

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

In the matter of an Application for mandates in the nature of Writs of Certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**Application No. CA (WRIT) 173/2021**

Janaka Bandara  
412, 3<sup>rd</sup> Lane  
Robert Gunewardena Mawatha  
Battaramulla.

**Petitioner**

**Vs.**

1. Hon. Upali Abeyrathne  
Retired Judge of the Supreme Court  
Chairman  
No. 42/10, Beddagana North  
Pitakotte.
2. Hon. Daya Chandrasiri Jayathilake  
Retired Judge of the Court of Appeal  
Member  
No. 24, Diyawanna Gardens  
Pelawatta Battaramulla.
3. Mr. Chandra Fernando  
Retired Inspector General of Police  
Member  
No.1, Shrubbery Gardens  
Colombo 4.

Being Chairman and Members respectively of the Commission of Inquiry to inquire and obtain information to alleged incidents of political victimization of Public Corporations, Members of the Armed Forces and the Police Services.

Room No.210, Block No.2, 211d Floor,  
Bandaranayake International Conference Hall  
Buddhaloka Mawatha Colombo 7.

4. Mrs. Pearl K. Weerasinghe  
Former Secretary to the Commission of Inquiry  
Room No.210  
Block No.2, 2<sup>nd</sup> Floor  
Bandaranayake International Conference Hall  
Buddhaloka Mawatha  
Colombo 7.
  
5. Hon. Attorney General  
Attorney General's Department  
Colombo 12.
  
- 5(ii) Minister of Finance  
Minster of Buddha Sasana  
Religious and Cultural Affairs  
Minister of Urban Development and Housing  
The Secretariat,  
Lotus Road, Colombo 01.
  
- 5(iii) Minister of Labour  
Labour Secretariat  
Kirula Road, Colombo S.
  
- 5(iv) Minister of Education  
"Isurupaya" Battaramulla.
  
- 5(v) Minister of Health  
"Suwasiripaya"  
No. 385,  
Rev. Baddegama Wimalawansa Mawatha  
Colombo 10.
  
- 5(vi) Minister of Foreign Relations  
Republic Building  
Colombo 1.
  
- 5(vii) Minister of Fisheries  
New Secretariat  
Maligawatta, Colombo 10.

- 5(viii) Minister of Transport  
7<sup>th</sup> Floor, Sethsiripaya  
Stage II, Battaramulla.
- 5(ix) Minister of Trade  
The Secretariat  
Lotus Road, Colombo 01.
- 5(x) Minister of Wildlife and Forest Conservation  
No. 1090  
Sri Jayawardenapura Mawatha  
Rajagiriya.
- 5(xi) Minister of Public Services  
Provincial Councils and Local Government  
"Nila Medura"  
Elvitigala Mawatha  
Narahenpita, Colombo 5.
- 5(xii) Minister of Mass Media  
163, "Asi Disi Medura"  
Kirulapone Mawatha  
Polhengoda, Colombo 5.
- 5(xiii) Minister of Irrigation  
No. 500, T.B. Jayah Mawatha  
Colombo 10.
- 5(xiv) Minister of Highways  
Sethsiripaya Circular Road  
Battaramulla.
- 5(xv) Minister of Industries  
Level 07, West Tower  
World Trade Center  
Colombo 01.
- 5(xvi) Minister of Environment  
Sobadam Piyasa, No. 416/C/1  
Robert Gunawardana Mawatha, Battaramulla.
- 5(xvii) Minister of Lands  
"Mihikatha Madura"  
Land Secretariat, No. 1200/6,  
Rajamalwatta Road, Battaramulla.

- 5(xviii) Minister of Agriculture  
No.288  
Sri Jayawardanapura Mawatha  
Sri Jayawardanapura Kotte.
- 5(xix) Minister of Water Supply  
Lakdiya Madura, No. 35  
New Parliament Road  
Sri Jayawardanapura Kotte.
- 5(xx) Minister of Energy  
No. 80,  
Sir. Earnest De Silva Mawatha  
Colombo 7.
- 5(xxi) Minister of Plantations  
11<sup>th</sup> Floor, Sethsiripaya  
02<sup>nd</sup> Stage, Battaramulla.
- 5(xxii) Minister of Tourism  
World Trade Centre  
West Tower, Level 30  
Colombo 01.
- 5(xxiii) Minister of Ports and Shipping  
No.19, 1 Chaithya Road  
Colombo.
- 5(xxiv) Minister of Youth and Sports Affairs  
No.09  
Philip Gunawardena Mawatha  
Colombo 07.
- 5(xxv) Minister of Justice  
Superior Court Complex  
Colombo 12.
- 5(xxvi) Minister of Public Security  
14th Floor, "Suhurupaya"  
Battaramulla.

6. Secretary to the Cabinet of Ministers  
Office of the Cabinet of Ministers  
Republic Building  
Sir Baron Jayathilake Mawatha  
Colombo 01.
7. Director General  
The Commission to Investigate Allegations of  
Bribery or Corruption  
No.36, Malalasekera Mawatha  
Colombo 07.
8. Hon. Attorney General  
Attorney General's Department  
Hulftsdorp Street  
Colombo.
9. Inspector General of Police  
Police Headquarters  
Colombo 1.

#### **Respondents**

**Before**

**Hon. Justice Nishshanka Bandula Karunarathna**

**Hon. Justice D.N. Samarakoon**

**Hon. Justice M.T. Mohammed Laffar**

**Counsel**

Mr. Romesh de Silva PC with Sugath Caldera AAL, Harith de Mel AAL and Sahiru Jayasinghe AAL instructed by Ms. Nisansala Wijesinghe for the Petitioner.

Mr Milinda Gunathilake, PC, ASG with Dilan Ratnayake, SDSG, Uresha de Silva, DSG and Manohara Jayasinghe, DSG for the 5<sup>th</sup> to 9<sup>th</sup> Respondents.

**Written Submissions:**

By the Petitioners filed on 12.05.2022

By the 06<sup>th</sup> to 09<sup>th</sup> Respondents filed on 27.05.2022

**Argued on:**

08.04.2022

**Judgment on: 28.09.2022**

**N. Bandula Karunarathna J.**

This is an application for a Writ of Certiorari to quash the findings, decisions and recommendations of the 1<sup>st</sup> to 3<sup>rd</sup> respondents in the report marked 'P 4' in respect of the petitioner pursuant to the complaints bearing numbers 50/2020 and 431/20.

The petitioner further requests to grant the following reliefs;

- (i.) For a writ of prohibition, prohibiting the respondents or any one or more of them or their agents or subordinates from taking any steps whatsoever in terms of or relying on the finding's decisions and recommendations in the Report marked 'P 4' of the 1<sup>st</sup> to 3<sup>rd</sup> respondents with reference to the petitioner in respect of Complaints bearing No. 50/2020 and 431/20.
- (ii.) For a writ of prohibition, prohibiting the respondents or any one or more of them or their agents or subordinates from taking any steps whatsoever in terms of the Cabinet decision dated 18.01.2021 marked 'P 14' with reference to the petitioner in respect of Complaints bearing No. 50/2020 and 431/20.
- (iii.) For a writ of certiorari quashing the decisions of the Cabinet of Ministers dated 18.01.2021 marked 'P 14' to the Petition in respect of the Petitioner with reference to Complaints bearing No. 50/2020 and 431/20.
- (iv.) For an interim order, pending the hearing and final determination of this Application, preventing the respondents or any one or more of them from taking any further steps whatsoever in consequence of the finding's decisions and recommendation of the 1<sup>st</sup> to 3<sup>rd</sup> respondents in the report marked 'P 14' and the Cabinet decision dated 18.01.2021 marked 'P 14' in respect of the Petitioner with reference to the Complaints bearing No. 50/2020 and 431/20;
- (v.) For an interim order against the respondents or any one or more of them staying the operation of the finding's decisions and recommendations in respect of the Petitioner contained in the report marked 'P 14' with reference to the Complaints bearing No. 50/2020 and 431/2020 pending the full and final determination of this application;
- (vi.) An interim order staying the operation of the Cabinet Decision dated 18.01.2021 marked 'P 14' to the Petition in respect of the Petitioner with reference to the Complaints bearing No. 50/2020 and 431/2020 pending the full and final determination of this application;
- (vii.) For an order calling for the entire record of the Presidential Commission of Inquiry into Political Victimization (PCIPV) including the proceedings in relation to Complaints bearing No. 50/2020 and No.431/2020 and the Final Report of the PCIPV;
- (viii.) For an order calling for the official file bearing No. CR1/08/2016 from the 8<sup>th</sup> Respondent;

The petitioner pleads that the petitioner is an Officer of the Attorney General's Department currently holding the post of Senior State Counsel. The 1<sup>st</sup> respondent was the Chairman of the Commission of Inquiry appointed by His Excellency Gotabhaya Rajapakse, the President of the Democratic Socialist Republic of Sri Lanka by extraordinary gazette dated 09.01.2020 bearing number 2157/44.

The 2<sup>nd</sup> and 3<sup>rd</sup> respondents were the other two members of the said Commission of Inquiry appointed by His Excellency the President. The 4<sup>th</sup> respondent acted in the capacity of the Secretary to the said Commission of Inquiry comprising of the 1<sup>st</sup> to 3<sup>rd</sup> respondents.

The petitioner says that the 5<sup>th</sup> respondent is the Attorney General, who is named as a respondent in terms of Article 35(3) of the Constitution in view of the subjects and functions assigned to His Excellency, the President and remaining in his charge under Article 44 of the Constitution including the Ministry of Defence. The 5(ii) to 5(xxvi) collectively comprises the remaining members of the Cabinet of Ministers of the Democratic Socialist Republic of Sri Lanka.

The 6<sup>th</sup> respondent is the Secretary to the Cabinet of Ministers. The 7<sup>th</sup> respondent is the Director General of the Commission to Investigate Allegations of Bribery or Corruption appointed under and in terms of the Commission to Investigate Allegations of Bribery or Corruption Act Number 19 of 1994 as amended. The 8<sup>th</sup> respondent is the Attorney General who exercises all powers given in terms of the law to the said office. The 9<sup>th</sup> respondent is the Inspector General of Police who is the principal Officer-In-Charge of all divisions of the Sri Lanka Police.

The petitioner states that the acts and omissions of the 1<sup>st</sup> to 3<sup>rd</sup> respondents amount to matters that warrant the exercise of judicial review under and in terms of Article 140 to the Constitution. The 5<sup>th</sup> to 9<sup>th</sup> respondents or any one or more of them are persons who have or may take steps against the Petitioner on the basis or pretext of the acts or omissions of the 1<sup>st</sup> to 3<sup>rd</sup> respondents which are impugned by this application and are subject to the writ jurisdiction of this Court.

On 09.01.2020 by a warrant published in extraordinary gazette bearing number 2157/44 as amended by extraordinary gazette dated 22.01.2020 bearing number 2159/16, his Excellency Gotabhaya Rajapakse, the President of the Democratic Socialist Republic of Sri Lanka appointed the 1<sup>st</sup> respondent as Chairman and 2<sup>nd</sup>, 3<sup>rd</sup> respondents as members of a Commission of inquiry under and in terms of section 02 of the Commissions of Inquiry Act, number 17 of 1948 as amended.

The Petitioner states that the Commission of Inquiry comprising the 1<sup>st</sup> to 3<sup>rd</sup> respondents were commonly referred to as the Presidential Commission of Inquiry into Political Victimization. (Referred to as "PCIPV"). The warrant of his Excellency the President to the PCIPV was extended from time to time. In terms of the warrant of the President the 1<sup>st</sup> to 3<sup>rd</sup> respondents were appointed inter alia to inquire into and obtain information in respect of alleged political victimization during the period commencing 08.01.2015 and ending 16.11.2019 and to make recommendations with reference to any of the matters that have been inquired into under the terms of the said warrant as follows;

- (i.) Whether there has been any malpractice or irregularity, or non-compliance with or disregard of the proper prudence, norms guidelines, procedures and best practices applicable in relation to the administration of the Commission to Investigate Allegations

of Bribery or Corruption (CIABOC), Financial Investigations Divisions (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police;

- (ii.) Whether any investigations by the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Investigations Division (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police had been influenced or obstructed or prevented in any manner, resulting in loss, damage, injury or detriment, either direct or imputed to any person or persons;
- (iii.) Whether any officer entrusted with the conduct of investigations by the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Investigations Division (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police have acted under undue influence by third parties, including by the said Anti-Corruption-unit;
- (iv.) Whether any person had committed any act of political victimization, misuse or abuse of power, corruption or any fraudulent act in relation to the functions of the said Anti-Corruption unit, Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Crimes Investigations Division (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police, or in relation to the administration of any law or the administration of justice;
- (v.) To ascertain all complaints, the investigation of which was first allegedly decided upon by the Investigation Unit referred to in the Warrant and thereafter investigations thereon initiated and those complaints made in relation to officers of the Tri-forces and Sri Lanka Police that affect the national security and in the case of inquiries, investigations and legal proceedings held causing prejudice to some person in the administration of laws or administration of Justice due to pressure being exerted by a third party and in the case of inquiries, investigations and legal proceedings held in relation to the Tri-forces and Sri Lanka Police and the Public Service affecting the National Security and where prejudice was deemed to have been caused in any manner whatsoever and take immediate necessary measures to prevent prejudice being caused and National Security and Public Services being adversely affected;

On the face of the said warrant, the petitioner argued that he had no reason to believe or apprehend that the petitioner's conduct would be the subject of an inquiry or that the petitioner would be in anyway implicated or concerned in the matters at the inquiry.

The petitioner stated that the report of the PCIPV was announced to be handed over to his Excellency the President and was aware that thereafter the said Commission Report consisting of three Volumes was tabled in Parliament on 09.03.2021. Thereafter the petitioner was able to obtain a Copy of the same. The petitioner has annexed in Three Volumes of the Official Report of the 1<sup>st</sup> to 3<sup>rd</sup> respondents as 'P4' and pleads same as part and parcel of this petition. The Petitioner states that though there is



some knowledge of an Errata being published by the 1<sup>st</sup> to 3<sup>rd</sup> respondents, the petitioners have not been able to obtain a formal copy of such and therefore reserve the right to tender said 'Errata' marked as "P5".

The petitioner states that the following is evident concerning the petitioner from the Final Report of the PCIPV;

- (i.) There were two complainants to the Presidential Commission who had allegedly levelled allegations against the petitioner;
- (ii.) One was Mr. Nissanka Senadhipathi Chairman of Avante Garde Maritime, bearing Number PCI/PV/01/Com.50/2020 (50/2020)
- (iii.) The Second Complaint was by one Mr. Victor Samaraweera bearing Complaint Number 431/20;

The aforesaid complainants had been indicted by the Attorney General before the High Court at Bar in case No. HC/TAB/715/2019. The petitioner states that he was involved in the prosecution of the said complainants before the High Court at Bar in the discharge of his official duties as a Senior State Counsel and states that the said case is now listed for closing submissions. On 17.06.2020 the petitioner received a purported Summons from the PCIPV, under Section 16 of the Commissions of Inquiry Act, No. 17 of 1948, as amended, returnable on 23rd June 2020. On the face of the said Summons, the Complainant was one Nissanka Senadhipathi with regard to Complaint bearing reference No. PCI/PV/01/Com./50/2020.

The petitioner states that the Summons did not attach the Complaint made by the said Mr. Nissanka Senadhipathi or a summary thereof and in fact, the petitioner was never made aware by the PCIPV of the nature of the complaint or the allegations that had been made by the Complainant against the petitioner. Along with the said Summons, the petitioner had also been issued a Notice by the PCIPV to record a Statement before the Investigation Unit of the Commission, on 29.06.2020. The said Notification marked P7 was also in reference to Complaint bearing reference No. PCI/PV/01/Com./50/2020 and was served to the petitioner through the office of the Hon. Attorney General.

The petitioner states that upon receipt of the Summons and the Notice from the PCIPV marked as 'P 6' and 'P 7', the petitioner handed over a letter dated 18.06.2020 to the Hon. Attorney General, the 8<sup>th</sup> respondent, seeking his advice and appropriate redress as the matters referred to in the summons and the notice arose directly from the discharge and performance of his official functions and duties as an officer of the Attorney General's Department.

Thereafter the Attorney General has addressed a letter to the 1<sup>st</sup> respondent, Chairman of the said Presidential Commission strenuously objecting to the summons and notice issued on the petitioner stating inter alia that the PCIPV had no jurisdiction to hear and determine the complaint of the

complainant Mr. Nissanka Senadhipathi or to issue the summons or notice to the petitioner or make any findings or recommendations against the petitioner.

The petitioner says that in the circumstances he did not present himself before the PICPV in view of the legal objections raised by the Attorney General as the Chief Law Officer of the State, with a legitimate expectation that a decision will be made with regard to the legal objections contained in the said letter relevant to the matter.

The petitioner stated that he became aware of the following events that took place on 23.06.2020 before the PCIPV;

- (i.) The Letter dated 22.06.2020 marked 'P9' was formally tendered to the 1<sup>st</sup> to 3<sup>rd</sup> respondents for the purposes of it being filed on record and for an appropriate order to be made in connection with the several objections contained in the said letter;
- (ii.) The 8<sup>th</sup> respondent, the Attorney General had also directed a Senior Deputy Solicitor General assisted by a Senior State Counsel to appear on his behalf and make oral submissions with regard to the objections set out in his letter marked 'P9'.
- (iii.) The said Attorneys-at-Law, both officers of the Attorney General Department had thereafter sought to make submissions on the matters contained in the letter marked 'P9'.
- (iv.) The 1<sup>st</sup> respondent however vehemently prevented and denied any opportunity for the said Attorneys-at-Law to appear on behalf of the Attorney General to make Oral Submissions and threatened to hold such Attorneys-at-Law guilty for the offence of Contempt if any further attempt was made to make submissions.
- (v.) Thereafter, the officer of the Attorney General's Department assigned to assist the PCIPV, Additional Solicitor General Mr. Rohantha Abeyesuriya, P.C. made submissions in connection with the objections raised by the Attorney General in the letter marked 'P9' and moved the PCIPV to make an order on the same.
- (vi.) The petitioner says that the 1<sup>st</sup> to 3<sup>rd</sup> respondents did not make any order with regard to the objections raised by the Attorney General and proceeded to re-fix the inquiry for 26.06.2020.

The petitioner further says that having noted the manner in which the 1<sup>st</sup> to 3<sup>rd</sup> respondent appeared to be conducting itself, wrote a letter dated 25.06.2020 which was sent by registered post and hand-delivered to the aforesaid Commission of Inquiry. In the letter, the petitioner had informed the 1<sup>st</sup> to 3<sup>rd</sup> respondents that in view of the reasons stated in his letter that he will not be presenting himself before the Commission of Inquiry or its Investigation Unit. The petitioner argued that the petitioner by his conduct, therefore, has not waived or acquiesced in any manner in the conduct of the

Commission of Inquiry by the 1<sup>st</sup> to 3<sup>rd</sup> respondents pertaining to the petitioner and has reserved his rights appropriately against the said 1<sup>st</sup> to 3<sup>rd</sup> respondents.

It is important to note the decision of the Court of Appeal Writ Applications 166/20 and 167/20 and also the undertaking given by the PCIPV. The petitioner by way of further disclosure states as follows:

- (i.) Two applications for writs were instituted bearing number CA Writ 166/20 and 167/20 wherein the *vires* among other things of the PCIPV to accept and inquire into the complaint made by Mr. Nissanka Senadhipathi was canvassed;
- (ii.) The petitioner was named as the 5<sup>th</sup> respondent to the said applications;
- (iii.) The petitioner states that after Support for Notice and Interim Relief, the 1<sup>st</sup> to 3<sup>rd</sup> respondents through their counsel gave an undertaking voluntarily that the Commission will be advised not to summon the 5<sup>th</sup> respondent (Being the petitioner to these proceedings), especially in view of the letter written by the Attorney General taking into consideration that the 5<sup>th</sup> respondent is the prosecuting counsel in the pending cases in the High Court. Further, an undertaking was given that in the presence of both the petitioners in CA Writ 166/20 and 167/20 respectively will be dispensed with until the Court decides on the question of Notice and Interim Relief and their absence will not be held against them.
- (iv.) The petitioner stated that the said application is currently pending before the Court of Appeal and the undertaking given by the 1<sup>st</sup> to 3<sup>rd</sup> respondent remains to date.

The petitioner stated that he had a legitimate expectation that the 1<sup>st</sup> to 3<sup>rd</sup> respondents will not act contrary to an express undertaking given to the Court of Appeal. But it is manifestly clear on a plain reading of the final report marked 'P4', that the 1<sup>st</sup> to 3<sup>rd</sup> respondents have acted in breach of their aforementioned undertaking given to this court. The petitioner contended that in view of the undertaking given the 1<sup>st</sup> to 3<sup>rd</sup> respondent will not make any adverse finding or determination against him, since he was not summoned thereafter and it was implicit in the undertaking that all the matters adverted to in the Attorney General's letter marked 'P 9' had been accepted by the 1<sup>st</sup> to 3<sup>rd</sup> respondents.

On the face of the report concerning the complaint made by Mr. Nissanka Senadhipathi, Chairman of Avante Garde Maritime Services Pvt Ltd Bearing Number PCI/PV/01/Com.50/2020 (50/2020) the following findings have been made by the PCIPV, against the petitioner:

- (i.) That the petitioner wrote letters marked in evidence at the Commission of Inquiry as 'P 148' and 'P 149' which resulted in the arrest of Mr. Nissanka Senadhipathi
- (ii.) That the petitioner was present and objected to the grant of bail to Mr. Nissanka Senadhipathi at the official residence of Judge Gihan Pilapitiya, Judge of the High Court;

- (iii.) That the petitioner was present at the Bribery Commission to Investigate Bribery and Corruption on the day Mr. Nissanka Senadhipathi was questioned at the CIABOC; the innuendo being that the petitioner was instrumental in the conducting of the interrogation;
- (iv.) That the petitioner was the person who handled the Prosecutions against Mr. Nissanka Senadhipathi.

The petitioner stated that on or about 21.07.2020 the petitioner had received a Summons from the PCIPV, returnable on 28.07.2020 under section 16 of the Commissions of Inquiry Act, No. 17 of 1948, as amended. On the face of the said summons, the Complainant was one Victor Samaraweera with regard to complaint bearing reference No. PCI/PV/01/Com./431/2020.

The summons did not attach the complaint made by Mr. Victor Samaraweera or a summary thereof and in fact, the petitioner was never made aware by the PCIPV of the nature of the complaint or the allegations that had been made by the complainant against the petitioner. In view of the aforesaid circumstances and the stance taken by the Attorney General, the petitioner did not present himself before the PCIPV in respect of this complaint, but no findings have been made in respect of the petitioner regarding complaint number 431/20 by Mr. Victor Samaraweera as per the final Report marked P4.

It was revealed that no statement was recorded from the petitioner by the Investigation Unit of the PCIPV. The petitioner states that at no point whatsoever were any of the complaints in relation to the petitioner served on him or any allegations or charges against him read or explained to the petitioner by the PCIPV or any matters pertaining to the inquiry to be held. The petitioner says that he is unaware as to whether any purported complaints made to the PCIPV were directly levelled at the petitioner as up to-date the petitioner has not seen any of the purported complaints. The petitioner stated that based on the above the 1<sup>st</sup> to 3<sup>rd</sup> respondents had made several decisions and recommendations adverse to the petitioner and he states that similar decisions and identical recommendations have been made by the 1<sup>st</sup> to 3<sup>rd</sup> respondents against the petitioner as follows;

- (i.) That the respondents in relation to the complaints bearing No. 50/20 and 431/20 including the petitioner have with a view to causing the arrest of Mr. Nissanka Senadhipathi and Mr. Victor Samaraweera respectively, fabricated evidence with a view to abet the remand of the said persons;
- (ii.) That Mr. Nissanka Senadhipathi should be discharged from the proceedings in Magistrates Court B/32528/15 and B/44146 forthwith.
- (iii.) That Mr. Nissanka Senadhipathi should be discharged from the Case HCB/25/17 and the indictment to be withdrawn
- (iv.) That Mr. Victor Samaraweera must be discharged from the proceedings at Galle Magistrate Court bearing number B4414.

The petitioner stated that the following recommendation have been made against him;

- (i.) offences have been committed under section 189 read together with section 191 of the penal code and Abetment under section 100 of the penal code and section 70 of the Bribery Act for Corruption and therefore appropriate action should be instituted in a Competent Court in respect of the said Offences (Recommendations 1-3)
- (ii.) Forward the Report, Evidence and Documents to the CIABOC and the Attorney General for necessary steps to indict persons including the petitioner. (Recommendation 6)
- (iii.) Compensation to be granted to the complainants. (Recommendation 7)

The said findings, decisions and recommendations, although they are procedurally flawed and the petitioner states that they are also illegal, irrational and perverse on the merits as herein stated. At the relevant time, the Criminal Division of the Attorney General's Department was headed by Mr. Kapila Waidyarante, President's Counsel who was at that time a Senior Additional Solicitor General. The petitioner further states that he was one of the Officers assigned to handle the 'Avante Garde' case along with another Additional Solicitor General and at all times were subject to the supervision of the Attorney General and several Superior Officers of the Attorney General's Department who supervised this matter.

The petitioner argues that at no time whatsoever has any superior officer found at any time or manner any dereliction of duty and fault in the manner in which he has discharged his duties as an officer of the Attorney General's Department in relation to the Avant Garde matter. He was only one of the officers assigned to the said case and was Junior Counsel to all the other officers assigned and who supervised the said matter. The petitioner pleads that at no time whatsoever has any superior officer ever found fault with him as regards to his performance of his duties in the Attorney General's Department. The petitioner says that he has performed his duties conscientiously, diligently and faithfully.

The documents marked at the Commission of Inquiry referred to as 'P 148' and 'P 149' were written under the instructions of the Attorney General. The petitioner states that the Attorney General had agreed with the contents of the said letter and in fact, counter-signed the letter. The petitioner pleads that it has been the consistent and constant view of the present Attorney General and his predecessors in office that persons suspected of having committed offences in relation to matters such as the Avant Garde should be arrested and charged according to law.

In those circumstances, the petitioner specifically pleads that the said letter 'P 148' and 'P 149' were the decisions of the superior officers which were counter-signed by the Attorney General and were written by the petitioner in the performance of his duty as an officer of the Attorney General's Department carrying out the directions of said superior officers. The petitioner states that the former Attorney General directed him to go to the official residence of Judge Gihan Pilapitiya, Judge of the High Court and objected to bail on or about 06.09.2016. It is in those circumstances that the

petitioner had gone to the official residence of Judge Gihan Pilapitiya, Chief Magistrate and objected to bail.

The petitioner further stated that he went to the official residence of Judge Gihan Pilapitiya objected to bail in the discharge of his duties as an officer of the Attorney General's department. None of the superior officers of the Attorney General's Department has in no way or manner found fault with him for going to the official residence of Judge Gihan Pilapitiya on the said date and objecting to bail. The practice of the Attorney General's Department with matters in connection with the CIABOC, officers of the Attorney General's Department assigned to handle matters of the Bribery Commission at times go to the premises of the Bribery commission in that it is more convenient to have consultations there, in that inter alia all files are in that premises and any officer who needs to be questioned are present.

In these circumstances, a consultation at the CIABOC is more convenient and can be concluded without postponement to call for files and to call for officers. The petitioner states that the petitioner had done so, on several previous occasions with regard to other matters where he was assigned as the prosecutor on behalf of the CIABOC for several years. Other Officers of the Attorney General's Department assigned to handle matters of the Bribery Commission also do the same thing. In that context on the day when the petitioner attended the office of the CIABOC for a consultation in respect of another case, he was informed that Mr. Nissanka Senadhipathi was being questioned on the very same day. The petitioner specifically stated that he was not present during the interrogation nor did the Investigating Officer contact him or seek his advice during-the interrogation.

The petitioner argued that *ex-facie* the report of the commission demonstrates that there is no evidence before the commission to have reached the recommendation set out in the report against the petitioner. The petitioner stated that the 1<sup>st</sup> to 3<sup>rd</sup> respondents have not complied with the rules of Natural Justice and the report does not contain even an iota of evidence to support the recommendations made against the petitioner in respect of complaints No. 431/20 and 55/20. In the circumstances, the petitioner stated that the 1<sup>st</sup> to 3<sup>rd</sup> respondents have been biased in law and that they have acted mala fides in law. The petitioner stated that he was part of the team handling the Avant Garde case and the petitioner was instructed by his superior officers including the then Attorney General, to prosecute this matter.

The main argument of the petitioner was that the commission prior to arriving at the said conclusion has not observed the rules of Natural Justice in that *inter alia*;

- (i.) The petitioner was not informed of any charge against him;
- (ii.) The petitioner was not informed that he would be accused of any wrongdoing and the Commission would make any recommendation against him;
- (iii.) That he was not given an opportunity for offering any explanation as to why a recommendation against him was made by the commission should not be made.

The petitioner stated that the recommendation against him has been made mala fides in law. The recommendations are unreasonable, arbitrary, capricious teeming with illegality and devoid of

natural justice and is procedurally improper and also in breach of his legitimate expectation. It was the petitioner contended that the recommendations made against the petitioner constitute an unlawful interference and obstruction of his official functions as an Officer of the Attorney General's Department as well as the rights and entitlements entitled to the petitioner as an Attorney-at-Law of the Supreme Court.

The petitioner stated that consequent to the final report of the 1<sup>st</sup> to 3<sup>rd</sup> respondents, the Cabinet of Ministers took a decision on or about 18.01.2021 to implement the decisions and recommendations of the report of the 1<sup>st</sup> to 3<sup>rd</sup> respondents. The petitioner verily believes that the full report was not before the Cabinet of Ministers when they took the said decision and therefore the Cabinet of Ministers were not in a position to consider the full and proper context of the report and its deficiencies. The petitioner stated that the 6<sup>th</sup> to 9<sup>th</sup> respondents may take into cognizance the recommendations of the PCIPV and wrongfully implement the recommendation against the petitioner and therefore the findings against the petitioner contained in the said report could gravely affect him.

The Learned Additional Solicitor General who appeared on behalf of the Attorney General indicated to this court that the said Presidential Commission of Inquiry to Investigate Incidents of Political Revenge (PCOI) comprising of the 1<sup>st</sup> to 3<sup>rd</sup> respondents did not have the jurisdiction to inquire into the conduct of the petitioner, who at all times acted within the boundaries of his official duties.

The document marked 'P 9' dated 22.06.2020 written by the Attorney General to the Chairman of the Presidential Commission of Inquiry to Investigate Incidents of Political Revenge, specifically mentioned as follows;

"it appears that the complaint by the Complainant, Mr. Nissanka Senadhipathi has been lodged before the PCOI based on unfounded allegations against Prosecutors of the Attorney General's Department, to maliciously target and intimidate prosecutors and obstructing ongoing prosecutions against him, by seeking to vilify and bring in to disrepute the good name of the Attorney General and the Attorney General's Department, and preventing Officers of this Department who are also Officers of Court from carrying out their professional and statutory duties as Prosecutors."

"Further, it is noted that any attempt to impede the proceedings which are ongoing in Case No. HCB/25/2017 in the High Court of Colombo and about to commence in Case No. TAB/751/2019 in the High Court of Colombo, by requiring the testimony of Law Officers prosecuting in such proceedings would tantamount to interference with the judiciary under Article 111C of the Constitution and thereby undermine judicial independence."

"In the aforesaid circumstances, it would not be proper for an officer of the Attorney General's Department Officers to participate in any act which would fetter the Attorney General from performing his statutory duties, including prosecution of pending cases before Courts of Law. Particularly in relation to the said complainant, it appears that he has sought to misdirect the PCOI by causing summons to be issued on the Prosecuting Officer involved in

cases where the complainant is an Accused. It is an attempt on the part of the complainant to abuse the mandate and process of the PCOI for the collateral purpose of intimidating, harassing and embarrassing such officer and obstructing the discharge of his professional duties as a public officer, thereby attempting to derail the prosecution, subvert the course of justice and interfere with the judiciary, to the illegal and unlawful advantage of the complainant.”

“Therefore, the aforesaid Summons and Notice dated 17.06.2020 served on Mr. Janaka Bandara, Senior State Counsel was contrary to the process contemplated by the law and, as such, invalid.”

“However, without prejudice to the above, the Attorney General and its officers would make every endeavor to facilitate the work of the Commission of Inquiry appointed by His Excellency the President under the Commission of Inquiry Act (Chapter 393) as amended by Act No. 16 of 2008 and Act No. 3 of 2019, subject strictly to the provisions of the constitution, the law and the mandate of the Commission of Inquiry.”

The petitioner appeared before the Commission together with his lawyers on 23.06.2020. The Additional Solicitor General Mr. Vikum de Abrew was directed to appear on behalf of the petitioner. It is seen from page 43 to page 47 onwards of volume 1, that Mr. Vikum de Abrew was not permitted to speak.

The said proceedings are as follows;

ජ්‍යෙෂ්ඨ නියෝජ්‍ය සොලිසිටර් ජනරාල් වික්‍රම දිසානායක මහතා.

ස්වාමීනි මම මේ අවස්ථාවේදී ගරු නීතිපතිතුමා වෙනුවෙන් අනුශාංගික කරුණක් සම්බන්ධයෙන් ගරු කොමිෂන් සභාවේ අවධානය යොමු කිරීමට කැමති ස්වාමීනි.

කොමිෂන් සභාවේ ගරු සභාපතිතුමා -

මම භීතයෙන් නීතිපති දෙපාර්තමේන්තුවෙන් සහයෝගය පිණිස පිරිසක් පත් කරලා තියෙනවා නීතිපතිවරයා විසින්. ඒ පිරිසට පුළුවන් කොමිෂන් සභාවට සහාය වෙන්න.

අතිරේක සොලිසිටර් ජනරාල් රොහාන් අබේසිංහ මහතා -

ස්වාමීනි, අපිව පත් කරලා තියෙන්නේ ගරු කොමිෂන් සභාවේ කටයුතු වලට සහාය දැක්වීම සඳහා. මෙතන ප්‍රශ්නය වෙලා තියෙන්නේ මෙම ගරු කොමිෂන් සභාව විසින් 16වන වගන්තිය ප්‍රකාරව කරපු දැනුම්දීමක් මත අපගේ දෙපාර්තමේන්තුවේ යම් නිලධාරියෙක් මෙම කොමිෂන් සභාව වෙත කැඳවලා තියෙනවා. ඒ පිළිබඳව අපට ගරු කොමිෂන් සභාව ඉදිරියේ කරුණු ඉදිරිපත් කිරීමට ප්‍රශ්නයක් තියෙනවා. මාගේ මිතුරා ඔහු වෙනුවෙන් පෙනී සිටින්නේ.

කොමිෂන් සභාවේ ගරු සභාපතිතුමා -

නීතිපතිතුමා හෝ කවුරුත් වෙනුවෙන් වූවත්, නීතිපති දෙපාර්තමේන්තුවට බලය තියෙන්නේ පනතේ 26 වගන්තිය යටතේ තියෙන සීමිත බලතල ප්‍රමාණයක් විතරයි. ඒ අනුව නීතිපති



දෙපාර්තමේන්තුවට පුළුවන් මේ කොමිෂන් සභාව ඉල්ලා සිටි විටෙක කොමිෂන් සභාවට අවශ්‍ය සහයෝගය සපයන්න.

අතිරේක සොලිසිටර් ජනරාල් රොහාන් අබේසිංහ මහතා -

කොමිෂන් සභා පනතේ 24 වන වගන්තිය ප්‍රකාරව අවශ්‍ය විටෙක ගරු නීතිපතිතුමා හෝ ඔහුගේ නියෝජිතයෙකුට ගරු කොමිෂන් සභාව ඉදිරියේ පෙනීසිටින්න පුළුවන්.

කොමිෂන් සභාවේ ගරු සභාපතිතුමා -

ඔව්. ඒ සෑම දෙයක්ම තියෙන්නෙ කොමිෂන් සභාවට සහයෝගය දෙන්න. මේ පනත යටතේවත් කොමිෂන් නීතිපතිවරයාට බලයක් දීලා නැහැ 16 වගන්තිය යටතේ කැඳවන වගඋත්තරකාරයෙක් වෙනුවෙන් පෙනී සිටින්න. නීතිපතිවරයාට සදාචාරාත්මක හෝ නීතිමය අයිතියක් ලබාදීලා නැහැ. ඔබට කිසිම අයිතියක් නැහැ වගඋත්තරකරුවෙකු වෙනුවෙන් පෙනී සිටින්න නීතිපති දෙපාර්තමේන්තුවට, ඒනිසා නීතිපති දෙපාර්තමේන්තුව මේ වේලාවේදී වගඋත්තරකරුවෙකු වෙනුවෙන් පෙනී සිටින්න තැත් කරනවා නම්, ඒක නීතිය අභිබවා යාමක් සහ තමාගේ බලයෙන් පිට කරන ක්‍රියාවක් බවට පත්වෙනවා. මොකද නීතිපති දෙපාර්තමේන්තුව පත් කරලා තියෙන්නේ, නීතිපතිවරයා පත්කරන්නේ 19 වන ආණ්ඩුක්‍රම ව්‍යවස්ථාව යටතේ. ඊළඟට නීතිපතිවරයාගේ බලතල පැහැදිලිවම අපරාධ නඩු විධාන සංග්‍රහයේ 393 වගන්තිය යටතේ සඳහන් වෙනවා. මේ කොමිෂන් සභාවේ වැඩ සම්බන්ධයෙන් යම් ප්‍රතිපාදන කොමිෂන් සභා පනතේ සඳහන් වනවා නීතිපතිවරයාට ක්‍රියා කළ හැකි ආකාරය. ඉන් ඔබට විත්තිකරුවෙක් හෝ වගඋත්තරකරුවෙකු වශයෙන් මෙම කොමිෂන් සභාව විසින් නම් කරන පුද්ගලයකුගේ අයිතිවාසිකම් වෙනුවෙන් පෙනී සිටින්න නීතිපතිවරයාට බලයක් නැහැ. ඔබට බලයක් නැහැ කියලා මම කිව්වා. ඔබට පෙනී සිටින්න බැහැ. කොමිෂන් සභාවට සහාය දෙන පුද්ගලයන්ට කොමිෂන් සභාවට අවශ්‍ය කරුණු පිළිබඳව පමණක් සාකච්ඡා කරන්න පුළුවන්.

ජ්‍යෙෂ්ඨ නියෝජ්‍ය සොලිසිටර් ජනරාල් වික්‍රම ද ආබෲ මහතා -

ස්වාමීනී මම...

කොමිෂන් සභාවේ ගරු සභාපතිතුමා -

මම ඔබට කිව්වා කොමිෂන් සභාව වෙත විත්තිකරුවෙක් වෙනුවෙන් කරුණු ඉදිරිපත් කරන්න හැකියාවක් නැහැ කියලා.

කොමිෂන් සභාවේ ගරු සභාපතිතුමා -

එතකොට කොමිෂන් සභාවට සහයෝගය දෙනවා නම් කොමිෂන් සභාවට පත් කරලා තියනවා සහයෝගය දීමේ මණ්ඩලයක් නීතිපතිවරයා විසින්. ඒ නීතිපතිවරයාගේ සහයෝගය දැක්වීමේ මණ්ඩලයේ ප්‍රධානියා හැටියට ජ්‍යෙෂ්ඨ නියෝජ්‍ය සොලිසිටර් ජනරාල්වරයා ඉන්නවා. ඔහුට කොමිෂන් සභාව අමතලා යමක් කියන්න පුළුවන්. මොකද නීතිපති දෙපාර්තමේන්තුවට දෙපාර්ශ්වයක් ඇවිල්ලා දෙපැත්තක් කියන්න බැහැ. හොඳට මතක තියාගන්න නීතිපති දෙපාර්තමේන්තුව කියන්නේ රජයේ ආයතනයක්, ඒ ආයතනයට පුළුවන් ඒ ආයතනයේ ප්‍රධානියා පත් කරපු මණ්ඩලයට, මේ කොමිෂන් සභාවට සහයෝගය දෙන්න. ඊට පිටස්තර කිසිම පුද්ගලයකුට ඇවිල්ලා කතාකරන්න අයිතියක් නැහැ නීතිපති දෙපාර්තමේන්තුවේ.

At page 47 Mr. Vikum de Abrew was threatened with contempt proceedings, if he continues to address the Presidential Commission.

ජ්‍යෙෂ්ඨ නියෝජ්‍ය සොලිසිටර් ජනරාල් වික්‍රම දිසානායක මහතා

ස්වාමීනී, ඔබතුමා ඇයි මම කතාකරන්නේ කියන එක පිළිබඳව ....

ගරු කොමිෂන් සභාවේ සභාපතිතුමා -

මම දැන් ඔබට කිව්වනේ ඔබට අයිතියක් නැහැ කියලා. ඔබ කරුණාකරලා යමක් කියනවානම් රොහන්ත අබේසූරිය මහත්මයා ඉන්නවා පත්කරපු මණ්ඩලයේ. එයා මාර්ගයෙන් ඉදිරිපත් කරන්න කොමිෂන් සභාවේ වැඩවලට සහයෝගය දෙන ක්‍රියාවක් නම්, එහෙම නැත්නම් කරුණාකරලා ඔබට මම කියන වචනය තේරෙනවද? එහෙම නැත්නම් ඔබ බාධා කරන පුද්ගලයෙක් හැටියට මම අභියාචනාධිකරණයට වාර්තා කරනවා ඔබට විරුද්ධව ක්‍රියා කරන්න කියලා. ඔබ ඉදිරිපත් කරනවානම් යම් කරුණක් සහයෝගය දීමේ මණ්ඩලයේ ප්‍රධානියා ඉන්නවා. ඒ ප්‍රධානියා මාර්ගයෙන් ඉදිරිපත් කරන්න. එහෙම නැත්නම් ඔබ මෙම කොමිෂන් සභාවේ වැඩවලට බාධා කරන පුද්ගලයෙක් හැටියට නම් කරනවා. ඔබට ඒ තත්වයට වැටෙන්න ඕනේ නම් කතා කරන්න. රොහන්ත අබේසූරිය මහතා, ඔබට යමක් තියෙනවා නම් කියන්න පුළුවන්. නීතිපතිවරයාට බැහැ දෙපැත්තක් අල්ලාගෙන වැඩ කරන්න. නීතිපතිවරයා මෙතන පත් කරලා එවල තියනවා මණ්ඩලයක්. ඒ මණ්ඩලය මේ කොමිෂමට සහාය දීමට. ඒ නිසා ඔබ ඒ මැද්දට පැනලා ඉවරවෙලා කොමිෂන් සභාවේ වැඩවලට බාධා කරන්න එන්න එපා. මොකද මම නිලධාරීන්ට විරුද්ධව ලියන්න ටිකක් අකමැතියි. ඔබ මගේ පැන යොමු කරවන්න එපා ඔබට විරුද්ධව යම් දෙයක් මේකෙ සටහන් කරවන්න. මොකද ඒක ලිව්වොත් ආපසු ඇදලා ගන්න බැහැ...

It is important to note that Mr. Rohantha Abeyesuriya PC ASG was present in a different capacity, namely to consult the Commission. He was not appearing on behalf of the petitioner during those proceedings. Mr. Rohantha Abeyesuriya and Mr. Vikum de Abrew have informed the commission about their duties. However, the Commission did not permit Mr. Vikum de Abrew to make submissions and even threatened him with contempt proceedings in the Court of Appeal. These circumstances, it shows clearly that there has been a breach of the rules of natural justice.

The 6<sup>th</sup> and the 7<sup>th</sup> respondents filed their objections answering the averments contained in paragraphs 29 and 31 of the petition and stated that upon perusing the document marked as P 9 dated 22.06.2020, it is evident that the Attorney General has informed the Commission of Inquiry of his stance and *inter alia* that any purported inquiry into the alleged conduct of the petitioner or any other officer of the Attorney General's Department with regard to the discharge of his or her professional and statutory duties in such capacity is contrary to the mandate of the Commission of Inquiry as set out in the Gazette Notifications marked as R 1 and R 2.

The 6<sup>th</sup> and the 7<sup>th</sup> respondents further stated that His Excellency the President by warrant published in the Extraordinary Gazette Notification bearing No. 2212/53, dated 29.01.2021 appointed a Special Presidential Commission of Inquiry to further investigate and report on the decisions and recommendations of the Commission of Inquiry. By Extraordinary Gazette Notification bearing No.2221/54, dated 01.04.2021, the mandate contained therein was amended requiring the said

Special Presidential Commission of Inquiry to inquire and report whether all or any of the findings, decisions and recommendations contained in the said Report in regard to the persons identified therein are justified and whether any or all of them should be implemented or caused to be implemented or otherwise be pursued.

The 7<sup>th</sup> respondent filed their objections and stated further as follows;

- (i.) Based on a request made by the former Director General of the Commission to Investigate Allegations of Bribery and Corruption (CIABOC), the petitioner was permitted to assist CIABOC.
- (ii.) Based on the permission so granted by the Attorney General, the petitioner assisted CIABOC with regard to investigations and in particular, in the case bearing No. M.C. Colombo/B-59620.
- (iii.) Further, the petitioner was one of the officers of the Attorney General's Department who was specially authorized by the Commission to appear on its behalf in the case bearing No. 59287/1/2016, where the complainant of Complaint No.50/2020 was one of the suspects.
- (iv.) On 06.09.2016, the complainant of Complaint No.50/2020 was arrested and produced before Chief Magistrate at his residence by the OIC of the Raid Investigation Unit, who was accompanied by the legal officers of CIABOC, the former Director General and the petitioner.
- (v.) Further, based on a request of the former Director General, the petitioner was one of the officers of the Attorney General's Department specially authorized to appear in the Revision application bearing No. HCRA/149/2016 (M.C. No. B-59620).

1<sup>st</sup> to 4<sup>th</sup> respondents were absent and unrepresented ignoring the notices served on them.

The background facts relevant to this case are, by Extraordinary Gazette 2157/44 of 09.01.2020 [as amended by Extraordinary Gazette 2159/16 of 22nd January 2020], His Excellency the President appointed a Commission of Inquiry [in terms of the Commissions of Inquiry Act No 17 of 1948] consisting of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents. The 1<sup>st</sup> respondent was appointed as the Chairman of this Commission.

To appreciate the question of whether the said Commission could lawfully inquire into and make recommendations with respect to the petitioner, it is necessary to ascertain the "mandate" or the scope of authority of the said Commission of Inquiry as stated in the said Gazette.

According to the preamble of the Gazette marked P2, the appointment of the Commission was necessitated by allegations made by:

(A)

- (i.) Public officers;
  - (ii.) Employees of public corporations;
  - (iii.) Members of the Armed Services;
  - (iv.) Members of the Police Service;
- (B) Who held office before the January 2015 Presidential Election or the August 2015 General Election; AND
- C. Who-
- (i.) Resigned from public office with the change of Government;
  - (ii.) Otherwise ceased to hold public office with the change of Government;
  - (iii.) Who continued to hold such office after the change of Government?

The categories of persons upon whose allegations the Commission of Inquiry was empowered to act are very relevant to the question of whether the said Commission had any authority to make the recommendations it did against the petitioner. The primary complainant against the petitioner was one Nissanka Senadhipathi. Though he was a former Military Officer, ceased to function as such before the change of Government. Therefore, he does not fulfil the requirements of "C" above. He did not resign or cease to hold office with the change of Government nor did he continue to hold office after the change of Government. Mr. Nissanka Senadhipathi does not say that he fell within the criteria in "C" above.

The Gazette 2157/44 was very clear and specific about the "agencies" whose conduct was liable to be inquired into, in order to determine whether there was political victimization against the complainants who satisfy the requirements of A, B and C above. The operative part of the Gazette identifies 3 such agencies, namely;

- (a) Commission to Investigate Allegations of Bribery and Corruption ("CIABOC");
- (b) Financial Investigations Division sic of the Sri Lanka Police("FCID"); and
- (c) The Special Investigation Unit of the Sri Lanka Police ("SIU").

By the subsequent Gazette 2159/16 marked P3, the entities liable to be investigated by the Commission were expanded to include the Criminal Investigation Department ("CID"). The latter Gazette clarified that the inclusion of the Criminal Investigation Department is "in addition to the Agencies" mentioned in the previous Gazette, namely the CIABOC, FCID and SIU. Accordingly, there were only 4 agencies, and the Commission of Inquiry was authorized to investigate. The Attorney General's Department was not one of them.

Thus, it is clear that the 1<sup>st</sup> to 3<sup>rd</sup> respondents had no authority to inquire into the conduct of an officer of the Attorney General's Department when the said Department was not one of the agencies it was authorized to investigate. The petitioner says that he acted within the scope of his authority. The mandate given to the 1<sup>st</sup> to 3<sup>rd</sup> respondents did not empower the Commission of Inquiry to inquire into the functions of the Attorney General's Department. All the decisions made, actions and

measures taken by the petitioner were authorized by the Attorney General. The petitioner says that he was at all times acting in the course and within the scope of his employment.

It is important to note that Paragraph (a) of the operative part of the Gazette 2157/44 specifically refers to any "malpractice or irregularity, or non-compliance with or disregard of the proper prudence, norms, guidelines procedures and best practices " This implies a situation where a public officer acted in excess of or contravention of the scope of his duties. This necessarily means that the conduct of an officer which is demonstrably within the boundaries of his duties could not have been lawfully inquired into by the Commission of Inquiry.

The 6<sup>th</sup> to 9<sup>th</sup> respondents take the view that the petitioner could not have been the subject of any inquiry of the Commission nor could the Commission have made any findings against him for three reasons:

- (1) The primary allegation was made against the petitioner by Mr. Nissanka Senadhipathi who did not fall within the specific categories of persons whose complaints the Commission was empowered to investigate;
- (2) The Attorney General's Department has not been included amongst the entities the Commission was authorized to investigate;
- (3) The Commission did not have the authority to investigate public officers who, at all times, acted in the course within the scope of their employment.

The Commission of Inquiry was empowered, subject to the satisfaction of certain other conditions, to investigate certain matters arising from complaints made by four classes of persons, namely;

- (i.) Public officers;
- (ii.) Employees of public corporations;
- (iii.) Members of the Armed Services;
- (iv.) Members of the Police Service;

The primary complainant against the petitioner was one Nissanka Senadhipathi. There is no material to show, and there is no claim by Mr. Nissanka Senadhipathi or any other person, that Mr. Nissanka Senadhipathi at some time in the past fell within category (iii) above. There is also nothing to suggest, and no claim is being made that Mr. Nissanka Senadhipathi, at any time in his career, fell within i), ii) or iv) above categories. Even if he comes under iii) and he was a member of the Armed Services, the authority of the Commission to inquire into a complaint by Mr. Nissanka Senadhipathi depends on certain further conditions.

Mr. Nissanka Senadhipathi should have been a member of the Armed Services before the Presidential Election of January 2015, or the General Election of August 2015, and should have resigned or otherwise ceased to hold his post in the military after the change of Government in 2015, or should have continued in such post with the change of Government. There is no doubt whatsoever that Mr. Nissanka Senadhipathi did not resign, relinquish, retire, or was removed from the such post in 2015 with the change of Government nor did he continue in such post after the election of the new

Government. The material indicates that he was a private citizen who functioned as the Chairman of the Maritime Security Company Avant-Garde at the time the 2015 Government came into power.

As such it is crystal clear that the 1<sup>st</sup> to 3<sup>rd</sup> respondents exceeded their mandate in entertaining the complaint of Mr. Nissanka Senadhipathi.

The scope of the mandate of the Commission of Inquiry, as can be inferred from the Extraordinary Gazette constituting the same is this. There were allegations that the Government that was in power from January 2015, to November 2019, was persecuting and victimizing public officers and law enforcement and military personnel who were holding their respective posts immediately before the election of this 2015 Government. The purpose of the Commission of Inquiry was to verify whether such allegations had merit and to recommend redress. Mr. Nissanka Senadhipathi was not in service immediately before the change of Government in 2015 and was not a member of the armed forces thereon.

It appears that the Commission was performing semantical gyrations to accommodate Mr. Nissanka Senadhipathi's complaint, which serves to demonstrate not only the disregard the Commission had for the boundaries of its legal authority but also its complete lack of independence and impartiality. In relation to this allegation, the 6<sup>th</sup> to 9<sup>th</sup> respondents argued that the observations, findings and recommendations made against the petitioner arising from any complaint made by Mr. Nissanka Senadhipathi is ultra vires the powers of the Commission.

The test of eligibility of a complaint is that the complainant must have resigned or ceased to function as or continued to function as a public officer or military officer after the change of Government in 2015. The complaint of Mr. Nissanka Senadhipathi does not qualify under these criteria. Under these circumstances, the findings made by the Commission arising from Mr. Nissanka Senadhipathi's complaint are ultra vires and a nullity.

The conduct of the Attorney General cannot be inquired into by the Commission of Inquiry. The mandate of the Commission is captured in paragraphs (a), (b), (c) and (d) of the operative part of Gazette 2157/44. As explained above, the warrant of His Excellency the President requires the Commission of Inquiry to investigate the institutions, namely the Commission to Investigate Allegations of Bribery and Corruption ("CIABOC"); Financial Crimes Investigations Division of the Sri Lanka Police ("FCID"); and The Special Investigation Unit of the Sri Lanka Police ("SIU").

The relevant part of this Gazette is reproduced below:

- (a) Whether there has been any malpractice or irregularity, or non-compliance with or disregard of the proper prudence, norms, guidelines, procedures and best practices applicable in relation to the administration of the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Investigations Divisions (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police;
- (b) Whether any investigations by the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Investigations Divisions (FCID) of the Sri Lanka Police or the

Special Investigations Unit (SIU) of the Sri Lanka Police had been influenced or obstructed or prevented in any manner, resulting in loss, damage, injury or detriment, either direct or imputed to any person or persons;

- (c) Whether any officer entrusted with the conduct of investigations by the Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Investigations Division (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police have acted under undue influence by third parties, including by the said Anti-Corruption unit;
- (d) Whether any person had committed any act of political victimization, misuse or abuse of power, corruption or any fraudulent act in relation to the functions of the said Anti-Corruption unit, Commission to Investigate Allegations of Bribery or Corruption (CIABOC), Financial Crimes Investigations Division (FCID) of the Sri Lanka Police or the Special Investigations Unit (SIU) of the Sri Lanka Police, or in relation to the administration of any law or the administration of justice;

The Commission of Inquiry is specifically required to investigate or inquire into the following:

- (a) Whether there has been any malpractice, irregularity, or non-compliance with or disregard of the proper prudence, norms, guidelines, procedures, and best practices applicable to the above-mentioned three institutions;
- (b) Whether any person has influenced, obstructed or influenced the investigations by the above-mentioned three institutions;
- (c) whether any officer of the above-mentioned three institutions has acted under the undue influence of third parties or the Anti-Corruption Unit;
- (d) Whether any person has engaged in political victimization, misuse or abuse of power, corruption or fraud in relation to the functions of the Anti-Corruption Unit and the above-mentioned three institutions.

It appears that the focus of the mandate is the activities of the said three institutions and also the Anti-Corruption Unit, which, it appears, is alleged to have influenced the three institutions. The subsequent Gazette added one further institution, namely the Criminal Investigation Department. As set out below, the relevant Gazettes granting the Commission its mandate, do not empower the 1<sup>st</sup> to 3<sup>rd</sup> respondents to inquire into the functions of the Attorney General's Department.

The Commission of Inquiry was required to inquire into whether;

- (i) The CIABOC, FCID, SIU and CID engaged in any malpractices, or irregularities and whether they violated their procedure and norms;
- (ii) Any person influenced the CIABOC, FCID, SIU and CID;

- (iii) Any third party or the Anti-Corruption Unit exercised undue influence over the CIABOC, FCID, SIU and CID;
- (iv) Any person engaged in any political victimization, abuse of power, corruption etc. in relation to the functions of the Anti-Corruption Unit, CIABOC, FCID, SIU and CID.

The petitioner is not an officer of the CIABOC, FCID, SIU and CID. Nor is he a member of this "Anti-Corruption Unit". Thus, any inquiry into the activities of any of the entities above will not extend to the petitioner.

The petitioner had been assisted in the investigative work and prosecuted cases on behalf of CIABOC. However, such work was always performed under the directions of the Attorney General's Department. There is no evidence to say that the petitioner even momentarily divested himself of the character of being an officer of the Attorney General's Department. In all the matters referred to in the report of the 1<sup>st</sup> to 3<sup>rd</sup> respondents, the petitioner has acted in the course and within the scope of his employment as an officer of the Attorney General's Department and not as an officer of CIABOC. This is expressly stated on page 6 of the Attorney General's letter.

It is my view that the Attorney General's Department not being a listed institution, the Commission of Inquiry had no power to inquire into the conduct of the petitioner.

The only way the petitioner would be liable to be investigated by the Commission is if he was a "person" or "third party" who used undue influence over the said institutions. The Attorney General, in a letter under his hand, wrote directly to the Commission and informed them that the petitioner was at all times acting under the instructions and with the sanction of the Attorney General. This letter should have brought to an end any question in relation to the conduct of the petitioner before the Commission. Any directions or advice given by the petitioner to the said institutions under the instructions of the Attorney General cannot be regarded as "undue influence". Thus, it is difficult to understand why the Commission of Inquiry considered that it had the authority to inquire into a complaint against the petitioner especially after the Attorney General confirmed that the said petitioner was acting under his authority.

The Commission had no authority to investigate the petitioner. The petitioner is a Senior State Counsel of the Attorney General's Department, was not an officer of the CIABOC, FCID, SIU, CID or the Anti-Corruption Unit nor was he a person who could be assumed to have exerted undue influence on any of those agencies. Accordingly, the Commission of Inquiry in examining his conduct, making adverse findings on the same and recommending certain measures against him has demonstrably acted beyond the terms of its warrant.

There is proof to confirm that the petitioner always acted under the directions of the Attorney General. The petitioner in attending to all matters relating to the investigation of the Avant Garde controversy and the decision to indict and prosecute persons involved in the same had acted under the directions of the Hon. Attorney General. There is no doubt that the petitioner's actions, conduct



and decisions were subject to the supervision of his superiors and supervisors at the Attorney General's Department. This has been confirmed by the Attorney General.

Under these circumstances, the petitioner should be regarded as having at all times acted within the scope of his duties.

The Commission of Inquiry had no authority to make, and there was no justification for making, adverse recommendations against a public officer who was acting in the course of his employment and within the scope of his duties. There could be a no greater irony than for a Commission of Inquiry arising from complaints of victimization by public servants for merely performing their duties, to now censure public officers who were themselves acting within the scope of their duties. A public officer acting within the scope of his duties cannot be held liable before the law. Certain judicial authorities relating to Civil Procedure reveal the approach of our Courts in cases where a subordinate officer is being sued for conduct that falls within the scope of his authority.

A discernible principle emerges from these authorities where the public officer has acted in good faith within the boundaries of his legal authority, the said public officer cannot be held personally liable for his actions. This means the responsibility for such conduct falls on the Head of his Department upon whose behalf and upon whose directions he is acting.

The case of Muttupilla v Bowes 17 NLR 453 is illustrative of this principle. It was decided that, though the plaintiff contended that he was suing the Principal Collector Customs in his personal capacity the action was instituted against the Defendant in his official capacity. Perera J. held that the proper person to be named as Defendant would be the Attorney General. This position is reflected in the following dicta:

"It is said that the action is one for tort against the defendant in, so to say, his personal capacity, but it is, I think, clear that the defendant has been sued in his official capacity as on a mere breach of contract. In the caption of the Plaint, he is described as the Principal Collector of Customs, and there is no averment that in detaining the plaintiff's goods he acts *mala fide* or outside the scope of his authority, and the remedy sought is the delivery to the plaintiff of certain goods that he detains in his capacity of Principal Collector of Customs. The decision in the case of Raleigh v. Goschan [1898] 1 Ch 73, Ch D, is in point. In the circumstances mentioned in the plaint, the proper party to be sued was the Attorney-General".

In Singer Sewing Machine Company v Bowes [4 CWR 78], De Sampayo J. made a similar observation. His Lordship observed that, as admittedly the defendant entered into the agreement in his official capacity, that is to say, as a servant of the Crown, within the scope of his authority, the claim of the plaintiffs is really against the Crown and action should be against the Attorney General as representing the Crown".

According to the available documents and the evidence, the petitioner was not engaged in a personal adventure. There is absolutely no material to show that the Petitioner in taking the action that gave rise to the complaints against him to the Commission, did so as part of a private adventure or as an

act of personal vengeance. Insinuations have been made that the petitioner had unreasonably objected to bail being granted to Mr. Nissanka Senadhipathi.

Reference was also made to his presence within the precincts of the Bribery Commission (CIABOC). The petitioner did not appear in some of the cases which the Report of the 1<sup>st</sup> to the 3<sup>rd</sup> respondents refer to in the narrative against the petitioner. However, these actions though sought to be portrayed as malicious, were sanctioned by and done with the awareness of the Attorney General. To impute personal liability to the petitioner, for conduct which was demonstrably authorized by the Chief Law Officer of the State, evinces a malicious design by the Commission of Inquiry to harass and victimize an officer of the Attorney General's Department for merely doing what the law required of him to do.

The Commission of Inquiry has recommended *inter alia* that the petitioner be indicted for fabricating evidence. This would have devastating consequences for him. There is no material to support the allegation that the petitioner acted improperly and abused his power. Such recommendations, made without any justification whatsoever, will have grave ramifications for the public service.

The preamble of the Extraordinary Gazette 2157/44 states in reference to the alleged harassment of public officers of the 2015 Government that "the alleged process of political victimization has created a substantial negative impact on the performance of public officers and as a result, such officers have shown and show reluctance to take decisions while discharging their duties and prefer to adopt a passive approach towards work."

In the letter addressed by the Attorney General to the Commission of Inquiry Hon. Attorney General has observed that the petitioner has been named as a "Respondent", purportedly in terms of Section 16 of the Commission of Inquiry Act. The Attorney General has stated that the said Section does not refer to a "Respondent". The said Section refers to "every person whose conduct is the subject of inquiry under this Act, or who is in any way implicated or concerned in the matter under inquiry". The Attorney General notes that, though the summons arises from a complaint made by Mr. Nissanka Senadhipathi, the complaint nor the allegations made by the former has not been communicated to the petitioner. Thus, the basis on which the Commission of Inquiry considered the petitioner "a person whose conduct is the subject of inquiry" or how he would be considered "a person whose conduct is the subject of inquiry" was not conveyed to the petitioner.

The learned President's Counsel who appeared on behalf of the 6<sup>th</sup> to 9<sup>th</sup> respondents submits that the Commission of Inquiry was vested with a specific and clear mandate by His Excellency the President. The complaint made by Mr. Nissanka Senadhipathi was not one which the Commission was authorized to inquire into. By proceeding to examine and make adverse recommendations on Mr. Nissanka Senadhipathi's complaint, the Commission has not only acted *ultra vires*, but it has also displayed its lack of impartiality and independence and exhibited the malice it harbored towards the petitioner. A literal, purposive and practical construction of the mandate of the Commission will lead to the inevitable conclusion that the actions, functions and conduct of the Attorney General and every person acting under the authority of the Attorney General could not be inquired into by the Commission.

The Commission has blatantly and brazenly disregarded the observations made by the Attorney General in the letter marked "P 9". In the said letter, the Attorney General has confirmed that the petitioner has, at all times, and acted in accordance with his instructions and pursuant to his official duties. The ramifications that any adverse findings against the petitioner would have on the Attorney General's Department, the public service and the judiciary, as impressed upon the Commission by the Attorney General, have been disregarded.

The consequence of a decision being *ultra vires* is that it is a nullity.

The Attorney General has confirmed that the Petitioner had acted in the course of his employment and within the scope of his duties, the Commission had no authority to inquire into his conduct. Considering that the said findings will demoralize the officers of the Attorney General's Department with State Counsel likely to be reluctant to take the initiative that is necessary to serve the ends of justice and being conscious of the chilling effect the Commission's recommendation will have on the Public Service, Public Administration and the Administration of Justice in Sri Lanka,

The irony here is that the Commission itself, by victimizing public servants who have at all times acted within the scope of their duties, will exacerbate the very inertia in the public service it was expected to arrest. Accordingly, this court can take into account the broader, long-term consequences the Commission's findings and recommendations will have for the public service and make a decision on the relief sought by the petitioner.

Wade and Forsyth Administrative Law 10<sup>th</sup> Edition deals with the power of issuing Writs of Certiorari and Prohibition when the lower Tribunal has acted in excess of Jurisdiction on pages 214 and 215, where there is a breach of natural justice on pages 372 to 379, where there is a lack of fair hearing at pages 405 to 408 and bias at pages 389 to 392.

It is important to note that there are a few cases in which the matters of writs concerning the Presidential Commission of Inquiry were decided.

- (a) Dharmaratne vs Samaraweera and Others 2004 1 SLR 57
- (b) Mendis. Fowzieand others vs. Goonewardena (1979) 2 SLR 322
- (c) Seneviratne vs. Tissa Dias Bandaranayake and Another (1999) 2 SLR 341
- (d) B. Sirisena Cooray vs. Tissa Dias Bandaranayake and two Others (1999) 1 SLR 1

Article 140 of the Constitution prescribes the Law under which this Court can issue writs in the nature of Certiorari and Prohibition.

This Court issues a Writ of Certiorari quashing the findings, decisions and recommendations of the 1<sup>st</sup> to 3<sup>rd</sup> respondents in the report marked 'P4' in respect of the petitioner pursuant to the complaints bearing No. 50/2020 and 431/20, under prayer (b) of the petition dated 23.03.2021.

Further, we issue a Writ of Prohibition, prohibiting the respondents or any one or more of them or their agents or subordinates from taking any steps whatsoever in terms of or relying on the finding's decisions and recommendations in the Report marked 'P4' of the 1<sup>st</sup> to 3<sup>rd</sup> respondents with

reference to the petitioner in respect of Complaints bearing No. 50/2020 and 431/20, under prayer (c) of the petition dated 23.03.2021.

This Court issues a writ of prohibition, prohibiting the respondents or any one or more of them or their agents or subordinates from taking any steps whatsoever in terms of the Cabinet decision dated 18.01.2021 marked 'P 14' with reference to the petitioner in respect of Complaints bearing No. 50/2020 and 431/20, under prayer (d) of the petition dated 23.03.2021.

We further issue a Writ of Certiorari quashing the decisions of the Cabinet of Ministers dated 18.01.2021 marked 'P 14' to the Petition in respect of the Petitioner with reference to Complaints bearing No. 50/2020 and 431/20, under prayer (e) of the petition dated 23.03.2021.

Considering the circumstances, we make no order for cost.

**Judge of the Court of Appeal**

**D.N. Samarakoon J.**

**I agree.**

**Judge of the Court of Appeal**

**M.T. Mohammed Laffar J.**

**I agree**

**Judge of the Court of Appeal**