

**JATHIKA SEVAKA SANGAMAYA**  
**v**  
**SRI LANKA PORTS AUTHORITY AND ANOTHER**

COURT OF APPEAL  
THILAKAWARDENA, J.  
WIJERATNE, J.  
CA 589/2002  
JUNE 3, 2002  
SEPTEMBER 4, 2002  
NOVEMBER 26, 2002

*Writ of Certiorari – Preliminary Objections – Meaning? – Sustainability – Advantages – Disadvantages – Locus Standi – Public Law Remedy – Busybody or a public benefactor.*

**Held:**

- (i) A preliminary objection can be a pure question of law, it could be based on a mixed question of law and facts and even on a question of fact alone.....

*Per Shiranee Thilakawardena, J.*

“Preliminary points of law are too often treacherous short cuts the price of which can be delay anxiety and expense.”

- (ii) The purpose of raising preliminary objections is not to shut out or stifle legitimate adjudication. Preliminary objections are particularly unhelpful and are without basis in the context where facts and/or law are in dispute.
- (iii) *Writ of Certiorari* is available even to strangers because of the element of public interest.

*“Every citizen has standing to invite the Court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddling busy body but as a public benefactor.”*

**APPLICATION** for a *Writ of Certiorari*.

**Cases referred to:**

1. *AC v Nissan* - 1969 1 All ER 629 (AL)
2. *Tilling v Whiteman* - 1979 All ER 739

3. *Prabhakar Gerald Walter v Chief Secretary* - 1953 AIR TC 286 at 291

4. *Wijesiri v Siriwardena* - 1982 1 Sri LR 171 at 175

*K. Kanag-Iswaran, P.C. with Daya Pelpola, S.J. Mohideen, M. Iqbal Mohamed and Nigel Bartholomusz* for the appellant

*Gamini Marapona, P.C. with Naveen Marapana* for the 1st respondent.

*Romesh de Silva, P.C. with N.R. Sivendran and Sugath Caldera* for 2nd respondent.

*Cur.adv.vult.*

January 30, 2003

### **SHIRANEE TILAKAWARDENA, J.**

This application has been preferred by the petitioner invoking the writ jurisdiction of this Court. The respondents have taken preliminary objections regarding the maintainability of this application. The preliminary objections on behalf of the 2nd respondent were as follows:

- (a) The petitioner is guilty of suppression and misrepresentation of material facts and as such, the petitioner is not entitled to invoke the discretionary remedy in the form of an application for Writ, of Your Lordships' Court. There are several instances of suppression and misrepresentation of facts which will be dealt with hereunder.
- (b) The petitioner is guilty of inordinate delay/laches and the petitioner is not entitled to have and maintain this application.
- (c) The petitioner has no locus standi to have and maintain this application for a writ of certiorari and/or Prohibition. This is not a representative action and the public law remedy is not available to the petitioner.
- (d) The Board of Investment against which various allegations have been levelled has not been made a party to this application and thus, the Petition ought to be dismissed in limine.

- (e) The petitioner is not in any event entitled to Public Law remedy.

This matter comes up for an order on these preliminary objections.

The gravermen of the argument of the petitioner was that the preliminary objections purported to have been taken were based on certain facts and merits which were disputed and that the determination on these matters could not be done without preceding into the inquiry.

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The first matter that has to be determined by this Court is the limitation of matters that can be taken as "Preliminary Objections" without going into the merit of the pleadings filed in the case. A preliminary objection can be on a pure question of law, a determination of which obviates or makes unnecessary, any consideration of the facts contained in the pleadings and/or the merits of the case. As for instance, a matter of law which is canvassed relating to the patent lack of jurisdiction. There is no dispute that such a matter can be disposed of, on that question of law alone. Therefore matters pertaining to jurisdiction would be canvassed by way of preliminary objection and be determined by the Court specially in the circumstances where the matter of jurisdiction is placed on a pure question of law. The patent lack of jurisdiction, matters relating to prescription etc. especially when they are based on facts that are not contested and are matters that can be disposed of in this manner.

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The advantage of a preliminary objection is the possibility to dispose of a matter expeditiously which can lead to a resolution of the dispute between parties with a minimum amount of expense or delay, for the convenience of all parties including the Court.

A preliminary objection could also be based on a mixed question of law and facts and even on a question of fact alone but, only in situations where there are *ex facie* either no dispute or a frivolous dispute on the fundamental facts that are being urged before the Court and contained in the pleadings that have been filed, such matters can be decided as a preliminary objection.

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Preliminary issues, may be taken at the beginning in isolation of the merits of the case for convenience of all parties and may

even rule upon by the Court, but such issues may not decide the entirety of the dispute that is before the Court. It would assist in the management of the case through the appellate procedure, especially in matters that need to be determined in isolation of the other issues in the case and would prevent the unnecessary delays and inconvenience caused to parties as well as would prevent lengthy and prolonged litigation into matters before Court.

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Preliminary objections are also particularly useful for actions which have no substance and where it is clear that such action could not possibly succeed.

The purpose of raising preliminary objections is not to shut out or stifle legitimate adjudication. Preliminary objections are particularly unhelpful and are without basis in the context where facts and/or law is in dispute. It is also important to distinguish a preliminary objection from an objection on any point of law, which can be raised at any part of the trial unlike the preliminary objections, which by its nature is expected to be raised at the beginning of the proceedings prior to the beginning of the arguments in the case.

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This has been referred to in Halsbury's Laws of England – Vol. 36 paragraph 35. "A party may by his pleading raise any point of law. A point of law so taken is called " an objection in point of law". It assumes as true the facts alleged by the other party and declares that those facts are not sufficient to raise the legal inference, or to afford the ground of relief, for which the other party contends. It differs from a confession and avoidance in that it does not seek to draw from the facts alleged, or to prove additional facts in support of, some fresh inference other than that on which the party whose pleading is objected to relies, but merely declares that that party's own allegations are insufficient to support the contention which he puts forward.

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Objection on a point of law replaces the old system of demurrer. Such an objection is disposed at the trial unless otherwise ordered".

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In fact, in the case of *A-C v Nissan*<sup>(1)</sup> "the House of Lords have emphasized the disadvantages of ordering the trial of a preliminary point of law on **assumed facts**".

It must be particularly remembered that preliminary points of law are "too often treacherous short cuts, the price of which can be delay, anxiety and expense". "The practice in lower courts of allowing preliminary points of law to be decided on hypothetical facts ought to be confined to cases where the facts are not complicated and the legal issues short and easily decided upon or exceptional circumstances". (*Tilling v Whiteman*<sup>(2)</sup>).

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In this case, the preliminary objection goes to the very root of the pleadings and such objection cannot be decided without carefully going into the pleadings and the documents relating to the circumstances of this case.

A preliminary objection has been defined in Venkataramaiya's Law Lexicon Page 1875 as follows. "The epithet "preliminary" is inappropriate as regards this objection because a preliminary objection is one that is raised to the sustainability of an application or action on the basis of the assumption of the truth of all the averments of fact made by the suitor, in the application or plaint and is therefore, one that can be taken in argument though not raised in the written defence. The objection here is obviously and entirely different and is not one which can be taken in argument without raising it in the written defence so as to give an opportunity to the opponent to state his answer or explanation – *Prabhakar Gerald Walter v Chief Secretary*<sup>(3)</sup>."

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Even an objection raised regarding the locus standi specially in exercising the writ jurisdiction of this Court one has to consider the development of law where even any public, interested person or a group of persons can invoke the writ jurisdiction of this Court specially in case of abuse of power by public authorities are concerned. It is relevant that "Every citizen has standing to invite the Court to prevent some abuse of power, and in doing so he may claim to be regarded not as a meddling busybody but as a public benefactor". (*Administrative Law – Wade & Forsyth 8th Edition page 673*).

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In *Wijesiri v Siriwardene*<sup>(4)</sup> at 175 Wimalaratne, J. with Ratwatte, J. agreeing held that *writ of certiorari* is available even to strangers, as the Courts have often held, because of the element of public interest.

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In these circumstances, this Court overrules the preliminary objections and fix this case for argument.

**WIJEYARATNE, J.** I agree

*Preliminary objection overruled*  
*Matter fixed for argument.*