IN THE SUPREME COURT OF DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application under and in terms on Article 105(3) of the Constitution read with Section 21 of the Human Rights Commission of Sri Lanka Act No. 21 of 1996.

SC / Contempt / 01 / 2023

Human Rights Commission of Sri Lanka,
No. 14, R A de Mel Mawatha,
Colombo 04,
Sri Lanka.

Complainant – Petitioner

-Vs-

1. M.P.D.U.K. Mapa Pathirana,
   Secretary,
   Ministry of Power and Energy,
   No. 437, Galle Road,
   Colombo 03.

2. N.S. Ilangakoon,
   Chairman.

3. K.G.R.F. Comestar,
   Additional General Manager.

4. T.K. Liyanage
   Finance Manager.

5. A.R.M.M.S. Karunasena,
   Deputy General Manager.

   All of
   Ceylon Electricity Board,
   6th Floor, No. 50,
   Sir Chittamapalam A.
   Gardiner Mawatha,
   Colombo 02.

6. Janaka Rathnayake,
   Chairman,
   Public Utilities Commission,
   No. 1200/9, Rajamalwaththa
   Road, Battaramulla.

7. Mohamed Uvais Mohamed,
   Managing Director/Chairman.

8. V.N. Weerasuriya,
   Deputy General Manager
   (Finance),

9. S.M.C.P. Samarakoon,
   Manager (Sales)

   All of Ceylon Petroleum
   Corporation,
   Dr. Danister De Silva
   Mawatha,
   Colombo 09.

10. Hon. Attorney-General
    Attorney General's
    Department,
    Colombo 12.

Contemnor - Respondents

Before : Hon. E.A.G.R. Amarasekara, J.

Hon. Kumudini Wickremasinghe, J.

Hon. A.L. Shiran Gooneratne, J.

Counsel : Mr. Upul Jayasooriya PC with Theekshana Pathirana, Sachira Andrahannadi and Sandamal Rajapaksha for the Complainant Petitioner.

Kanishka de Silva Balapatabendi, DSG with MS. I. Randeny for the 1st & 10th Contemnor Respondents.

Dr. Romesh de Silva, PC. With Uditha Egalahewa, PC, Nishan Anketell and N. K. Ashokbharan for 2nd and 5th Contemnor Respondents.

Argued on : 03.02. 2023 and 07.02.2023

Decided on : 10.02.2023

E. A. G. R. Amarasekara, J.

The Complainant Petitioner, The Human Right Commission of Sri Lanka (Hereinafter sometimes referred to as the HRCSL or the Petitioner) has invoked the jurisdiction of this Court by way of Petition and Affidavit tendered to this court on 30.01.2023 and has sought relief among others;

1. An interim order compelling the 1st and 2nd Respondents, and in particular the 2nd Respondent, to abide by the Directive marked P7 until the final determination of the case;
2. Issue summons in the first instance on the 1st to 9th Respondents;
3. Issue notice on the Attorney General and direct him to file draft charges on the accused Contemnors;
4. An Order nisi directing the Respondents, in particular the 2nd Respondent, to appear before the Supreme Court and to show cause as to why the 2nd Respondent should not be dealt with and punished for contempt of Court pursuant to Section 21 of the HRCSL Act read with Article 105(3) of the Constitution in respect of the following Rule;
   'That on or about 26/01/2023 within the Jurisdiction of this Court in Colombo that the 2nd Respondent by failing to abide by the Directive marked P7 issued by the Petitioner unduly interfered with the course of administering justice in this Republic and thereby committed the offence of Contempt of Court punishable under Article 105(3) of the Constitution read with section 21 of the Human Rights Commission of Sri Lanka Act no21 of 1996.'

At the top of the caption of the Petition, the Petitioner has referred to the application as an application made under and in terms of Article 105(3) of the Constitution read with Section 21 of the Human Rights of Commission of Sri Lanka act No.21 of 1996 (Herein after sometimes referred to as the HRCSL Act). Article 105 (3) of the Constitution confers on this Court the power to punish for Contempt of this Court. Section 21 (1) and (2) of the HRCSL Act make contemptuous acts against the HRCSL equivalent to Contemptuous acts done against this Court and authorize this court to try and punish such contemptuous acts.

Section 21 (3)(c) of the HRCSL Act reads as follows;

"21(3) If any person-[c] refuses or fails without cause which is the opinion of the Commission is reasonable to comply with the requirements of a notice, written order or direction issued or made by to him, by the commission……. Such person shall be guilty of the offence of contempt against or in disrespect of, the authority of the Commission." (Underlined by me).

In terms of section 24(4), where the Commission determines a person is guilty of an offence of contempt, it may transmit a certificate to this Court, setting out the determination and such certificate has to be signed by the Chairman of the HRCSL. Thus, section 21(4) of HRCSL Act provides for how the HRCSL may

invoke the Jurisdiction of this Court for Contempt. It is by transmitting the said Certificate. Since section 21(1) empowers this Court to try every such offence as an offence committed against this Court, it appears that the determination by the HRCSL is not conclusive as an act of contempt against this Court. Thus, this Court has to come to its own conclusions at the end, if this Court take cognizance of the certificate and proceed to try the offence. Once the Certificate is transmitted to this Court, as per section 21(5), this Court need not proceed further unless this Court thinks it fit to take cognizance of the certificate transmitted by the HRCSL.

In relation to a Similar Provision in the Commission to Investigate Allegations of Bribery or Corruption Act No 15 of 1994, K. Sripavan C.J., held that if the Court take cognizance of the certificate, it tantamounts to initiation / instituting of the proceedings. Therefore, there is no necessity to file a Petition and Affidavit- vide **MRS. Dilrkshi Dias Wickramasinghe,P.C, V Hon. Lakshman Namal Rajapaksha, M.P, SC Contempt 04/2016** decided on 15.09,2016. However, what is important is that this Court should think it fit to take cognizance of the Certificate.

The Procedure adopted by the Petitioner in this matter invoking Jurisdiction of this Court

The Petitioner invoking the Jurisdiction of this Court in terms of section 21 of the HRCSL Act has filed a petition and an affidavit along with documents marked P1 to P15 which includes the certificate. Further among other reliefs, it has prayed for an interim relief to compel the 1st and 2nd Contemnor Respondents to abide by the directive marked P7 until the final determination of this case. It is trite law that if someone asks for interim relief, he must disclose all material facts to show *uberima fides* and has to show the existence of a prima facie case. As such, it can be understood why this application was made by way of a petition and affidavit along with several documents. Nevertheless, it must be noted what has been attempted through an interim relief was to enforce a directive issued by the HRCSL when there is no such provision to enforce a directive in that manner in terms of section 21 of the HRCSL Act, in terms of which the jurisdiction of this court was invoked to take cognizance of the certificate.

Whether the interim relief could have been given or can be given

When this matter was taken up on 02.02.2023, 2nd to 5th Contemnor Respondents (hereinafter 2nd to 5the Respondents) have given an undertaking to provide uninterrupted electricity supply in the course of the day and until the case is supported. The learned Counsel for the Petitioner contends in his submissions that an undertaking is equivalent to an interim order. It may be so as far as it is in force, but it is not an order made by a Court but an undertaking a party voluntarily gives. Thus, once it is withdrawn the party moved for interim relief must satisfy Court that he has a prima facie case and the existence of other requirements needed to issue interim relief. Thus, when the undertaking was withdrawn on 03 .02 2023, this court declined to grant interim relief at that moment and stated that it will be considered if the order nisi is issued as prayed for. However, for the following reasons an interim relief could not have been given by this court.

- To issue an interim relief it should have direct relevance to the main relief prayed for. The main relief prayed for in the petition seems to be the Order nisi mentioned above. Non issuance of the interim relief to abide by the directive has nothing to do with the safeguarding of the final relief prayed for or the punishment of contempt. Non issuance will not render the final relief nugatory.

- The final relief in the petition itself is an order nisi which is temporary in nature and there is no order prayed for an order absolute in the petition.
- As it was informed to this court that the Petitioner does not intend to punish the other Respondents for contempt and only wants to frame charges against the 2nd Respondent, no interim relief can be issued against the 1st Respondent as there is no imaginable final relief against the 1st Respondent.
- The 2nd Respondent is only the chairman of the Board of the CEB and other members of the Board have not been made parties to this application and even the General Manager who is entrusted with the executive powers and is charged with the business of the board, the organization and execution of the powers, functions and duties of the board and administrative control of the Board as per the Electricity Board is not a party to the action. No interim relief has been prayed for against them. Hence, issuing of an interim relief against the chairman has no force on the other members of the board and the general manager. Such an interim relief may become useless as they are not bound to abide by it.
- As Counsel for the 2nd Respondent correctly pointed out, Contempt proceedings are quasi criminal in nature, inviting to reply to an application for interim relief may affect his right to remain silent.
- This court cannot consider an interim relief on the basis of maintaining the status quo, since undertaking given indicates that the status quo at the time of institution of proceedings was the interruption of power supply.
- This application was made under section 21 of the HRCSL Act. It provides for contempt proceedings but not for the enforcement of the directives of the HRCSL. The highest Court of this country cannot act as a 'cat's paw' to enforce orders other than in the manner provided by law. If this court rubber-stamp and enforce directives or decisions of other institutions when such enforcement is not provided by law, this court will have to be responsible for the illegalities, errors and defects etc. in such orders.

As per the reasons given later in this order, this court would not take cognizance of the certificate and as such there is no prima facie a case where this court can grant such interim relief.

<u>Whether the Certificate marked P14 should be taken cognizance of and whether the Order Nisi as prayed for in the petition be issued</u>

The Counsel for the Petitioner later argued that the mere certificate alone could have qualified the Petitioner and the Court should proceed and issue summons in relation to the contempt proceedings purely on the strength of the certificate. In other words, he invites this Court to turn a blind eye to the Petition and affidavit and the accompanying documents other than the certificate. However, he referred to some of these other documents in his oral submission even after taking up such argument. Even in his synopsis of submissions tendered after the oral submissions he has referred to some of the documents other than the certificate. A party cannot be allowed to blow hot and cold. It is not proper for a party to use documents he tendered for his benefit and ask others to ignore them. If so, he should have taken up this position at the beginning withdrawing the interim relief. Due to the fact that the Petitioner has prayed for interim relief and issued notices to the parties, Parties are before Court and it is the Petitioner who filed these documents before Court. It is against the conscience of this Court to ignore such documents when such documents contain glaring evidence with regard to the process that took place in

issuing the certificate, and legality and or regularity of such certificate. On the other hand, it is not the task of this Apex Court to rubber-stamp the certificate and commence contempt proceedings. The legislature in its wisdom has used the words "which the supreme Court may think fit to take cognizance". As per the decision in **SC Contempt 04/2016** referred to above, the expression 'take cognizance' means taking judicial application of the mind of the Court to the facts mentioned in the certificate. It is the view of this Court that the words 'thinks fit' add more scope to the words 'take cognizance'. If the documents tendered by the Petitioner itself indicate that it is improper to proceed for contempt and it is unlikely to reach a conclusion that will end in punishing the purported contemnor, it is not fit to take cognizance of the certificate. It would only be a waste of valuable time, energy and resources of this Court as well as of the Parties involved. Afterall, all these documents are documents tendered by the Petitioner. It must be noted that as per section 21(6), it is not possible to summon commissioners to get clarifications on any issue relating to the documents tendered with the Petition unless they themselves decide to come and give evidence.

As said before, the Counsel for the Petitioner informed Court that he intends to proceed for contempt only against the 2nd Respondent, first this Court will consider the certificate alone and see whether it is fit to proceed against the 2nd Respondent.

As per the last paragraph of the certificate, HRCSL has determined that CEB and/or its officials have acted in contempt of the HRCSL. To frame charges against a person or many of them it must be clear who is or are liable to answer the charges. As per the said last paragraph it is not clear whether it is CEB alone or CEB and its officials together or its officials alone are liable. On the other hand, when it says 'its officials', without naming them, it may contain large group of persons that this Court could not recognize without further clarifications. Only named person is the CEB (Ceylon Electricity Board), a legal person. As mentioned before due to the words used "and/or", it is not clear whether it is CEB or its officials are liable. On the other hand, CEB is a body corporate which consists of many members (section 3 of the CEB Act). It is the General manager, subject to the general instructions of the Board on matters of policy, is charged with the business of the Board, organization and execution of the powers, functions and duties of the Board etc. If the CEB is the Contemnor, there is no material in the certificate to single out the chairperson of the Board of CEB to frame charges against him. What is mentioned above is sufficient to refuse to take cognizance of the certificate against the 2nd Respondent on the strength of the certificate.

Furthermore, as per section 21 (3) (c) of the HRCSL Act, offence of contempt of the HRCSL constitute only when one refuses or fails without a reasonable cause to comply with request of a notice, written order or direction issued or made to that person by the HRCSL. The certificate does not indicate that the 2nd Respondent, chairman of the CEB refused to act in accordance with the purported directive. Further, the certificate does not reveal that an opportunity was given to him to show cause to the HRCSL to assess whether the show cause was reasonable or not. Hence another reason emanating from the certificate not take cognizance of the certificate. Even the affidavit tendered with the petition does not indicate such opportunity was given to show cause prior to the issuance of the certificate.

Now it is time to consider the background facts that has come to light through the application along with the documents tendered by the Petitioner.

The certificate attempts to highlight a noncompliance by CEB in contravention of a directive(P7) issued by HRCSL despite a clear undertaking given by the CEB. The learned DSG submitted that HRCSL has no

authority to issue this type of directives, and Directives and Directions are distinct to each other having different meanings.

In section 10(c) of the English version of HRCSL Act the word directive is found but in a different context. The word 'Direction' is found in sections 21(3) (c) and in section 16 (6) of the Act. However, it appears that the Sinhala version of the Act use the word "Vidanaya" for both the words, directive and direction. Even if it is considered that the word used as directive is used for a direction contemplated in the Act, direction is issued only after a conciliation or mediation process referred to in section 16 of the Act. Neither the certificate nor the affidavit indicates that there was a conciliation or mediation process as contemplated by section 16 of the Act. Since an interim relief was prayed in the first instance, it can be assumed that all the material facts were revealed by the Petitioner. Since nothing relating to a conciliation or mediation process has been divulged there may be a truth in the argument that this type of direction/directive cannot be issued by the Petitioner.

It was undisputed and the counsel for the petitioner in his oral submissions admitted that the process ended in issuing the certificate was after an investigation by the HRCSL on its own motion in terms of section 14 of the Act. Unless the Commission decided to refer it to conciliation or mediation under section 15(2), only recommendations can be issued in term of the other provisions of section 15 of the HRCSL Act. This make the directive marked P7 questionable as to the fact whether it was issued as per the law. P7 directive is the base for the issuance of the certificate that has to be taken cognizance of at the first instance to commence contempt proceedings. The P7 directive/direction indicate that it was issued on the basis of the settlement arrived. The purported settlement is found in P6 and P5. In P6 the purported settlement has been entered as a recommendation of the HRCSL- vide last paragraph of P6. As per the documents, both P5 and P6 were made at 4.00 pm on 25.01.2023. The settlement part that indicates the terms seems to be identical in both P6 and P5. If a recommendation is issued, there seems to be no provision to convert such recommendation to a directive/ direction. If a recommendation is issued, procedure contemplated in the Act requires the HRCSL to give a time limit to report back to the HRCSL with regard to the implementation of the recommendation. If the relevant person fails to report or the actions taken by that person is inadequate, the HRCSL must make full report and place it before the President of the Country who shall cause it to be placed before the Parliament. This may be to provide administrative relief but there is no provision to convert a recommendation to a direction and proceed to initiate contempt proceedings. Though, the learned Counsel for the Petitioner later attempts to indicate that P6 is not a recommendation as contemplated by the HRCSL act but a mutual settlement, both the Petition and the affidavit tendered by the chairperson of the HRCSL have referred to this document marked as P6 also as a recommendation. This creates doubts as to the legality of the procedure followed by the HRCSL.

P1 and P2 marked with the Petition are addressed to the 1st and the 6th Respondent only and P2 informs them to take part in an inquiry to be held at 10.30 Am. Even though P2a attendance sheet indicates that some of the officers of the CEB were present, the purpose of their attendance is not clear since the invitation letters sent to them are not marked. P2a does not indicate the authority they had from CEB or any other person. Thus, P1 to P2a does not indicate any involvement of the 2nd Respondent, the chairman of CEB. Even though P3 is addressed to the 2nd Respondent requesting him to take part in a discussion in relation the power interruptions during the Advanced Level examinations, it does not indicate that it is intended to enter in to an agreement. Nevertheless the 2nd Respondent has not participated in the discussions as evinced by P3a, and P4 indicates that representatives were authorized to represent the CEB

but not the Chairman, the 2nd Respondent. Thus P3, P3a or P4 do not provide sufficient material to impose a separate liability on the chairman, the 2nd Respondent with regard to any agreement entered into, if there is any valid agreement on behalf of the CEB.

P5 clearly indicates that the Representatives of the CEB signed it subject to a condition which states that it was signed on behalf of the Chairman and subject to the approval of the Director Board. It must be noted P4 does not authorize them to represent the Chairman. Thus, the paragraph 10 of the petition and the corresponding paragraph in the affidavit contains incorrect facts. Perhaps, the representative of the CEB would have used the term 'on behalf of 'since the place for signature was allocated to the Chairman Of CEB. The condition they entered when signing P5 clearly indicates that they did not have authority to enter into an agreement on behalf of the CEB and they needed the approval of the CEB. (These facts indicate that paragraph 11 of the petition and corresponding paragraph of the affidavit of the Chairperson of the HRCSL is questionable). It is also questionable whether without the approval of the Board the Chairman, could bind CEB since it is a statutory body governed by the provisions of the statute that established it. It appears the representatives of the CEB by inserting the condition did the correct thing to indicate that they lacked the authority to bind the CEB. Thus, P5 does not indicate a clear agreement. P6 also contains the same conditions and it bears the same time as P5. There is nothing to indicate that at the same moment of time the representatives of the CEB got the approval of the Board. Hence, these documents create a serious doubt as to whether there was a clear agreement as stated in the certificate, for which CEB or the 2nd Respondent consented. It must be noted that the time for discussions to commence was 4.00 pm. Even the purported agreements seem to have reached by 4PM. The learned Counsel for the Petitioner tried to explain this in oral submissions by stating that it is a typographical error which fact is not supported by the averments in the affidavit of the Chairperson of the HRCSL. The said affidavit states that, since there was a condition entered accompanying the signature, the Petitioner inquired as to the rationale behind this condition and after a recess of nearly 30 minutes parties agreed to sign the agreement. Her affidavit as aforesaid does not indicate how both the documents marked P5 and P6 contains the same time which is the time the discussions was to be commenced. Her affidavit does not explain, when there is a serious doubt as to the approval of the CEB was lacking due to the condition placed by the signature in P5, how such approval was taken for P6. HRCSL should have considered that CEB is a statutory body which is governed in accordance with the statute that established it, and it may need time to give approval for an agreement through its regular procedure. Time gaps between P4 to P6 questions whether there was sufficient time for a Statutory Body to meet and take decisions. However, the facts revealed through the Petitioners own documents create serious doubts as to the validity of the agreement entered which is the base for the purported directive and the certificate. This Court does not see that there was clear agreement as stated in the Certificate.

One may argue that advance level examinations had already started and there was an urgency to find solutions. Advance level examinations would have been scheduled many weeks ago when power interruptions were already in force. These problems could have been foreseen by the relevant authorities including some of the other Respondents. Even the affidavit of the chairperson of the Petitioner refers to P9 where His Excellency the President made some remarks regarding the gravity of the situation some months ago. However, delay in taking steps to find solution cannot be an excuse to do it in an incorrect manner. The last moment dramas to find solutions which lacks legal validity and propriety only allow some to capitalize on the public emotions for their personal gains while causing harm to the faith the people have on the institutions they respect.

As per the reasons given above;

A. The certificate itself does not contain sufficient material to form charges against the 2nd Respondent
B. The documents tendered by the Petitioner itself questions the legality of the settlement and the process culminating in issuing a directive and a certificate.

Thus, this Court does not think that it is fit to take cognizance of the certificate and proceed further to commence contempt proceedings against the 2nd Respondent or to issue an order nisi as prayed for.

Accordingly, the application is dismissed without costs.

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Judge of the Supreme Court

Kumudini Wickremasinghe., J.

I agree.

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Judge of the Supreme Court

A.L. Shiran Goonneratne, J.

I agree.

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Judge of the Supreme Court