S.C. (SD) No. 1/2023 to S.C. (SD) No. 5/2023

"LICENSING OF SHIPPING AGENTS, FREIGHT FORWARDERS, NON-VESSEL OPERATING COMMON CARRIERS AND CONTAINER OPERATORS (AMENDMENT)" BILL

BEFORE:	Buwaneka Aluwihare, PC	- Judge of the Supreme Court
	A. L. Shiran Gooneratne	- Judge of the Supreme Court
	Arjuna Obeyesekere	- Judge of the Supreme Court

S.C. (SD) No. 1/2023

Petitioner — Deshabandu Suresh Rupasingha Gunewardene

Counsel — Nuwan Peiris

S.C. (SD) No. 2/2023

Petitioner — Joint Apparel Association Forum Sri Lanka

Counsel — Sanjeewa Jayawardena, PC with Lakmini Warusevitane and Dr. Milhan Mohamed

S.C. (SD) No. 3/2023

Petitioners —
(1) Russel Anthony Juriansz
(2) Trisherman Frink
(3) Sahad Mukthar

Counsel — Saliya Peiris, PC with Suren Gnanaraj, Rashmi Dias and Farhad Jiffry

S.C. (SD) No. 4/2023

Petitioner — Sri Lanka Association of Manufacturers and Exporters of Rubber Products

Counsel — Dr. Romesh De Silva, PC with Niran Anketell

S.C. (SD) No. 5/2023

Petitioner — Ceylon Freight and Logistics Association (Limited by Guarantee)

Counsel — Nuwan Peiris

Respondent — Hon. Attorney-General

Counsel — ASG Vikum De Abrew, PC with DSG Yuresha De Silva and SC Shiloma David

The Court assembled for hearing at 10.00 a.m. on 20th January 2023.

A Bill seeking to amend the "Licensing of Shipping Agents, Freight Forwarders, Non-Vessel Operating Common Carriers and Container Operators Act, No. 10 of 1972" [*the Bill*] was published as a Supplement to Part II of the Gazette of 10th November 2022. It was presented in Parliament by the Minister of Ports, Shipping and Aviation and was placed on the Order Paper of Parliament on 05th January 2023.

<u>Articles 120, 121 and 123 of the Constitution</u>

Article 120 of the Constitution provides that, "*The Supreme Court shall have sole and exclusive jurisdiction to determine any question as to whether any Bill or any provision thereof is inconsistent with the Constitution.*"

Article 121(1) goes on to provide as follows:

> "*The jurisdiction of the Supreme Court to ordinarily determine any such question as aforesaid may be invoked by the President by a written reference addressed to the Chief Justice, or by any citizen by a petition in writing addressed to the Supreme Court. Such reference shall be made, or such petition shall be filed, within fourteen days of the Bill being placed on the Order Paper of the Parliament and a copy thereof shall at the same time be delivered to the Speaker* ..."

In terms of Article 123(1), "*The determination of the Supreme Court shall be accompanied by the reasons therefor and shall state whether the Bill or any provision thereof is inconsistent with the Constitution and if so, which provision or provisions of the Constitution.*"

Once a primary determination is made as provided in Article 123(1) as to any inconsistency with the Constitution, the consequential determinations the Court is required to make are specified in Article 123(2), which reads as follows:

"Where the Supreme Court determines that the Bill or any provision thereof is inconsistent with the Constitution, it shall also state –

(a) whether such Bill is required to comply with the provisions of paragraphs (1) and (2) of Article 82; or

(b) whether such Bill or any provision thereof may only be passed by the special majority required under the provisions of paragraph (2) of Article 84; or

(c) whether such Bill or any provision thereof requires to be passed by the special majority required under the provisions of paragraph (2) of Article 84 and approved by the People at a Referendum by virtue of the provisions of Article 83,

and may specify the nature of the amendments which would make the Bill or such provision cease to be inconsistent."

Petitions challenging the Bill

Seven Petitioners have accordingly invoked the jurisdiction of this Court in terms of Article 121(1) by filing the above numbered five petitions in the Registry of the Supreme Court, with the last of the said petitions having been filed on 17th January 2023. The learned Counsel for the Petitioners submitted that Clause 2(2) of the Bill, which contains the only amendment that is sought to be made to the Licensing of Shipping Agents Act, No. 10 of 1972 [the Act] is inconsistent with Articles 3, 4, 12(1), 14(1)(g), 76(1) and 148 of the Constitution, and hence needs to be approved by the special majority of Parliament and by the People at a Referendum.

Upon receipt of the said petitions, the Registrar of this Court issued notice on the Hon. Attorney General as required by Article 134(1) of the Constitution.

All five petitions were taken up together. The learned Counsel for the Petitioners and the learned Additional Solicitor General for the Respondent made oral submissions, which were supplemented by written submissions. In the course of his submissions, the learned Additional Solicitor General informed this Court that an amendment shall be moved at the Committee Stage of Parliament to Clause 2(2), which shall be referred to later in this Determination.

The Act

The long title to the Act provides that it is an "*Act to provide for the regulation and control of the carrying on of the business of a shipping agent by the introduction and operation of a system of licensing, and for matters connected therewith or incidental thereto.*" The Act has been amended in 1981 [Act No. 9 of 1981], 1982 [Act No. 16 of 1982] and 2002 [Act No. 18 of 2002]. As the latter amendment sought to regulate and control Freight Forwarders, Non Vessel Operating Common Carriers and Container Operators, the Act was re-named as the "Licensing of Shipping Agents, Freight Forwarders, Non-Vessel Operating Common Carriers and Container Operators Act."

Section 3(1) of the Act stipulates that no person shall carry on business as Shipping Agent, Freight Forwarder, Non-Vessel Operating Common Carrier and Container Operator except under the authority or otherwise than in accordance with the terms or conditions of a license issued in that behalf. While the Act contains provisions relating to the manner in which an application for a license must be made and the grounds on which an application may be refused, Section 6 of the Act sets out the circumstances and the manner in which a license may be suspended or cancelled.

The Act contains two provisions which empower the making of regulations. The first is Section 3(5) which reads as follows:

"Regulations may be made under this Act for and in respect of all or any of the following matters:

(a) *subject to the provisions of this Act, the qualifications required of any persons applying for a license under this Act;*

(b) *the period for which and the terms and conditions subject to which, licences may be granted;*

(bb) *the circumstances in which applications for the transfer of a Shipping Agent, Freight Forwarder, Non-Vessel Operating Common Carrier, and Container Operator may be made by an owner, principal, charterer or master and the manner in which such applications may be disposed of;*

(c) *the mode and manner in which applications for licenses may be made and disposed of;*

(d) *the furnishing of all such statements, declarations relating to the business carried on by a Shipping Agent, Freight Forwarder, Non Vessel Operating Common Carrier, and Container Operator as may be necessary for ensuring that the provisions of this Act or any regulations made thereunder are complied with;*

(e) *the standards to be observed by Shipping Agents, Freight Forwarders, Non Vessel Operating Common Carriers and Container Operators and the prohibition of acts or omissions in contravention of such standards."*

The second Section in the Act that empowers the making of regulations is Section 10, of which Sub-sections (1) and (2) are set out below:

"(1) *The Minister may make regulations for the purpose of carrying out or giving effect to the principles and provisions of this Act.*

(2) In particular and without prejudice to the generality of the powers conferred by subsection (1), the Minister may make regulations in respect of any matter required by this Act to be prescribed or in respect of which regulations are authorized by this Act to be made."

The Bill

The Bill proposes to amend the Act by amending subsection (5) of Section 3 of the Act as follows:

(1) In paragraph (e) thereof, by the substitution for the words "*contravention of such standards.*" of the words "*contravention of such standards; and* ";

(2) By the addition at the end of paragraph (e) of that subsection, of the following new paragraph, numbered as (f):

"*a charge, levy and tariff imposed by the relevant service providers of shipping agents, freight forwarders, non-vessel operating common carriers and container operators for the services rendered by them, and regulating the procedure of imposing and collecting such charge, levy and tariff.*"

The amendment to Clause 2(2) that is due to be moved at the Committee Stage of Parliament reads as follows:

"*a charge or commission imposed by shipping agents, freight forwarders, non-vessel operating common carriers and container operators for the services rendered by such service providers, and the procedure of imposing and collecting such charge or commission.*"

We shall now consider the several arguments presented by Mr. Sanjeeva Jayawardena, PC, the learned Counsel for the Petitioner in SC SD Petition No. 02/2023, Mr. Saliya Peiris, PC, the learned Counsel for the Petitioners in SC SD

Petition No. 03/2023, and Dr. Romesh De Silva, PC, the learned Counsel for the Petitioner in SC SD Petition No. 4/2023, in support of their position that the proposed amendment [Clause 2(2) of the Bill] is inconsistent with the Constitution in that it violates Articles 3, 4, 12(1), 14(1)(g), 76(1) and 148 of the Constitution and hence needs to be approved by the special majority of Parliament and by the People at a Referendum.

The provisions of a bill cannot be vague or unclear

Mr. Sanjeeva Jayawardena, PC submitted that the provisions of the Bill lacks clarity and are vague and obscure and that such a law can lead to the arbitrary implementation of its provisions and therefore violate Article 12(1).

The learned Additional Solicitor General submitted that *even if any legislative enactment may have the potential to be abused or misused, such speculation, presumptions, assumptions, surmises or propositions ought not be taken into consideration.* In support of this position, he relied on the findings of this Court in two previous determinations. The first was the **Third Amendment to the Constitution Bill** [Decisions of the Supreme Court on Parliamentary Bills (1978-1983), Vol. I, 139 at page 147] where this Court held that, "*A law cannot be struck down as discriminatory because of the fear that it may be administered in a discriminatory manner. Mere possibility of abuse of power is not sufficient ground to hold that a law offends the fundamental right of equality.*". The second was the **Agrarian Services (Amendment) Bill** [Decisions of the Supreme Court on Parliamentary Bills – (1991-2003), Vol. VII, 9 at page 12], where it had been determined that, "*There is of course the possibility that an attempt might be made to implement the Bill, after enactment, in a manner inconsistent with the Constitution. Our jurisdiction does not extend, quia timet, to make pronouncements intended to prevent or restrain possible future violations, particularly by persons and bodies other than the legislature; our jurisdiction is confined to determining whether the Bill as it stands would constitute an infringement of the Constitution.*"

However, in the **Welfare Relief Benefits Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003), Vol. VII, 279] this Court, having considered *inter alia* the provisions of that bill including those relating to the selection process for the recipients of such benefits, the criteria for eligibility to receive assistance in terms of a scheme formulated under the bill, the date of commencement and the duration of the payments under a scheme and the fact that all schemes shall be published in the Gazette and placed before Parliament prior to the commencement of such schemes, concluded that the said provisions offer **adequate safeguards** to ensure that the selection of the recipients under each scheme will be made in a non-discriminatory manner thereby ensuring compliance with Article 12 of the Constitution.

It is only having identified the above safeguards that this Court stated that, *"It is not within the jurisdiction of the Court to speculate as to what would happen in the implementation of the scheme.* ***The provisions of the Bill should be examined objectively to ascertain whether there are sufficient safeguards to prevent discrimination on any of the grounds referred to in Article 12 (2) of the Constitution and to prevent arbitrariness in the decision making process.*** *The provisions referred to above are in our view adequate safeguards in this regard."* [emphasis added] [at page 282].

In the **Bureau of Rehabilitation Bill** [SC (SD) Petition Nos. 54-61/2022], this Court, having considered the aforementioned findings of this Court in the **Third Amendment to the Constitution Bill** [supra] and the **Welfare Relief Benefits Bill** [supra], referred to by the learned Additional Solicitor General, held as follows:

> *"In assessing whether the provisions of a bill are vague or lack clarity, the question before this Court would be whether the bill has been drawn up with the amount of clarity and precision as would enable a reasonable person to discern which actions are forbidden, or which actions are required. If the operation and boundaries of the bill in question cannot be identified without resorting to guesswork, then the provisions of the bill would be vague, and*

therefore arbitrary. Even if the provisions of the impugned Bill are unambiguous, if it fails to provide adequate safeguards in the exercise of such power, that too will be arbitrary. Thus, provisions that are vague and those that do not have adequate safeguards violate Article 12(1) of the Constitution.

In considering the application of a bill or its provisions, it is only plausible and real-world possibilities that would be entertained by this Court. The threat of potential abuse should not be based on fanciful hypotheses, and should always be guided by the perspective of the proverbial reasonable person. There should be a realistic possibility that the provisions of the Constitution would be abused through the provisions of the law. In such a situation, this Court undoubtedly possesses the jurisdiction to consider such possibilities, and would not have to wait for any actual or imminent infringement. The need for this Court to be proactive and vigilant is underscored by the absence of post-enactment review."

It is therefore our view that the jurisdiction conferred on this Court extends to examining if the provisions of a bill are clear and if adequate safeguards have been inbuilt to ensure that there is no arbitrariness in its implementation.

<u>Clause 2(2) of the Bill and the violation of Article 12(1)</u>

Explaining the background to the Bill, the learned Additional Solicitor General submitted that a regulation made in 2005 under Section 3(5) of the Act to empower any container operator who maintains an inland container depot to levy a charge from a user for the services rendered in terms of the tariff recommended by the Association of Container Depot Operators was quashed by the Court of Appeal on the ground that it was *ultra vires* the regulation making power of the Minister. He submitted that on appeal, the Attorney General had informed this Court way back in November 2008 that it is proposed to amend the applicable law and that proceedings before this Court had been terminated on that basis. He submitted further that the Bill was the result of such proposal.

We have examined the Cabinet Memoranda dated 17th June 2022 and 3rd October 2022 made available by the learned Additional Solicitor General and find that approval of the Cabinet of Ministers for the Bill had been granted on the basis of the above proposal intimated to this Court in November 2008. We must observe that the said Cabinet Memoranda does not contain any material that sets out the necessity or the rationale for State involvement in the recovery of charges by one private entity from another private entity, or as the learned Counsel for the Petitioners submitted, the necessity to interfere with commerce and matters of business, or the policy objective that is sought to be achieved by the enactment of the said clause into law. This is significant in view of regulations made by the Minister in 2013 and 2017 under Section 10 of the Act which stipulated *inter alia* that "*all charges on containerized cargo which cover entire cost of the carriage of goods referred to in the transport document from the origin to destination shall be included in the all-inclusive freight specified in the Bill of Lading*" and that other than a delivery order fee, no licensed service provider shall charge from an importer or an exporter in Sri Lanka any charge other than the all-inclusive freight specified in the Bill of Lading.

It must be noted at the outset that the words "service providers" in Clause 2(2) remains undefined and no legislation by Parliament or otherwise provides for any interpretation of the term "service providers". The Petitioners' primary contention in this regard was that due to the undefined construction, and the lack of any guidelines or consultative process stated in the law as to how the Minister may classify "service providers", the proposed Bill seeks to confer upon the Minister an unfettered power to make regulations authorising "service providers" to impose a tariff on shipping agents. In effect, the proposed Clause 2(2) of the Bill employs an undefined phrase in the form of "service providers" and confers upon the Minister an unfettered, unguided authority to empower such unknown private actors to impose a tariff on shipping agents. As such, it was submitted by the learned Counsel for the Petitioners that the Bill is arbitrary, devoid of certainty and is inconsistent with Article 12(1).

Furthermore, the impugned Clause is unclear as to whether it seeks to regulate the very imposition of charges or commissions by shipping agents and other service providers or only the procedure for the imposition and collection of such charges. Given that Section 3(5) commences with the words "*Regulations may be made under this Act for and in respect of all or any of the following matters*", a reasonable argument could be made that the very imposition of charges and commissions could be subject to regulation, a position which was not contested by the learned Additional Solicitor General. In that case the regulations could potentially cover the issues of whether certain charges can be imposed or not as well as the amounts that may be charged. It may even seek to circumscribe the types of charges that may be levied. The provision could also be interpreted to mean that the regulatory power is limited only in a manner in which charges and commissions could be imposed or collected. It is not possible without recourse to guesswork to determine the ambit of the clause, particularly given the paucity of material placed before the Cabinet of Ministers.

The learned President's Counsel submitted that in the Determination of the **Special Goods and Services Tax Bill** [SC SD 01-09/2022], this Court, *inter alia*, concluded that "*the failure to set out the basis of the computation of the proposed tax, the tax base and the criteria in the Bill and the grant of power to the Minister to set out the same, amounts to a violation of Article 12 (1) of the Constitution*". Therefore, it was submitted that in the absence of a statutory procedure to impose or to collect a tax or a levy between equal partners engaged in a commercial transaction where the Minister is given an unfettered power to collect the said charges with no Parliamentary control amounts to a violation of Article 12(1) of the Constitution.

This Court is inclined to agree with the argument of the learned Counsel for the Petitioners that the impugned clause is vague and lacks clarity. Article 12(1) of the Constitution guarantees equal protection of the law to all persons. The learned President's Counsel for the Petitioners in SC SD 03/2023 referred to previous instances in which this Court noted the significance of ensuring certainty of the law, with specific reference as to how any uncertainty or vagueness or ambiguity would permit the violation of a person's Fundamental Right to equal protection of the law.

We wish to observe a reference made in **Premachandra v Jayawickrama** [(1994) 2 Sri LR 90 at 102], where G. P.S. De Silva, C.J., citing *Wade,* noted:

"The rule of law has a number of different meanings and corollaries. ***Its primary meaning is that everything must be done according to law.*** *Applied to the powers of government, this requires that every government authority which does some act which would otherwise be a wrong (such as taking a man's land), or which infringes a man's liberty (as by refusing him planning permission), must be able to justify its action as authorised by law. That is the principle of legality.* ***But the rule of law demands something more, since otherwise it would be satisfied by giving the government unrestricted discretionary powers, so that everything that they did was within the law . . .The secondary meaning of the rule of law, therefore, is that government should be conducted within a framework of recognised rules and principles which restrict discretionary power*** *. . . " (Wade, Administrative Law, 5th ed., p. 22)"*

The learned President's Counsel Mr. Saliya Peiris also made reference to the **Sri Lanka Broadcasting Authority Bill** [Decisions of the Supreme Court on Parliamentary Bills (1991-2003) Vol. VII 81, at page 97] where this Court, citing **Osbourne v. Canada (Treasury Board)** [1993 2 LRC 1] observed:

"Vagueness can have constitutional significance in at least two ways... A law may be so uncertain as to be incapable of being interpreted so as to constitute any restraint on governmental power. The uncertainty may arise either from the generality of the discretion conferred on the donee of the power or from the use of language that is so obscure as to be incapable of interpretation with any degree of precision using the ordinary tools... A Law ... may... by reason of its imprecision, not qualify as a reasonable limit. Generality and imprecision of

language may fail to confine that invasion of a [fundamental] right within reasonable limits. In this sense vagueness is an aspect of over-breadth."

The ambiguity in the scope of the regulatory power is of concern, because depending on the scope of the regulatory power it may be necessary for the law to set out a procedure for a hearing or presentation of views of the parties concerned. It is only after examining the scope of the regulatory power that this Court could determine whether any safeguards need to be set out to prevent any abuse of power. More fundamentally, the precise scope will have to be set out to determine whether the clause would need guidelines on the exercise of the power that is being bestowed on the Minister. The impugned Clause (including the proposed Committee Stage amendment) does not provide any criteria for the exercise of that power. Given the ambiguity of the clause adverted to above, such absence of criteria is of grave concern, especially in view of Sections 11 and 12 of the Act in terms of which a contravention of any regulation is an offence which may attract a fine and a period of imprisonment.

In these circumstances, we are of the view that both the original language of Clause 2(2) as well as the amendment proposed thereto lacks sufficient clarity to satisfy the threshold test established by this Court in the **Bureau of Rehabilitation Bill** [supra]. Therefore, we hold that Clause 2(2) of the proposed Bill, which seeks to amend Section 3(5) of the principal Act is inconsistent with Article 12(1) of the Constitution.

Inconsistency with Article 148

Article 148 of the Constitution states that "*...No tax, rate or any other levy shall be imposed by any local authority or any other public authority, except by or under the authority of a law passed by Parliament or of any existing law.*" In this regard, Mr. Saliya Peiris PC, on behalf of the Petitioners in SC SD Petition No. 03/2023 made special reference to the Sinhala construction of the proposed Clause 2(2), which reads as follows:

(2) එම උපවගන්තියේ (ඉ) ඡේදයේ අවසානයට, පහත දැක්වෙන අලුත් ඡේදය එකතු කිරීමෙන්:-

"(ඊ) තමන් විසින් සපයනු ලබන සේවා සඳහා, නැව් නියෝජිතයන්, නැව් බඩු ගෙනයන්නන්, යාත්‍රා ක්‍රියාකරුවන් නොවන පොදු ප්‍රවාහකයන් සහ කන්ටේනර් මෙහෙයුම්කරුවන්ගේ අදාළ සේවා සපයන්නන් විසින් පනවනු ලබන ගාස්තුවක් හෝ බද්දක් සහ එවැනි ගාස්තුවක්, හෝ බද්දක් පැනවීමේ සහ එකතු කිරීමේ කාර්ය පටිපාටිය නියාමනය කිරීම.".

The word "බද්දක්" can only be construed as "tax" in translation and therefore it appears that the intention of Clause 2(2) is to authorise such "service providers" to impose a tax. The Constitution, in Article 148, delineates Public Finance to be the province of the Legislature. As such, no taxes or tariffs may be imposed by law, except by way of an Act of Parliament. The proposed bill seeks to empower a Minister to authorise "service providers" to impose taxes on shipping agents, freight forwarders, non-vessel, operating common carriers and container operators in form of a "charge, levy, or tariff". Clause 2(2) is therefore, in our opinion, inconsistent with Article 148.

<u>The Bill is outside the scheme of the Act</u>

The learned President's Counsel for the Petitioners in SC SD Petition Nos. 2-4/2023 submitted that the Act pertains to a licensing scheme which regulate and control those who are carrying on the business of shipping agents, freight forwarders, non-vessel operating common carriers and container operators in the shipping industry, and that Clause 2(2) of the Bill which would empower the Minister to make Regulations for and in respect of charges, levies or tariffs that could be imposed by **the relevant service providers** of shipping agents, freight forwarders, non-vessel operating common carriers and container operators is completely outside the scope of the Act. We are in agreement with this submission and are of the view that empowering unknown and unidentified entities - i.e. service providers - who are not licensed under the Act to impose a charge on persons regulated by the Act, is outside the scheme of the Act.

It was submitted further that even if the words *relevant service providers* are deleted as proposed in the amendment that is sought to be moved at Committee Stage, the Clause still seeks to empower the Minister to make regulations to enable shipping agents, freight forwarders, non-vessel operating common carriers and container operators to impose charges. This, it was submitted, is totally alien to the scope of the Act and devoid of any legal rationale, and are matters which would ordinarily be regulated by market forces and the bargaining power of the parties. In view of the finding reached by this Court that the impugned clause is vague and lacks clarity, the necessity for us to consider this argument presented on behalf of the Petitioners does not arise.

Conclusion

In the above circumstances, we hold that the Bill as a whole is inconsistent with Articles 12(1) and 148 of the Constitution and as such may be enacted only by the special majority required by Article 84(2). We place on record our deep appreciation of the assistance given by the learned Additional Solicitor General and all learned Counsel for the Petitioners.

BUWANEKA ALUWIHARE, PC, J
JUDGE OF THE SUPREME COURT

A.L. SHIRAN GOONERATNE, J
JUDGE OF THE SUPREME COURT

ARJUNA OBEYESEKERE, J
JUDGE OF THE SUPREME COURT