

**DUWEARATCHI AND ANOTHER
v.
VINCENT PERERA AND OTHERS**

COURT OF APPEAL.
SENEVIRATNE, J. AND SIVA SELLIAH, J.
C.A. APPLICATION No. 700/84.
JULY 9, 10, 11, 13, 23, 24, AND 25, 1984.

Writ of Certiorari – Order made by Minister under Sports Law No. 25 of 1974 – Interim stay order – Extension of interim stay order – Inherent power of Court.

The Minister of Sports (1st respondent) purporting to act under section 39 (1) of the Sports Law No. 25 of 1975 on 25.5.1984 directed the Sri Lanka Tennis Association of which the 2nd and 3rd respondents are President and Secretary respectively to release

14 tennis courts depicted in a sketch annexed to the Order for carrying out a coaching and training programme in tennis at a national level. The two petitioners who are the President and Secretary of the Playing Section of the Sri Lanka Tennis Association filed this application for certiorari to quash the direction of the Minister (1st respondent) alleging that the Playing Section was an independent body with control of the tennis courts and challenging the validity of the order. On 8.6.1984 the petitioners obtained ex parte a stay order prohibiting the implementation of the Minister's order, valid till 26.6.1984. The case was called on 25.6.1984 on which day the 2nd and 3rd respondents attended. The proceedings of 25.6.1984 revolved around the question whether the stay order should be extended or not. The Court however extended the stay order till 9.7.1984 and fixed the same date for inquiry into the objections of the 1st and 2nd respondents. Beginning 9.7.1984 the Court inquired into the objections of the 1st and 2nd respondents.

The main disputes in the case were whether the Playing Section of the Sri Lanka Tennis Association was a body independent of the Sri Lanka Tennis Association and whether the tennis courts were under the control of the Playing Section. The question before Court was whether or not the operation of the interim stay order should be extended.

Held—

(1) An interim stay order in a writ application is an incidental order made in the exercise of the inherent or implied powers of the Court. The Court should be guided by the following principles :

- (i) Will the final order be rendered nugatory if the petitioner is successful ?
- (ii) Where does the balance of convenience lie ?
- (iii) Will irreparable and irremediable mischief or injury be caused to either party ?

The court did not determine the controversial issues in the case but held that the final order would not be rendered nugatory nor the balance of convenience be tilted against the petitioners nor irreparable damage be caused to them because there would still be left nine tennis courts for the use of their Playing Section even if the Minister's order was complied with. Further the Minister's order had been made in the national interest for the purpose of training promising players for an international tournament. Therefore the interim stay order should be vacated and not extended.

Cases referred to :

- (1) *Billmoria v. Minister of Lands, Land Development and Mahaveli Development and Two Others* [1978-1979] 1 SLR (S.C.) 19, 13.
- (2) *Weerasooriya v. Sidamaram Chetty* 8 C.W.R. 238.
- (3) *Mohamed Felumesh v. S. Mondale and Others* AIR 1960 Cal. 582.
- (4) *State of Orissa v. Madan Gopal* AIR 1932 S.C. 12.

A. C. Goonaratne Q.C. with S.C. Crosette Thambiah, P. Nagendra and J. Salwatura for petitioners

Sarath Silva, D. S. G., for 1st respondent

K. N. Choksy, P.C. with Romesh de Silva, Dinal Phillips, Kumar Nadesan and Miss P. Ratnayake for 2nd and 3rd respondents.

August 3, 1984.

SENEVIRATNE, J.

The two petitioners are the members and office bearers, to wit, President and Hony. Secretary of a Sports Club "The Playing Section of the Sri Lanka Tennis Association". The 1st respondent is the Hon. Minister of Sports & Parliamentary Affairs. The 2nd and 3rd respondents are the office bearers, to wit, President and Hony. Secretary of the SRI LANKA TENNIS ASSOCIATION. The SRI LANKA TENNIS ASSOCIATION is the National Association for the sport of tennis, in terms of sections 28 and 29 of the Sports Law No.25 of 1973. The Constitution of the SRI LANKA TENNIS ASSOCIATION has been produced as (P 1), and that of the Playing Section of the SRI LANKA TENNIS ASSOCIATION has been produced as (P 2). The Constitution (P 2) calls the association in which the petitioners are the office bearers, "THE SRI LANKA TENNIS ASSOCIATION, THE PLAYING SECTION" – Rule (1)

This is an application by the petitioners under Article 140 of the Constitution for a mandate in the nature of a Writ of Certiorari to quash the direction issued to the SRI LANKA TENNIS ASSOCIATION by the 1st respondent the Minister of Sports under section 39(1) of the Sports Law, by letter dated 25.5.1984 (P4A) as amended by letter dated 28.5.1984 (P4C) to which is annexed a sketch of the Tennis Courts (P4B). The letter (P4A) was a direction as follows :—"Considering that the development and promotion of the sport of Lawn Tennis in Sri Lanka is seriously impeded by the lack of necessary facilities to carry out coaching and training programmes, I hereby specially direct you in terms of section 39(1) of the Sports Law No. 25 of 1973, to make available 14 Courts (numbers given) situated at your premises. . . . and depicted in the sketch annexed hereto, with immediate effect, to carry out coaching and training programmes at a national level". There is a further direction to make available the facilities and the pavilion in the premises to persons engaged in or connected with such coaching and training programmes.

The petitioners allege that the Tennis Courts situated in the premises are at present "lawfully in the possession of the said Playing Section of the SRI LANKA TENNIS ASSOCIATION, and they are under the control of the Committee, and after due notice some of these courts are reserved for the use of the SRI LANKA TENNIS

ASSOCIATION for temporary purposes set out in the rules". For this position taken up in the petition, the petitioners have relied on the Constitution of the SRI LANKA TENNIS ASSOCIATION (P1), Rules 27(d) and (f), and also Rule 11(b) of the Constitution (P2) of the Playing Section. Though in the petition it is not directly said so, it is clear that the position taken up by the petitioners in this petition is that what the petitioners called "The Playing Section of the SRI LANKA TENNIS ASSOCIATION" is a separate and independent body vis-a-vis the SRI LANKA TENNIS ASSOCIATION, subject to certain rules of the SRI LANKA TENNIS ASSOCIATION'S Constitution. In the counter objections filed by the petitioners dated 13.7.84, the petitioners more directly take up the position that they are the office bearers of an independent body, the SRI LANKA TENNIS ASSOCIATION Playing Section, which is the name given to this body in its Constitution (P2).

The petitioner's case is that the 1st respondent the Hon. Minister had no power to issue this general direction (P4A) in terms of section 39(1) of the Sports Law, and as such the said direction is unlawful and illegal. That in any case the SRI LANKA TENNIS ASSOCIATION cannot comply with the direction of the 1st respondent as all the courts in terms of rules 27 (d) and (f) (P1) are in the control of the Playing Section and the SRI LANKA TENNIS ASSOCIATION has only the right to use such courts for several temporary purposes. Due to the above and other reasons adduced in the petition (not relevant to the present matter before me) the petitioners moved for a Writ to quash the directions of the Hon. Minister, and for an order on the respondents staying the implementation of the said direction, until the hearing and final determination of this application. This application of the petitioners was supported before another Bench on 8.6.1984 and on that day notice was issued on the respondents, and also an interim order directing the 3rd respondent to stay the implementation of the direction given by the 1st respondent in letter (P4A) read with (P4B) and (P4C) till 26.6.1984 was issued. The proceedings of 8.6.1984 were ex parte proceedings. When this application was called on 25.6.1984 the 2nd and 3rd respondents appeared in court and objected to the extension of this interim stay order. The court extended the stay order till 9.7.1984 and fixed the application for inquiry into the objection to the extension of the stay order for 9.7.1984. It is this objection to the extension of the interim stay order by the respondents (and the resistance to the non-extension of the stay order by the petitioners) that is, the subject matter of this inquiry. From 9.7.1984 this matter was argued for several days.

The 1st respondent the Hon. Minister has by an affidavit dated 21.6.1984 filed objections to this application to quash the said direction issued by him. P 4A P 4B and P 4C). He has set out the circumstances which led him to make this direction and justifies the issue of the direction. In paragraph 15(7) of the affidavit, the 1st respondent affirms that "on a consideration of the recommendation made to me by the said Committee and in view of the immediate need as aforesaid to improve the standard of the sports, as a first measure, I issued the direction in P4A. to carry out coaching and training programmes at a National Level".

The 2nd and 3rd respondents have filed their objections by way of petition and affidavit dated 21.6.1984, and also prayed Court not to extend the stay order issued on 8.6.1984. The 2nd and 3rd respondents have averred that the direction made by the Hon. Minister is lawful, and have further stated that the Playing Section of the SRI LANKA TENNIS ASSOCIATION by virtue of its Constitution is neither a member of the SRI LANKA TENNIS ASSOCIATION nor affiliated to the SRI LANKA TENNIS ASSOCIATION, but was a section of the SRI LANKA TENNIS ASSOCIATION, and the Playing Section had no independent status in fact or in law. These respondents have further taken up the position that the tennis courts were always in the possession and control of the SRI LANKA TENNIS ASSOCIATION, which was exercised by the SRI LANKA TENNIS ASSOCIATION through its Playing Section. The respondents are denying that the Playing Section has any powers or authority more than those delegated to it by the SRI LANKA TENNIS ASSOCIATION under its Constitution. Having set up this position in law and in fact, the 2nd and 3rd respondents have proceeded to set out the following matters. As the material in the objections which I now refer to have become very important for the decision of the matter presently before me, I will refer to them with reference to the paragraphs—

Paragraph 23 (a) – The S.L.T.A. in order to further the sport of tennis had decided to launch a coaching scheme with special emphasis on the youth of the country.

Paragraph 23 (b)– The S.L.T.A. had a pool of about 50 youths for training and engaged the services of a professional coach one Mr. Neville Senaratne.

Paragraph 24-Thereupon the S.L.T.A. wished to have the use of some of the said tennis courts which had been managed by the Playing Section. This was objected to by certain individuals of the Playing Section.

Paragraph 34 is as follows :-

The respondents state further that irremediable damage will be caused to the S.L.T.A., if the stay order granted in this application is extended further than 26.6.1984 ; in that

Paragraph 34 (a)-All preparations to conduct the first ever Junior International Tennis Championships in Sri Lanka (an internationally recognised ranking tournament) due to commence on 17.8.1984 have come to a halt.

The rest of the paragraphs 34 (b) and (c) set out more facts about this international tournament.

Paragraph 34 (d) and (e) state as follows :

(d) the coaching and training of the national squad for the aforementioned tournament has come to a standstill ;

(e) the Inter Club Tournament had to be postponed ;

Having made these averments, in prayer (b), it is prayed that the "court be pleased not to extend the stay order issued in the application".

The petitioners have, by petition and affidavit dated 3.7.1984, filed objections to this application of the 2nd and 3rd respondents for the dissolution and/or non-extension of the interim stay order. In these objections the petitioners directly indicate that the Playing Section is an independent body. These objections deal mainly with two matters. Paragraphs 1 – 15 of the affidavit filed by the petitioners deal with the disputes that have arisen between what is called the Playing Section and the SRI LANKA TENNIS ASSOCIATION. Paragraph 17 to the last paragraph in the affidavit, paragraph 25, deal with the affidavit filed by the 1st respondent. It is relevant to the matter before me to note that these counter objections and the affidavit do not controvert paragraphs 23 (a) and (b), and paragraph 34 of the affidavit filed by the 2nd and 3rd respondents, as regards the matters pleaded by them in paragraphs 23 and 34 of their petition. Failure to controvert these affirmations or the silence regarding these affirmations, has a direct and vital bearing on the matter before me, that is, whether to extend

the interim stay order or not. The 2nd and 3rd respondents have further filed an affidavit by Camilus Senaratne the professional Tennis Coach, who has been engaged by the SRI LANKA TENNIS ASSOCIATION for their coaching programmes. Camilus Senaratne affirms to the coaching programmes launched by the SRI LANKA TENNIS ASSOCIATION and to the conduct of the international tournament which is planned by the SRI LANKA TENNIS ASSOCIATION. There is no affidavit from the petitioners or from any other person contradicting the affirmations in the affidavit of Camilus Senaratne.

From the relevant averments and affirmations in the pleadings of the parties – petitions and affidavits which I have referred to – the following serious matters in dispute or debatable and contentious matters surface :

- (1) whether generally the direction issued by the Hon. Minister is valid under section 39 (1) of the Sports Law ;
- (2) whether the “Playing Section” of the SRI LANKA TENNIS ASSOCIATION is a body independent and separate from the SRI LANKA TENNIS ASSOCIATION or is a section of the SRI LANKA TENNIS ASSOCIATION ;
- (3) whether the possession and the control of the Tennis Courts in the SRI LANKA TENNIS ASSOCIATION premises is in the SRI LANKA TENNIS ASSOCIATION or the Playing Section of the SRI LANKA TENNIS ASSOCIATION.

The immediate matter before me is the application of the 2nd and 3rd respondents not to extend the stay order, and conversely the application of the petitioners for a stay order till the determination of this application. I will now deal with these immediate matters which are before this court. For this purpose, I am of the view that it is necessary for this court to form a tentative view, subject to a final decision at the hearing of this application, regarding the dispute No. 2 set out by me above. The first reference to the Playing Section of the SRI LANKA TENNIS ASSOCIATION is in rule 7 (c) of the constitution (P1), which states – “All Associates, life Associates and honorary Life Associates shall be eligible to apply for Membership in the Playing Section of the Association”. The membership of the Association is set out in section 3 of the Rules. It is clear from rule 2 that the membership of this Association is only available to a group of persons and not to individuals. Rule 4 states – “Associateship in the

Association shall be available to any individual who is interested in Tennis". Thus, rule 4 should be read with rule 7 (c). The next rule that deals with the Playing Section is rule 27, and rule 27 (d), which deals with the tennis courts in the SRI LANKA TENNIS ASSOCIATION premises is a matter highly in dispute in this application before me. Rule 27 (h) sets out that – the Playing Section shall be deemed to be a Member of the Association for the purposes of rules set out therein". It is the interpretation of these clauses that will result in determining the status of this Playing Section vis a vis the SRI LANKA TENNIS ASSOCIATION. Some light is thrown on this matter by document (R1A), which contains a part of a speech made by the 1st petitioner, who is the current President of the Playing Section, and also a person, who has held high office in the SRI LANKA TENNIS ASSOCIATION itself. In this speech (R1A), the 1st petitioner has stated as follows : – "There is an impression that the Parent Body and the Playing Section are two separate entities, and should act independently. This is not so. The Playing Section is the creation of the Association." There was no explanation offered for this speech and the position set out therein, except a bare statement by the learned counsel for the petitioners that a legal interpretation of the rules particularly rule 27 cannot be based on that speech. In this matter, such as the one before me, where I am considering an interim order before a final order is made, the position in law is that the court can express for the purpose of a decision a prima facie and a tentative opinion subject to a final decision. I am of the view that on the plain construction of the provisions in the constitution of the SRI LANKA TENNIS ASSOCIATION, which I have set out above read with the enunciation of the constitution by the 1st petitioner in (R1A) prima facie it appears that the Playing Section is only "a section of the SRI LANKA TENNIS ASSOCIATION" and "is a creation of the Association". I must reiterate that this prima facie view is only expressed for the decision of the matter before me, and is subject to a final decision. However, I must add that I am able to form this tentative view because both eminent counsel for the petitioners and the 2nd and 3rd respondents devoted a major portion of their arguments to submissions on the relation of the Playing Section to the SRI LANKA TENNIS ASSOCIATION.

I will now come to the matter that is immediately before me, *i.e.* the application in respect of the interim stay order issued. The Hon. Minister's directive directs the SRI LANKA TENNIS ASSOCIATION to

make available the 14 Courts (Numbers given with reference to sketch P4B) "with immediate effect to carry out the coaching and training programmes at a national level". The petitioners in their petition state that there are 23 courts in the SRI LANKA TENNIS ASSOCIATION premises, the control and possession of which according to petitioners is vested in the Playing Section. In terms of rule 27 (f) the courts are made available to the SRI LANKA TENNIS ASSOCIATION for use for the purpose set out therein, *i.e.* mainly for tournaments and matches. The Playing Section has also voluntarily made 7 courts permanently available to the SRI LANKA TENNIS ASSOCIATION for coaching and training programmes. Four courts have been set apart for the coaching programmes of the Playing Section. Thus, only 12 courts are left for the use of the Playing Section which has about 250 members. As a counter to this affirmation, the 2nd and 3rd respondents have affirmed to the fact that only about 40 members of the Playing Section turned up daily for, what both parties call "recreational tennis". The 2nd and 3rd respondents have affirmed that after the direction (P4A), *i.e.* from 29th May, the SRI LANKA TENNIS ASSOCIATION have used the courts Nos. 1 – 14, and that the Playing Section used the courts 15 – 23 till there was an interruption. But the petitioners in the counter affidavit have denied that the direction of the Hon. Minister was at all implemented. In any case the 2nd and 3rd respondents have not denied the affirmation of the petitioners regarding the use and distribution of the courts before the directive. Both parties agreed that the effect of the Hon. Minister's directive will be that the Playing Section will be reduced to the use of 9 courts *i.e.* 3 courts less than the number of courts daily in use by the Playing Section. The petitioners have affirmed that if this direction of the Hon. Minister is implemented it will result in 250 members of the Playing Section being left with only 9 courts to serve their daily recreational needs. This is their main objection – apart from the objections in law to the implementation of the direction of the Hon. Minister.

Thus, it is clear that the ground on which the petitioners have obtained the interim stay order is that if the Minister's direction is implemented the Playing Section will be reduced to the use of only 9 courts from the 12 courts, which are now in use by this section.

I have set out with reference to paragraphs, the affirmations of the 2nd and 3rd respondents regarding the need for the use of courts for training programmes. In the course of the argument the issue raised

was whether the reasons adduced by the 2nd and 3rd respondents against the extension of the stay order should be confined to paragraph 34 of their objections of 21.6.1984 referred to by me above, or whether the reasons for the application of these two respondents should also include the averments in paragraphs 23 (a) and 23 (b). I am of the view that the application of these two respondents not to extend the stay order issued is based on the averments contained in paragraphs 23 (a) and 23 (b), and the further grounds which should be considered as of immediate necessity are contained in paragraph 34 – the forthcoming Junior International Tournament due to commence on 17.8.1984, for which a coaching programme for the Juniors will have to be undertaken. It would be erroneous to confine the objections of these respondents to paragraph 34 only. The case of the Petitioners is that there is no such Junior International Tournament due to take place. But though it is so stated from the Bar, the petitioners have safely avoided contradicting the affirmations to this effect in the respondents' affidavit – paragraph 34 (a) to (e). Without any such affirmation, these objections to the vacation of the interim stay order can only be explained on the basis of the intense acrimony prevailing between the petitioners and the 2nd and 3rd respondents.

As regards the issue of an interim stay order in a Writ application, the court is guided by certain principles. In this instance, there is an additional and important aspect to be considered in relation to this stay order. The direction of the Hon. Minister, whether lawful or unlawful (to be decided later) has been made on the face of it, to a National Association and quite patently in the public interest, the cause of national sport – Tennis. No mala fides whatsoever has been alleged against the Hon. Minister. It is in this background that the conflicting contentions of the petitioners, and the 2nd and 3rd respondents regarding the interim stay order issued should be considered.

The main factor to be considered by a court for the issue of or non-issue of a stay order (in this instance the vacation of a stay order) has been set out by his Lordship Samarakoon, C.J., in the case of *Billimoria v. Minister of Lands, Land Development and Mahaweli Development and Two Others* (1). This decision dealt with the issue of a stay order in an application for a Writ of Certiorari. Samarakoon, C.J. stated the principle as follows :– “In considering the question we must bear in mind that a stay order is an incidental order made in the

exercise of inherent or implied powers of court. Without such power the court's final orders in most cases would if the petitioner is successful be rendered nugatory, and the aggrieved party will be left holding an empty decree worthless for all purposes – Vide Bertram, C. J., in *Weerasooriya v. Sidambaram Chetty (2)*". His Lordship the Chief Justice further observed at page 15 "the interests of justice therefore required that a stay order be made as an interim measure. It would not be correct to judge such stay orders in the same strict manner as final orders. Interim orders by their very nature must depend a great deal on a judge's opinion as to the necessity for interim action".

A consideration of the authorities shows that two other principles or matters have been considered in the issue of interim stay orders. "The balance of convenience" of the parties to the dispute has been considered. The balance of convenience has been defined in C. M. Row's Law of Injunction 5th Ed ; (1980) at page 201 as follows :– " 'balance of convenience' means – the comparative mischief or inconvenience to the parties If the inconvenience leans to the side of the plaintiff then alone interlocutory injunction should be granted".

The term "balance of convenience" – as regards the issue of injunctions has been defined in Halsbury's Laws of England – 4th Ed ; Volume 24, para 956 as follows :– "The Court takes into consideration the balance of convenience to the parties and the nature of the injury which the defendant, on the one hand, would suffer if the injunction was granted and he should ultimately turn out to be right, and that which the plaintiff, on the other hand, might sustain if the injunction was refused and he should ultimately turn out to be right".

The case of *Mohamed Felumesh v. S. Mondale and others (3)* is a case in which in a writ application the Court considered the balance of convenience in the issue of an interim stay order. The Court ruled as follows :– "The question of balance of convenience poses a more difficult problem, but, in our opinion, in the facts and circumstances of this case, that question should be answered in favour of the appellant". The third principle that has to be considered, which is seen from the authorities in the issue of an interim order is whether if an interim order is not issued "irreparable and irremediable mischief or injury" will be caused to a party. In C. M. Row's book referred to above – page 201 "Irreparable injury" has been defined as – "injury which

cannot be adequately remedied by damages". *State of Orissa v. Madan Gopal* (4) is a case in which an application for a Writ of Mandamus was made against the State of Orissa, under Article 226, and 131 of the Constitution of India. The High Court issued an interim order, on the ground that the respondents' unless protected by the Court would undergo irreparable and irremediable loss of possession of the mining leases of immense value hardly capable of being remedied by payments of money as compensation", against the State of Orissa to refrain from disturbing the petitioners' possession over some mining areas.

The first test given above, whether if an interim stay order is not issued the relief which the petitioners will get will be rendered nugatory is a matter of importance and relevance to be considered in this instance. This principle is also connected to the other principle of the balance of convenience of the parties. But it must be stated that in this instance I am really considering the negative aspect of these principles, i.e. whether the interim stay order already issued should not be extended but vacated and dissolved. It is quite clear that if the Hon. Minister's order in (P4A) is implemented till the final determination of this application, the ultimate relief the petitioners will get if successful, will in no manner be rendered nugatory. The situation of the ultimate relief obtained being rendered nugatory, if an interim stay order is not issued, arises, inter alia, in a category of writ applications dealing with the vesting of property in Land Acquisition, under the Ceiling and Housing Property Law, and such like instances. The inconvenience that will result to the petitioners from the non-extension of the stay order will be that the Playing Section will be restricted to a lesser number of courts, i.e. only 9 courts till the determination of the application. The balance of convenience would certainly tilt in favour of the petitioners if the non-extension of this stay order would result in the petitioners being deprived completely of the use of any courts, and as such, prevented from indulging in daily recreational tennis. On the other hand, as regards the balance of convenience the application for the vacation of this interim stay order is not based on any personal interest of the 2nd and 3rd respondents, such as indulging in recreational tennis by them, to the exclusion of the petitioners and the members of the Playing Section. In this instance the application for the non-extension or vacation of the stay order is not for any personal benefit of the 2nd and 3rd respondents, but is made in the interests of a national sports body, the SRI LANKA

TENNIS ASSOCIATION, for national interest – “coaching and training programmes at a national level” (P4A) generally, and immediately for staging a Junior International Tennis Championship Tournament.

For these reasons –

- (1) That the non-extension or the vacation of the interim stay order will not render nugatory any final relief, which will be obtained by the petitioners in this application, if successful ; and
- (2) That the balance of convenience is not in favour of the extension of the interim stay order–

I hold that the interim stay order issued against the 2nd and 3rd respondents on 8.6.1984 should not be extended and should be vacated and dissolved. The stay order issued on 8.6.1984 is not extended and is vacated and dissolved.

I have carefully considered the quantum of costs that should be ordered against the petitioners, who have resisted the application. The hearing of this application proceeded for several days. Further, this is an instance in which some compromise was possible but the petitioners were not prepared to do so due to the acrimony prevailing. These matters in my view should be considered in awarding costs. I order the petitioners to pay the 2nd and 3rd respondents as costs of this inquiry Rs. 2,500. The application of the 2nd and 3rd respondents is allowed with costs fixed at Rs. 2,500.

SIVA SELLIAH, J. – I agree.

Application allowed.
