

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an application for mandates in the nature of Writs of *Certiorari*, *Prohibition* and *Mandamus* in terms of article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka, read with the provisions of section 24 (1) of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 (as amended)

Anoma S. Polwatte,  
No. 12, Kurunegala Road,  
Nugawela

**Petitioner**

**SC / Writ Application No. 01/2011**

Vs,

1. Ms. L. Jayawickrama,  
Director General,  
The Commission to Investigate Allegations  
of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.

Mr. Ganesh R. Dharmawardena  
Director General,  
The Commission to Investigate Allegations  
of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.

**1<sup>st</sup> Substituted-Respondent**

Ms. Dilrukshi Dias Wickramasinghe, PC  
Director General,  
The Commission to Investigate Allegations  
of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.

**1<sup>st</sup> Substituted-Substituted-Respondent**

Mr. Sarath Jayamanne, PC  
Director General,  
The Commission to Investigate Allegations  
of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.

**1<sup>st</sup> Substituted-Substituted- Substituted-  
Respondent**

2. Mr. J.A.S. Ravindra,  
Secretary,  
The Commission to Investigate Allegations  
of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.
3. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.
4. Rtd. Justice A. Ismail,  
Chairman,  
Former Commission to Investigate  
Allegations of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.

5. Rtd. Justice P. Edussuriya,  
Member,  
Former Commission to Investigate  
Allegations of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.
  
6. Mr. T.I. De. Silva,  
Member,  
Former Commission to Investigate  
Allegations of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.
  
- 6A. Rtd. Justice D.J.De. S. Balapatabendi,  
Chairman,  
The Commission to Investigate Allegations  
of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.
  
- 6B. Rtd. Justice L.K. Wimalachandra,  
Member,  
The Commission to Investigate Allegations  
of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.
  
- 6C. Jayantha Wickramaratna,  
Member,  
The Commission to Investigate Allegations  
of Bribery or Corruption,  
P.O. Box 1431,  
36, Malalasekara Mawatha,  
Colombo 07.

7. Mr. P.B. Abeykoon,  
Secretary,  
Ministry of Public Administrations and  
Home Affairs,  
Independence Square,  
Colombo 07.
  
- 7A. Mr. J. Dadallage,  
Secretary,  
Ministry of Public Administrations and  
Home Affairs,  
Independence Square,  
Colombo 07.
  
- 7B. J. J. Rathnasiri,  
Secretary,  
Ministry of Public Administrations and  
Home Affairs,  
Independence Square,  
Colombo 07.
  
8. Mr. P.G. Amarakoon,  
Chief Secretary,  
Central Province,  
The Chief Secretary's Office,  
District Secretariat Building,  
Kandy.
  
9. Chief Secretary,  
Central Province,  
The Chief Secretary's Office,  
District Secretariat Building,  
Kandy.

**Respondents**

**Before:** B.P. Aluwihare PC J  
H. Nalin J. Perera J  
Vijith K. Malalgoda PC J

**Counsel:** Sanjeewa Jayawardane PC with Rajiv Amarasooriya for the Petitioner  
Dilan Ratnayake DSG, with Ms. Thusitha Jayanetti for Respondents

Argued on: 08.02.2018

**Judgment on: 26.07.2018**

**Vijith K. Malalgoda PC J**

The Petitioner to the present application Anoma Senarath Polwatte filed the present application before this court, seeking mandates in the nature of Writs of *Certiorari*, *Prohibition* and *Mandamus* as against the Respondents acting in terms of Article 140 of the Constitution read with section 24 (1) of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994 and consequential interim orders referred to in the prayer to the application.

When this matter was supported for leave on 29<sup>th</sup> March 2011, this court after considering the material placed, had decided to grant leave but no interim relief was granted as prayed by the Petitioner, since the learned Senior State Counsel who represented the Respondents had given an undertaking that no further action will be taken with regard to the matter referred to in this application until this court makes a ruling.

The Petitioner, who is a Class I Officer of the Sri Lanka Administrative Service with a 24 year career, was holding the substantive position of the Provincial Land Commissioner of the Central Province, at the time the alleged investigation was commenced by the 1<sup>st</sup> Respondent. During the said period of 24 years, the Petitioner had held several important positions including the position as the Divisional Secretary Harispattuwe from July 1998 to February 2006. During this period the Petitioner was officially involved in acquisition of lands for the widening and development of the Kurunegala to Katugastota Highway and in fact her services were appreciated by the Secretary to the Ministry of Highways by his letter dated 02.02.2005 (P10 (a))

The Petitioner was subsequently transferred as the Divisional Secretary Kundasale in February 2006 and was appointed as the Provincial Land Commissioner by the Governor, Central Province in August 2006.

In August 2006 the Petitioner was noticed by Office-in-Charge, fraud Investigation at the Commission to Investigate Allegations of Bribery or Corruption to appear at the said office to attend an inquiry with regard to the payment of compensation under Katugastota-Kurunegala Road expansion project. As submitted by the Petitioner, the Petitioner attended the said inquiry and during the said inquiry the Petitioner was questioned on the payment of compensation in respect of the land acquired from and out of the land owned by her husband and herself. In this regard the Petitioner presented herself before the Commission on three occasions but it was the position taken by the Petitioner before us that the said inquiries were limited to a specific question put to her but, the allegation against the Petitioner was never explained and a detailed statement was not recorded depriving her of an opportunity to explain her position as against the complaint against her.

On or about the 1<sup>st</sup> week of November 2010, four years after her first statement was recorded, the Petitioner was served with summons to be present before the Chief Magistrate's Court of Colombo on 16.11.2010 in respect of a Bribery case bearing No. 60 147/01/ Bribery. With regard to the timing of the said case, the Petitioner had further submitted that as at 16.11.2010 the terms of office of the Commissioners of the Commission to Investigate Allegations of Bribery and Corruption had expired and no new appointments were made.

When the Petitioner presented herself before the learned Chief Magistrate of Colombo on 16.11.2010 she was served with a copy of the charge sheet and enlarged on personal bail with two sureties. When the charge sheet was served and read out to her, the Petitioner learnt that the charges against her were based on an allegation of payment of compensation with regard to a land during the road expansion of the Katugastota- Kurunegala Highway.

In the Petition filed before this court, the Petitioner had averred several grounds in challenging the decision of the Commission to Investigate Allegations of Bribery and Corruption to prosecute the Petitioner under the provisions of the Bribery Act; (under Section 70) and the said grounds can be summarized as follows;

- a) There is a clear issue of patent *ultra vires* on the part of the 1<sup>st</sup> Respondent in her decision to execute the directive of the Commission, at a time when the Commission had ceased to have a legal existence.
- b) There is no provision for the continuance of any prosecution by the 1<sup>st</sup> Respondent in the absence of the Commission.
- c) The Bribery Act and amendments there to clearly provides a prohibition against the entertainment of any prosecution which is unaccompanied by the distinct sanction required by law.

The 1<sup>st</sup> and the 2<sup>nd</sup> Respondents to the above application whilst objecting to the grant of any relief had taken up the position that the Magistrate's Court action against the Petitioner had been lawfully instituted under section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 and a true copy of the directive received by the 1<sup>st</sup> Respondent was annexed to the statement of objection produced marked R-1.

As observed by this court, the Petitioner who was not satisfied by the said directive produced marked R-1 had raised an additional ground challenging the impugned decision to prosecute the Petitioner before the Magistrate's Court Colombo in the counter objections filed before this court. The said ground is to the effect that,

"A perusal of the document R-1, confirms that at the very least, there was not even valid directive made in terms of section 11 of the Commission to Investigate Allegations of Bribery and Corruption Act."

had been raised and was canvassed before this court during the argument stage.

Section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No. 19 of 1994 which deals with the directive to institute proceeding by the Commission reads as follows;

Section 11     Where the material received by the Commission in the course of an investigation conducted by it under this act, discloses the Commission of an offence by any

person under the Bribery Act or the Declaration of Assets and Liabilities Law, No 1 of 1975, the Commission shall direct the Director General to institute Criminal proceedings against such person in the appropriate court and the Director General shall institute proceedings accordingly.

When going through the above provision, it is clear that when an offence is disclosed either under Bribery Act or Declaration of Assets and Liabilities Law, during an investigations conducted under the provisions of the Commission to Investigate Allegations of Bribery or Corruption Act, there is a mandatory requirement for the Commission to direct the Director General (Commission shall direct) to institute proceedings.

Part I section 2 of the said Act provides for the establishment of a “Commission” and the relevant provisions in part I reads as follows;

## **PART I**

**Section 2 (1)** There shall be established, for the purpose of this Act, a Commission (hereinafter referred to as the Commission) to Investigate Allegations of Bribery or Corruption made to the Commission in accordance with the succeeding provisions of this Act and to direct the institution of prosecutions under the Bribery Act and the Declaration of Assets and Liabilities Law No 1 of 1975.

(2)(a) The Commission shall consist of three members, two of whom shall be retired Judges of the Supreme Court or the Court of Appeal and one of whom shall be a person with wide experience relating to the Investigation of Crime and Law enforcement.

Even though the Act had not provided a specific provision as to how the directive should be made, there exist a prerequisite under section 11 of the Act to obtain a directive when the

investigations conducted, discloses the commission of an offence, before launching any prosecution.

Whilst producing the Directive received from the commission marked as R-1, the 1<sup>st</sup> Respondent, the Director General had submitted in her affidavit that,

“By way of objection to paragraph 1 of the petition the 1<sup>st</sup> and 2<sup>nd</sup> Respondents admit only the jurisdiction and specifically state that there is a valid directive made under section 11 of the Commission to Investigate Allegations of Bribery or Corruption Act No 19 of 1994 and accordingly the action has been lawfully instituted (A certified copy the directive made by the commission dated 02.03.2010 is annexed to this statement of objection as R-1)”

When going through the document R-1, I observe that it is a photocopy of a part of a journal sheet which carries journal entry No 28. If I reproduce the same journal entry in this judgment, it reads as follows;

“(28) DG, Report of ADL at 14 and 20 considered. Direction is given for the institution of proceedings.”

at the end of the above minute a short signature of somebody is found with the date 02.03.2010.

Any other journal entries found in the same folio are not before us and the maker of R-1 is also not to be found from the above entry. However the 1<sup>st</sup> Respondent in her objection filed before this court had confirmed that it is the directive she received from the Commission but she is silent on the maker of the said minute, or she has failed to annex an affidavit from the maker of the said minute.

On behalf of the Petitioner, several objections have raised for R-1 being considered as a valid directive made under section 11 of the Act but I will confine myself to some of the important issues raised on behalf of the Petitioner.



functions of the Commission. As identified in section 3 referred to above, when an offence is disclosed after an Investigation, Commission shall direct the institution of proceedings and the said conduct of the Commission had been identified within the Functions of the Commission. The powers of the Commission has been identified under section 5 of the Act and under section 2 (8), such powers of the Commission may exercise by its members either sitting together or separately.

Thus it is clear that the members of the Commission can exercise ancillary powers on his own though the full complement of the Commission is not available at one given time. But as for the exercise of functions such as the direction to be given to the Director General, it is crystal clear that the Act has not provided for one member alone to give such direction. However as already observed by me, R-1 refers to a directive given by one member and in the said directive, it is not clear as to whether the reports referred to, had been considered by the full commission before making such directive.

In the said circumstance, I have no hesitation to conclude that there is no valid directive made under section 11 of the Act to institute criminal proceedings before the Magistrate's Court, with regard to the investigations carried out by the fraud Investigation Unit of the Commission to Investigate Bribery and Corruption as against the Petitioner to the present Application. I therefore conclude the directive produced marked R-1 is patently illegal.

In addition to the above ground raised before us, the Petitioner raised another objection on the basis that,

- a) There is a patent act of *ultra vires* when the Director General execute a directive of the Commission at a time when the Commission ceased to have legal existence
- b) There is no provision in the Act to continue with the prosecution in the absence of the Commission

Since I have already concluded that there exist no valid directive to institute criminal proceedings, I don't think it is necessary to discuss the legal effect of a valid directive at a time the commission ceased to have legal existence.

As a third ground, the Petitioner has relied on section 78 (1) of the Bribery Act and submitted that a written sanction has been made a condition precedence to a prosecution been launched in the Magistrate's Court.

Section 78 (1) which is the basis for the above objection reads as follows;

Section 78 (1)            No Magistrate's Court shall entertain any prosecution for an offence under this Act except by or with the written sanction of the Commission.

During the argument before this court the Petitioner contended that there is a clear distinction between the Commission and the Director General under the provisions of the Act and when the Commission directs the Director General to institute Criminal proceedings, the implementation of the said directive should be within the provisions of section 78 (1) of the Bribery Act, where the functions of the Magistrate is restricted by the provision of the above section.

As submitted by the Petitioner, unless the Commission itself goes before the Magistrate's Court, no other person including the Director General is empowered to go before the Magistrate without the sanction of the Commission under the above provision.

I have already concluded with regard to the validity of the directive said to have given by the Commission to institute criminal proceedings against the Petitioner referred to in Document R-1, and in the light of the said conclusion reached, any other conclusions with regard to matters ancillary to the above, will have an academic value only. In other words I have already concluded that there is no valid directive made by the commission before this court and therefore there is no valid prosecution instituted before the Magistrate under the provisions of the Act. In the said circumstance, any consideration of the provisions of the section 78 (1) become academic and therefore I decide to refrain from making any observations with regard to the matters raised by the Petitioner on this issue.

As already concluded in this judgment the 1<sup>st</sup> Respondent had failed to provide a valid directive given by the Commission under section 11 of the Act and the directive produced marked R-1 is not a valid directive made under section 11 to institute proceedings before the Magistrate's Court. In the said circumstances I conclude that R-1 is patently *ultra vires* and attracts the ground of illegality. In the said circumstances I issue a mandate in the nature of writ of *Certiorari*

quashing the charge sheet served on the Petitioner by the 1<sup>st</sup> Respondent acting on the purported illegal direction produced marked R-1, as prayed in paragraph (h) to the petition.

I further make order issuing a mandate in the nature of a writ of *Prohibition* as prayed in paragraph (g) to the petition.

I make no order with regard to the other relief prayed by the Petitioner but state that the Petitioner is entitled to other relief which are consequential to the main relief granted by this court.

Petitioner is entitled to the cost as against the 1<sup>st</sup> Respondent to the present application.

**Judge of the Supreme Court**

**B.P. Aluwihare PC J**

I agree,

**Judge of the Supreme Court**

**H. Nalin J. Perera J**

I agree,

**Judge of the Supreme Court**