*Writ of Certiorari - Code of Criminal Procedure - Sections 115, 115(1), 116(1), 136(1)(d) - Institution of actions - Establishment Code - Cap. XLVIII - Section 27:10 - Interdiction of Public Officer only after institution of Criminal proceedings - Filing of 'B' Report - does it amount to an institution ?*

The Petitioner sought to quash the decision of the Respondent to interdict him and to compel the Respondent to restore him to his earlier post. The Petitioner was arrested by the Bribery Commission officials on an allegation of accepting a bribe on 10.02.2004, and was produced before the Magistrate's Court on a 'B' Report. The Respondents interdicted the Petitioner.

The Petitioner contends that he could be interdicted only after institution of proceedings and filing of a 'B' Report does not amount to an institution of proceedings in the Magistrate's Court.

**HELD:**

- (i) The OIC of the Open Investigating Branch of the Bribery Commission filed a Report setting out the fact that the Petitioner had committed an offence under the Bribery Act.
- (ii) Filing of a Report setting out the facts that a suspect has committed an offence does not amount to an institution of proceedings in the Magistrate's Court. Equating a Report under Section 116(1) to an institution of criminal proceedings is wrong.

- (iii) In order to interdict a State officer under Section 27:10 Establishment Code Cap. XLVIII Criminal proceedings must first be instituted against him - it is wrong to interdict a State Officer under the above Section without instituting criminal proceedings.

**APPLICATION** for Writs of Certiorari/Mandamus.

**Cases referred to:**

1. *Tunnaya vs. OIC Galewela* 1993 1 Sri LR 61

*S. A. D. S. Suraweera* for Petitioner.

*Ms. Uresha de Silva, S. C.*, for Respondents.

**SISIRA DE ABREW J.**

This is an application for writs of certiorari and mandamus to quash the decision of the second respondent interdicting the petitioner and to compel the second respondent to restore the petitioner to his earlier post. The petitioner, an employee of Sri Lanka Samurdhi Authority, was appointed as a Manager of Samurdhi Authority with effect from nineteenth of June 2002. He was attached to the Samurdhi Society of Kakirawa division of Kakirawa Divisional Secretariat at the time of his interdiction. The petitioner claims that he was authorized by the Director General of Samurdhi, the second respondent to invest money belonging to the Samurdhi General Society and Samurdhi Bank societies in various banks including Pramuka Bank. The petitioner, having obtained the prior approval of the executive committee of the Samurdhi General Society of Kakirawa, deposited an amount less than 3 million of Rupees in Pramuka Bank by way of fixed deposits. The petitioner states that he was arrested by the open investigation branch of the Commission to Investigate Allegations of Bribery and Corruption (hereinafter referred to as the Bribery Commission) on an allegation of accepting a bribe of Rupees 18,500 from the Pramuka Bank. This arrest was made on the 10th of February, 2004. The petitioner was produced before the learned Magistrate of Kakirawa on a B Report. The

second respondent, by his letter dated 31st of March 2004 (P6), interdicted the petitioner on the basis that proceedings had been instituted against in the petitioner in the Magistrate's Court of Colombo on a charge of accepting a bribe.

Learned counsel for the petitioner contended that the said decision of the second respondent (P6) was arbitrary, capricious and unlawful as no proceedings had been instituted against the petitioner in the Magistrate's Court. Learned Counsel for the petitioner further contended that the second respondent would become entitled to interdict the petitioner under section 27:10 of chapter XLVIII of the Establishment Code only after the institution of proceedings against the petitioner in the Magistrate's Court. The other contention of the learned Counsel for the petitioner is that filing of a B report does not amount to an institution of proceedings in the Magistrate's Court. In view of the above contentions it is necessary to examine whether filing of the report setting out the facts of the case, in the Magistrate's Court by the officer in charge of the open investigations branch of the Bribery Commission amounts to an institution of proceedings. Under section 136(1) of the Criminal Procedure Code, proceedings in the Magistrate's Court can be instituted in one of the following ways. (1) On a complaint being made orally or in writing to Magistrate of such court that an offence has been committed which such court has jurisdiction either inquire into or try him:

Provided that such a complaint if in writing shall be drawn and countersigned by a pleader and signed by the complainant; or (2) On written report to the like effect being made to a Magistrate of such court by an inquirer appointed under chapter XI or by a peace officer or a public servant or a servant of a Municipal Council or of an Urban Council or of a Town Council; or

(3) Upon the knowledge or suspicion of a Magistrate of such court to the like effect:

Provided that when proceedings are instituted under this paragraph the accused or when there are several persons accused any one of them,

shall be entitled to require that the case shall not be tried by the Magistrate upon whose knowledge or suspicion the proceedings were instituted, but shall either be tried by another Magistrate or committed for trial; or

(4) On any person being brought before a Magistrate of such court in custody without process, accused of having committed an offence which such court has jurisdiction either to inquire into or try; or

(5) Upon a warrant under the hand of the Attorney General requiring a Magistrate of such court to hold an inquiry in respect of an offence which such court has jurisdiction to inquire into; or

(6) On a written complaint made by a court under section 135.

Under the above section it is possible to argue that filing of a report by a police officer in Magistrate's Court amounts to institution of proceedings. In this connection, it is pertinent to consider the decision of the Supreme Court in *Tunnaya vs. O. I. C. Galewela* <sup>(1)</sup>. In *Thunaya's* case the suspect was arrested and produced before the Magistrate who remanded him. After a lapse of three months *i.e.* on 20.12.89 an application for bail was made to the Magistrate. This application was refused by the learned Magistrate on the footing that there was a report before the Magistrate setting out the facts which clearly shows that the suspect had committed an offence, and proceedings had therefore been instituted against the suspect. An application made to the Court of Appeal to revise the aforesaid order was refused. The Court of Appeal held that "the filing of a report making a definite allegation that a suspect committed the offence complained of was sufficient to constitute to an institution of proceedings within the meaning of section 115 of the Criminal Procedure Code". The Court of Appeal refused the application for bail made on behalf of the suspect. The Supreme Court in appeal set aside the judgment of the Court of Appeal and held that "as no proceedings were in fact instituted upon the report under section 116(1) the Magistrate had jurisdiction to release the petitioner on bail on 20.12.89, subject to the terms of the proviso to section 115(1) of the Code as a period of three months since the suspect's arrest had expired". In the said case *Bandaranayaka J.*, at

pg. 67 stated that "producing a suspect before the Magistrate's Court in custody in terms of section 116(1) has nothing to do with the institution of proceedings under section 136(1)(d) of Chapter XIV or any other clause of that section." Bandaranayaka J at pg 68 remarked as follows. " The point is that one is still at the investigative stage when a suspect is forwarded under custody to the Court in terms of section 116(1). It is wrong to treat it as an automatic institution of proceedings ..... Equating a report under section 116(1) to an institution of criminal proceedings is wrong."

It is manifest from the said judgment that filing of a report setting out the facts that a suspect has committed an offence does not amount to an institution of proceedings in the Magistrate's Court.

In the present case, the O. I. C. of the open investigation branch of the Bribery Commission filed a report setting out the facts that the petitioner had committed an offence under the Bribery Act. Applying the legal principals stated in the aforesaid decision, I hold that no proceedings were instituted against the petitioner in the Magistrate's Court when he was produced before the Magistrate of Colombo. Therefore it has to be concluded that no proceedings had been instituted against the petitioner when he was interdicted by the second respondent. When one examines section 27:10 of chapter XLVIII of the Establishment Code, in order to interdict a state officer under the aforementioned section criminal proceedings must, first, be instituted against him; it is wrong to interdict a state officer under above section of the Establishments Code without instituting criminal proceedings. For the above reasons, I hold that the decision of the second respondent (P6) interdicting the petitioner is arbitrary and unlawful. I, therefore, issue a writ of certiorari, quashing the decision of the second respondent contained in P6 and direct the second respondent to reinstate the petitioner in his earlier post as stated in the document marked P2.

There will be no costs.

SRIPAVAN J. — I agree.