

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

In the matter of an Application for Special Leave to Appeal against the order of the Court of Appeal in case baring No. CA Writ 416/17 in terms of Article 128 (2) of the Constitution

Mr. Jaliya Wickramasuriya,
6525, Riada Ct. Mc Donough,
GA 30253, USA

Petitioner

SC Appeal 26/2021

SC SPL LA 117/2018

CA Writ Application No.416/2017

Vs,

1. Hon. Thilak Marapana,
Minister of Foreign Affairs,
Colombo 01.
2. Prasad Kariyawasam,
Secretary,
Ministry of Foreign Affairs,
Colombo 01.
3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondents

And Between Now

Mr. Jaliya Wickramasuriya,
6525, Riada Ct. Mc Donough,
GA 30253, USA

Petitioner-Petitioner

Vs,

1. Hon. Thilak Marapana,
Minister of Foreign Affairs,
Colombo 01.

- 1A. Hon. Dr. Sarath Amunugama,
Minister of Foreign Affairs,
Colombo 01.

- 1B. Hon. Dinesh Gunawardena,
Minister of Foreign Relations, Silk Development,
Employment and Labour Relations,
Ministry of Foreign Relations,
Republic Building, Sir Baron Jayathilaka Mawatha,
Colombo 01.

Substituted Respondent-Respondent

2. Prasad Kariyawasam,
Secretary, Ministry of Foreign Affairs,
Colombo 01.

- 2A. Ravintha Ariyasinha,
Secretary, Ministry of Foreign Relations,
Colombo 01.

And Presently at,

Ravintha Ariyasinha,
Ministry of Foreign Relations,
Republic Building, Sir Baron Jayathilaka Mawatha,
Colombo 01.

- 2B. Admiral Prof. Jayanath Colombage,
Secretary, Ministry of Foreign Relations,
Republic Building, Sir Baron Jayathilaka Mawatha,
Colombo 01.

Substituted Respondent-Respondent

3. Hon. Attorney General,
Attorney General's Department,
Colombo 12.

Respondent-Respondent

Before: Justice Vijith K. Malalgoda, PC
Justice K. K. Wickremasinghe,
Justice Mahinda Samayawardhena,

Counsel: Romesh de Silva, PC with Shavindra Fernando, PC, Manjuka Fernandopulle and Niran Anketell instructed by K. V. Gunasekara for the Petitioner-Petitioner

Mrs. Farzana Jameel, PC, ASG, with Vikum de Abrew, SDSG, and Ms. Yuresha de Silva, SSC, for the 1B, 2B and 3rd Respondents

Argued on: 22.03.2021

Judgment on: 29.10.2021

Vijith K. Malalgoda PC J

The Petitioner Jaliya Chithran Wickramasuriya has come before this court challenging the decision of the Court of Appeal, to uphold the preliminary objection taken before the said court and dismiss the said application, on several grounds as averred in the petition dated 23rd April 2018 filed before this court.

When the instant application was supported before this court on 17.02.2021, court having considered the material placed before court, had granted Special Leave on the following questions of law.

Did not the Court of Appeal err in law by failing to sufficiently consider and/or appreciate that;

- i. Ex-facie there was no material before court that in fact the decision contained in the document annexed here to marked P-12 was that of His Excellency the President
- ii. What was being challenged Ex-facie was that of the decision of the 2nd Respondent and/or of the 1st Respondent and not that of His Excellency the President and at most the 2nd Respondent is seeking to justify his decision contained in P-12 on purported direction of the President

The Petitioner who was first appointed as the Consular General of Sri Lanka to the United States of America (Los Angeles) for a period of two years commencing from 22.01.2007 by the then President of Sri Lanka was recalled on 11.03. 2008 and was then appointed as the Ambassador of Sri Lanka to the United States of America (Washington) on 30.06.2008 by the President of Sri Lanka.

His term of office had come to an end since 15.04.2014 and he had relinquished his duties as the Ambassador since then.

As submitted by the Petitioner, after relinquished his duties in United States of America, he had come back to Sri Lanka and whilst he was in Sri Lanka, proceedings were instituted before the Magistrate's Court of Fort for alleged wrongdoing in respect of the purchase of premises in Washington DC.

Whilst denying any allegation levelled against him, the Petitioner had submitted that, in the course of his duties as Ambassador, the Petitioner was instructed by the Government of Sri Lanka to purchase a new chancery building to house the residence of the Ambassador to the United States and a building located at 3025 White Haven Street, NW, Washington DC was purchased on behalf of the Government

of Sri Lanka acting in terms of the instructions given by the Government of Sri Lanka on a decision of the Cabinet of Ministers.

When the Petitioner arrived at the Air Port on 17th November 2016 with his wife, in order to go abroad, he was stopped at the Air Port and released from custody on the undertaking that he would appear before the Financial Crime Investigation Division on the same day. The Petitioner when visited the said unit on the same day, was arrested for alleged offences committed under the “Offences Against Public Property Act” and remanded for fiscal custody after producing him before the Fort Magistrate’s Court under case number B21/2016.

The Petitioner who was enlarged on bail on 17th March 2017 after being in remand custody for several months, was permitted by court to travel abroad in order to receive medical treatment for a period of eight weeks and had left Sri Lanka on 17th July 2017 to United States. On 3rd September when he was at Atlanta Air Port to leave for Chile, he was stopped by the law enforcement authorities and was extensively questioned on the same property transaction which is the subject matter of case number B21/2016. United States Law Enforcement Authorities had confirmed to his Lawyer, who was retained to represent him in the United States, that he is under investigation in respect of the same property transaction which is the subject matter in case number B21/2016.

The Petitioner has further submitted that, being the Sri Lanka’s Ambassador to the United States of America from July 2008 to May 2014, he is entitled for immunity in respect of acts performed in the exercise of his functions as a member of the Mission in terms of Article 39 (2) of the Vienna Convention of Diplomatic Relations read with section 2 of the Diplomatic Privileges Act No. 9 of 1996 even after ceasing to hold office. However, it was brought to the notice of the Hon, Magistrate Fort on 30th October 2017 by the officer who represented Financial Crime Investigation Division, that the diplomatic

immunities and privileges enjoyed by the Petitioner had been waived by the 1st Respondent, the then Minister of Foreign Affairs and had taken steps to inform the Government of United States of this decision. A copy of the said decision was later delivered to the Attorney at Law who represented the Petitioner before the Fort Magistrate's Court. (P-12)

Since the Petitioner could not leave United States of America pending the investigations carried out by the United States Law Enforcement Authorities based on the purported waiver granted by the Foreign Ministry, which is, according to the Petitioner is *ultra vires* and unlawful, an Application was filed by the Petitioner before the Court of Appeal,

- a) Seeking an order in the nature of a Writ of *Certiorari* quashing the decision contained in P-12
- b) Seeking an order in the nature of *Mandamus* directing the 1st and/or the 2nd Respondent to inform the Government of United States of America that the Petitioner continues to enjoy all Diplomatic privileges and immunities in terms of Vienna Convention on Diplomatic Privileges and Immunities in respect of acts performed by him in exercise of his functions as the Ambassador to the United States of America

The second Respondent filed an affidavit before the Court of Appeal placing before court the circumstances under which the impugned document the "Note Verbal dated 23.10.2017" (P-12 or R-8) was issued and paragraphs 9 and 10 of the said affidavits reads thus;

- "9. I state that Note Verbal No. 756 dated 23.10.2017 was received from the Embassy of the United States of America, requesting the waiver of diplomatic immunity owing to the Petitioner's conduct pertaining to the purchase of the Sri Lankan Embassy in Washington and the laundering US \$ 332,000 via Shell Companies. A certified copy of the

aforementioned Diplomatic Note is annexed hereto marked as 2R7 and pleaded as part and parcel hereof.

10. I state that pursuant to the instructions received from His Excellency the President, the Embassy of the United States of America was informed by way of Note Verbal dated 23.10.2017 that the immunity conferred on the Petitioner was waived enabling the relevant authorities in the United States of America to conduct investigations into the said incident. As the 1st Respondent was overseas, the aforementioned decision was conveyed by me to the Embassy of United States of America. A certified copy of the Note Verbal dated 23.10.2017 is annexed hereto marked 2R8 and is pleaded as part and parcel hereof.”

A preliminary objection was raised by the State with regard to the maintainability of the application before the Court of Appeal based on the affidavit filed by the 2nd Respondent referred to above. It was contended on behalf of the Respondents, that the Court of Appeal does not have jurisdiction to entertain the said application as the decision to waive diplomatic immunity enjoyed by the Petitioner was based on a decision taken by His Excellency the President, which was conveyed to the Embassy of the United States of America by the Secretary to the Ministry of Foreign Affairs.

The Court of Appeal upheld the above preliminary objection and dismissed the application which was pending before the Court of Appeal.

It is the above decision of the Court of Appeal is challenged in the instant application before this court and this court having considered the material placed before it had decided to grant Special Leave on two questions of law as referred to above.

Sri Lanka being a signatory to the Vienna Convention on Diplomatic Relations 1961, had given effect to its obligations by introducing Diplomatic Privileges Act No. 9 of 1996. Section 2 of the said Act had provided “the Articles in the convention” to have the force of Law in Sri Lanka.

The Diplomatic immunity enjoyed by a diplomatic agent (Diplomatic Agent is identified under the convention as “the head of the mission or a member of the diplomatic staff of the mission”) its limitation and waiver is discussed under the convention in Article 31, 32 and 39 as follows;

Article 31

1. A diplomatic agent shall enjoy immunity from the criminal jurisdiction of the receiving State. He shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of
 - a).....

Article 39

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the receiving State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the Ministry of Foreign Affairs or such other ministry as may be agreed.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the country, or on expiry of a reasonable period in which to do so, but shall subsist until that time, even in case of armed conflict. However, with respect to acts

performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.

3.

Article 32

1. The immunity from jurisdiction of diplomatic agents and of persons enjoying immunity under Article 37 may be waived by the sending state
2. Waiver must always be express
3.

It was the position of the Petitioner that, he is entitled for immunity even though he is no longer holding a diplomatic position, under Article 39 (2) of the Convention for acts committed in the capacity of the Ambassador of Sri Lanka to the United States of America. As already referred to in this judgement, the Petitioner was extensively questioned by the Law Enforcement Authorities with regard to a property transaction which was taken place during his tenor as the Ambassador of Sri Lanka to the United States of America.

In these circumstances it is clear that the matter that was investigated by the Law enforcement Authorities of the United States of America was linked with the official work of the Petitioner as the Ambassador to the United States America, and this position is confirmed by the United States Authorities, when they send the Diplomatic Note to the Foreign Ministry of Sri Lanka Requesting the waiver of diplomatic immunity of the Petitioner to the effect;

“As the Ministry is aware, Mr. Wickramasooriya, former Ambassador to the United States, is under investigation for the misappropriation, theft and embezzlement of public funds by a

public official and the related laundering of those fund. The Embassy has been informed that United States Law Enforcement Authority maintain that during the 2013 purchase of the Sri Lankan Embassy in Washington DC, Mr. Wickramasooriya falsely inflated the sales price of the embassy by approximately \$ 332,000”

Article 32 (1) and (2), of the convention provides for the sending state to waive immunity granted under Article 39 (2) of the Convention and it is the said determination made under Article 32 (1) and (2) was challenged by the Petitioner before the Court of Appeal.

As submitted by the 2nd Respondent, when the Note verbal dated 23.10.2017 from the embassy of United States America requesting the waiver of the Diplomatic Immunity of the Petitioner was received by the Foreign Ministry, he received instruction from His Excellency the President to waive the Diplomatic Immunity of the Petitioner, and that was communicated to the Embassy of United States by Note verbal dated 23.10.2017 (on the same day)

The Petitioner’s entitlement for diplomatic immunity derived from the appointment he received as a diplomatic agent, i.e., as the Ambassador to the United States of America, and the said appointment he received from His Excellency the President under Article 33 (c) of the Constitution, (the text that was in operation as at the date of his appointment) which reads as follows;

Article 33 In addition to the powers, and functions expressly conferred or imposed on or assigned to him by the Constitution or by any written law whether enacted before or after the commencement of the Constitutions, the President shall have the power-

- (c) to receive and recognize and to appoint and accredit Ambassadors, High Commissioners, Plenipotentiaries and other diplomatic agents.

Except for the powers to appoint a diplomatic agent, the constitution (the text that was in operation at the time he was appointed as well as the text that was in operation as at 23.10.2017) is silent on the immunities that derives from such appointment as a diplomatic agent, but it is only the Diplomatic Privileges Act No. 9 of 1996 and the convention which speaks of the entitlement and the removal of Privileges of a diplomatic agent.

As already discussed, under Article 32 of the Convention, the sending state may waive the immunity and it must always be express. Section 2 (3) of the Diplomatic Privileges Act No. 9 of 1996 speaks of a situation where the waiver of Diplomatic immunity by a head of a mission or by a person for the time being performing the functions of a head of a mission, and according to the said section such waiver “shall be deemed to be waiver by the state.”

Therefore it is clear, that in the absence of any Constitutional provision with regard to the removal of privileges that derived to a diplomatic agent by appointing him to the said position by Article 33 of the Constitution, under the provisions of the Diplomatic Privileges Act No. 9 of 1996 read with the provisions of the convention, it is the sending state that is entrusted with the removal of diplomatic immunity of a diplomatic agent.

Article 30 (1) and 35 (1) of the Constitution (the text that was in operation on 23.10.2017) provides that;

Article 30 (1) There shall be a President of the Republic of Sri Lanka, who is the Head of the State, the Head of the Executive and of the Government and the Commander-in-Chief of the Armed Forces

Article 35 (1) While any person holds office as President of the Republic of Sri Lanka, no civil or criminal proceedings shall be instituted or continued against the President in respect of anything done or omitted to be done by the President, either in his official or private capacity. Provided that nothing in this paragraph shall be reads and construed as restricting the right of any person to make an application under Article 126 against the Attorney General, in respect of anything done or omitted to be done by the President, in his official capacity; Provided further that the Supreme Court shall have no jurisdiction to pronounce upon the exercise of powers of the President under Article 33 (2) (g)

The President's power to remove the diplomatic immunity as the Head of the State was never challenged neither before the Court of Appeal no before the Supreme Court by the Petitioner but one of the main arguments of the Petitioner was that, ex-facie there is no decision by His Excellency the President before Court, to invoke the immunity of His Excellency the President under Article 35 of the Constitution.

The instant appeal was filed before this court by the Petitioner on 2nd May 2018 but the matter was not supported but had gone down for several days for various reasons. On 17th December 2020 the Petitioner had filed a motion along with several new documents and moved to support the said motion before this court. At that stage learned Addition Solicitor General who represented the Substituted 2B Respondent had moved to file an affidavit from the Substituted 2B Respondent explaining certain matters.

It is an accepted legal principle, for the parties to argue their appeals and the Appellate Court to decide the appeal on the same material that was available before the original court. When the Petitioner filed

the instant appeal before this court he had never moved or sought permission to submit fresh evidence before this court. However, two years after invoking the jurisdiction of this court, the Petitioner had filed some fresh evidence without seeking permission of this court along with the motion dated 17th December 2020 and moved to support the said motion before this court. The day on which the Petitioner was to support the motion, state on behalf of the substituted 2B Respondent, moved to file an affidavit from the said Respondent in order to explain certain development that took place when the instant application is pending before this court. The learned President's Counsel who represented the Petitioner neither supported his motion on that day nor objected to the application by the state.

Substituted 2B Respondent, the incumbent Secretary of the Foreign Ministry had sworn an affidavit with annexures marked R1-R7A and tendered before this along with a motion dated 11th February 2021.

Even though this court was not made to understand any reason as to why fresh material is needed to proceed with the instant appeal by any of the parties before filing the said material, I can observe a similarity between the two sets of documents filed before this court.

I am also mindful of Article 127 (2) of the Constitution which reads thus,

Article 127 (2) The Supreme Court shall, in the exercise of its jurisdiction, have sole and exclusive cognizance by way of appeal from any order, judgement, decree or sentence made by the Court of Appeal, where any appeal lies in law to the Supreme Court, and it may affirm, reverse or vary any such order judgment, decree or sentence of the Court of Appeal and may issue such directions to any Court of First Instance or order a new trial or further hearing in any proceedings as the justice of the case may require, **and may also call for and admit fresh or additional evidence if the interest of**

justice so demands and may in such event, direct that such evidence be recorded by the Court of Appeal or any Court of First Instance. (emphasis added)

When the instant application was supported before this court on 17.02.2021, three years after it was filed in the registry, the said fresh material was available before the court and presumably, the parties had referred to the fresh material and would have influenced this court in granting Special Leave. In these circumstances it is in the interest of justice, that this court would consider the fresh material that was placed before court by both parties.

However, I am further mindful of the fact that it is the 2nd Respondent, the Secretary to the Ministry of Foreign Affairs, a responsible Public Servant, had filed an affidavit before this court informing the circumstances under which he issued 2R8 when the matter was originally supported before the Court of Appeal, and the learned Additional Solicitor General who represented the said Respondent before court had based his preliminary objection to the contents of the said affidavit.

Even though there is reference to several documents that was exchanged between the Ministry of Foreign Affairs, the Embassy of the United States and Department of State, Washington since 2nd July 2020, in the affidavit filed before this court by the 2B added Respondent, paragraph 9 of the said affidavit refers to a Note Verbal dated 2nd July 2020 as follows;

“9. I state that Note Verbal bearing No. L/POL/33 dated 23rd October 2017, (by which the diplomatic immunity enjoyed by the Petitioner was waived) was, withdrawn by Note verbal bearing No. L/POL/33 (vii) dated 2nd July 2020, for the reasons contained therein. A certified copy of the Note verbal bearing No. L/POL/33 (VII) dated 2nd July 2020 is annexed hereto marked 2R3 and pleaded as part and parcel hereof.”

The reasons for the withdrawal of Note Verbal dated 23rd October 2017 was explained in the second and third paragraphs of the Note Verbal dated 2nd July 2020 (2R3) as follows;

2. Although, the aforesaid Note Verbal appears to have been issued by the Ministry of Foreign relations on the basis that such instructions have been issues by Former President, His Excellency Maithripala Sirisena, the Presidential Secretariat and Ministry of Foreign Relations has been able to verify that no records are available in both offices to prove that Former President has issued such instructions.
3. Based on above mentioned observations, the Ministry of Foreign Relations is of the view that the said waiver is not legitimate and hence the aforesaid Note Verbal No. L/POL/33 dated 23rd October 2017 is withdrawn.”

Even though the 2B added Respondent had not explained the circumstances under which a search was carried out, as to referred in paragraph two above, he has further, failed to inform this court when he is submitting an affidavit to consider as evidence before this court, whether he checked with the author of the previous affidavit, who said to have issued 2R8 (Note verbal dated 23rd October 2017) since the Court of Appeal had considered and acted upon his affidavit as evidence before the said court.

The Petitioner too had filed almost the same set of documents along with the motion dated 17th December 2020 and therefore it is not necessary to consider the said documents separately in this judgment but, it appears to me that both the Petitioner as well as the 2A added Respondent are now disputing a factual position submitted before the Court of Appeal by the predecessor of the 2B added Respondent.

The Petitioner had originally gone before the Court of Appeal seeking orders in the nature of Writ of *Certiorari* and Writ of *Mandamus* and the nature of this application before the Supreme Court has not

changed even though the matter before this court is an appeal against the order of the Court of Appeal. In the Petition filed before this court, the Petitioner had sought the following relief among few other interim orders from this court.

- b) set aside the order of the Court of Appeal dated 29th March 2018 in case No.CA/Writ/416/2017;
- d) issue an order in the nature of a Writ of *Certiorari* quashing the decision of Respondents contained in the documents annexed marked “P12” to the Petitioner in Court of Appeal case No. CA/Writ/416/2017;
- e) Issue an order in the nature of Writ of *Mandamus* directing the 1st and/or 2nd Respondent to write to the Government of the United States of America, informing that the Portioner continue to enjoy all the diplomatic privileges and immunities in terms of Vienna Convention on Diplomatic Privileges and immunities respect of acts performed by him in exercise of his functions the America and United Mexican States;

When the major facts are in dispute the courts are reluctant to issue a Writ of *Mandamus* and this was considered by this Court in the case of ***Dr. Puwanendan and Another Vs. Premasiri and two others (2009) Sri LR 107***

This is a case where the Petitioner had sought a Writ of *Mandamus* to compel the Registrar of Lands to remove an entry in the records of the Land Registry. Whilst affirming the decision of the Court of Appeal and also following a decision of the Court of Appeal in a similar matter, Thilakawardene (J) had observed as follows;

..... “On 5th March 2008 the Court of Appeal by its judgment, dismissed the applications filed by the Appellant stating *inter-aila* that the Appellant’s case was based on “disputed facts” and therefore the Court was not inclined issue such a Writ. Despite the significant evidence to support the Appellant’s allegation, we believe this dismissal to have been legally correct.

The nature of the Writ of *Mandamus* was clearly articulated in the case of ***Thajudeen Vs. Sri Lanka Tea Board and Another (1981) 2 Sri LR 471***. In Thajudeen, the Honorable Justice Ranasinghe, quoting de. Smith’s *Judicial Review of Administrative Action* (4th ed) 540, 561 stated that,

‘*Mandamus* has always been awarded as an extraordinary, residuary and supplementary remedy to be granted only when there is no other means of obtaining justice. Even though all other requirements for securing the remedy have been satisfied by the applicant, the court will decline to exercise its discretion in his favour if a specific alternative remedy equally convenient beneficial and effectual is available’

Thus, the Writ of *Mandamus* is principally a discretionary remedy a legal tool for the dispensation of justice, when no other remedy is available. Given the power of such a remedy the common law. Surrounding this remedy requires multiple conditions that must be met prior to the issuance of a writ by court. Only if (a) the major facts are not in dispute and the legal result of the facts are not subject to controversy and (b).....”

By submitting an affidavit before this court 2B added Respondent had informed that, all his efforts to find any documentary proof with regard to any decision that was communicated from the Presidential Secretariat to the Ministry of Foreign Affairs was failed but he has not taken up the position that there was no such decision by His Excellency the President on or around 23.10.2017 to withdraw the

Diplomatic immunity enjoyed by the Petitioner with regard to the official acts committed by him during his tenor as the Ambassador to the United States of America.

However, the affidavit filed before the Court of Appeal by the 2nd Respondent who said to have received such instruction and acted on the said instruction and communicated such instruction by Note Verbal dated 23.10.2017 was not rejected or denied by any authority before this court.

In the said circumstances, I am not inclined to consider granting any relief as prayed in paragraphs (b), (d) and (e) referred to above based on the fresh evidence placed before this court by both parties, since major facts with regard to the issues of Note Verbal dated 23rd October 2017 are disputed by the said evidence before this court.

When considering the main appeal that was filed before this court, it is further observed that the Court of Appeal had correctly allowed the preliminary objection raised by the state, based on the affidavit filed by the 2nd Respondent before the said court. The decision of the Court of Appeal was mainly based on Article 35 of the constitution.

During the arguments before this court, the learned President's Counsel who represented the Petitioner relied upon the decisions in *Reys Vs. Al-malki and Another (2017) UK SC 61, AC 735* and *Brigadier Andige Priyanka Indunil Fernando Vs. Majuran Sathananthan Case No. Co/1091/2020 and CO/1850/2020* decision of High Court of Justice Queen Bench division;

As observed by me both the above decisions refer to the diplomatic immunity enjoyed by diplomatic agent and how the domestic court should react to those in compliance with the convention.

However, I see no relevance of any one of those decisions to the instant case, since what was challenged before the Court of Appeal was the decision of the Sending state to waive the diplomatic immunity that

was enjoyed by the Petitioner under Article 39 (2) of the convention. When the sending state had decided to Act under Article 32 of the convention on a request by the receiving state, there is no dispute with regard to acts performed by the diplomatic agent whether it comes within the immunity or not.

For the reasons given in my judgement, I see no merit in the appeal before us. The appeal is therefore dismissed with cost fixed at Rs. 50,000/-.

Appeal Dismissed. With cost.

Judge of the Supreme Court

Justice K. K. Wickremasinghe,

I agree,

Judge of the Supreme Court

Justice Mahinda Samayawardhena,

I agree,

Judge of the Supreme Court