

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

Kahapola Arachchige Prabath
Anuruddha Nilupul Fernando
(Nilupul Kahapolarachchi)
No. 56, Delthara, Piliyandala.

AND 4 OTHERS

C.A 177/2010 (Writ)

Vs.

Urban Council Kesbewa
Kesbewa, Piliyandala

10. Sampath Perera
No. 36/5, Gangaboda Road,
Delthara, Piliyandala.

AND 10 OTHERS**RESPONDENTS**

BEFORE: Anil Gooneratne J.

COUNSEL: Chathura Galhena with Manoja Gunawardena for Petitioners
Arjuna Obeysekera D.S.G. for 3rd 4th 6th & 7th Respondents
Manohara de Silva P.C. for 8th 9th & 11th Respondents

ARGUED ON: 29.11.2013

DECIDED ON: 30.05.2014

GOONERATNE J.

The five Petitioners in this Writ Application are residents of 'Delthara' village, as described in the petition. The village itself located at the bank of either side of Bolgoda river. Petitioners claim to be officials of an organization called "Environmental Delthara", main objectives being the protection of natural resources and conservation of environmental riches of the Bolgoda lake and Bolgoda river. This is a public interest litigation and the Petitioners aver that the application was filed in fulfillment of its duty in terms of Article 28(F) of the Constitution to protect nature and conserve its riches. A Writ of Mandamus is sought against Respondents Nos. 1 – 6. Writ of Prohibition is sought against 1st & 2nd Respondents from issuing permits and granting approvals as their functions and duties as a local authority. This court observes that the filing of this type of `application is no doubt laudable. However I have to consider the merits and demerits of this application, and more particularly

whether the Respondents owe a duty to the Petitioners. Further is there a refusal on the part of official Respondents to perform their statutory/public duty on behalf of the civil society and the Petitioners?

The Petitioners plead the usefulness drawn from Bolgoda lake. It serves.

- (a) Provide irrigation facilities
- (b) The production of fish
- (c) Water for industrial usage
- (d) To control of flooding and digestion of waste

Petitioner further pleads that wet lands (marshy lands) around the Bolgoda River performs an invaluable function during heavy rains being a sponge to absorb rain water and drain it through the natural drainage system. Petitioners argue that illegal soil filling and unauthorized or illegal construction, in the vicinity where the Petitioner reside have negative effects and seriously threaten the vitality of Bolgoda lake system and its bio diversity. In paragraph 15 of the petition and its corresponding para in the affidavit it is stated a large Mangrove area called "Kadol Kumbura" depicted in Survey General's Plan Co/Mo/KSB/sub/2001/234 of 2001 indicates illegal

encroachments. Para 16 provide useful material which inter alia state natural flow of fresh water disturbed and reduction of oxygen to aquatic life. Petitioner very correctly plead the reservations on Bolgoda lake and prohibition for any type of construction (para 17/18).

In a gist some of the functions and duties bestowed on the 1st & the 2nd Respondents as pleaded by Petitioners are as follows (inclusive of lapses)

- (1) The 1st & 2nd Respondents in terms of Section 5 & 6 of the Housing and Town Improvement Ordinance have legal authority to approve plans prior to construction. Legal duty also to refrain from approving plans in conflict with the law.
- (2) In view of above Petitioners complains that the 1st & 2nd Respondents have failed to perform the above public duty and has approved plans contrary to above.
- (3) By plan P1, 23 lots identified as unauthorized encroachments. Unauthorized filling continues.
- (4) By plan P2, 11 of such lands of which portions gained by illegal soil filling are identified and survey conducted by Control Environmental Authority.
- (5) By P3, 18 lands identified by Survey General.
- (6) Deed of gift executed (P4) on land gained by illegal filling.
- (7) 1st Respondent constructed an unauthorized building.

There is also reference to a petition sent by the Petitioners along with 374 Villages (P5).

In response to above P5 the Petitioner aver that 1st 2nd 3rd 5th & 6th Respondents confined only to letters exchanged between them. As such the official Respondents have not taken any positive and productive steps as evidenced in P6, P7, P8 & P9. Petitioners plead that due to inaction of the official Respondents in this application, further letter marked P10(a) to P10 (c) are produced by the Petitioners. Petitioners state that 1st Respondent sent letters signed by the 2nd Respondent to inquire (vide P11a & P11(b). 1st Respondent also sent letter P12 to 9th Respondent.

The Respondents sent letters to 8th 10th & 11th Respondents by P13 to P13(c) & P14 (a) to P14(c) to immediately stop illegal soil filling. Petitioners complain that more than 8 months lapsed from the date of dispatch of the above letters by the Petitioners, but the illegal filling and unauthorized constructions are continuing without legal action being taken by the 1st & 2nd, 3rd to 6th Respondents. The 4th Respondent by Gazette P15 in terms of Section 24C & 24D of the National Environmental Act No. 47 of 1980 naming the Bolgoda lake and its surrounding 'environmental protected' area. P15 gives the prohibited construction area (40 feet).

I would for purpose of clarity and better understanding of the grievance of the Petitioners and incorporate the following para 44 of the petition.

The Petitioners state that the relevant agencies have failed and/or neglected to act with respect to the adverse impacts caused by soil fillings and constructions on Bolgoda River, its bank and surrounding marshy lands by following ways.

- (i) Failed to act to prevent environmental degradation according to Article 27(14) of the directive principles of state policy and fundamental duties in chapter V1 of the constitution of the Democratic Socialist Republic of Sri Lanka which states as follows.
- (ii) Failed to perform the legal duties under section 24B of the National Environmental Act.
- (iii) Failed to take appropriate measures under the rights vested under section 72 of the State Land Ordinance for preventing the unauthorized obstructions of Bolgoda River.
- (iv) Failed to serve quite notices under section 3(1) of the state lands (recovery of possession) Act No. 7 of 1979 , on the persons who are in unauthorized possession or occupation of the reservation areas of Bolgoda River requiring such persons to vacate such lands and to deliver vacant possession of such lands.
- (v) Failed to serve notices under section 65(1) of the Irrigation Ordinance No. 32 of 1946 (as amended) on the persons who obstructs and encroaches upon Bolgoda River requiring such persons to remove or abate such obstruction and encroachments.
- (vi) Failed to comply with the provisions of section 7(1) of the Housing and Town Improvement Ordinance No. 19 of 1915 (as amended) when approving the building

plans for the constructions on lands which are gained by illegal soil fillings over the Bolgoda River and its banks.

- (vii) Failed to act under the provisions of Regulations specified in Gazette Extraordinary No. 1634/23 dated 30/12/2009.

The position of the official Respondents gathered from affidavits and objections are catergorised and the gist of it are considered as follows.

1st & 2nd Respondents

- 9th & 10th Respondents sought planning permission from the 1st & 2nd Respondents to construct houses in non-reservation areas. Having considered their application and after following all legal procedures granted the necessary planning permission under the authority vested on the 1st Respondent, by the Urban Development Authority Law.
- Bolgoda and its reservation serve a useful environmental functions. Petitioner has not proved the specific functions.
- Petitioner has stated only a position with regard to part of Section 77 of the State Lands Ordinance.
- 1st & 2nd Respondents have taken all necessary action within the powers vested.

- 9th Respondent was directed to obtain a clearance certificate from 6th Respondent as regards non reservation areas and it was obtained and permission granted accordingly – 1,2 R1.

3rd Respondent

- In order to take legal action against unauthorized filling, the land area should be declared under Section 2(1) & 2(b)(1) of the Sri Lanka Reclamation and Development Corporation Act as a reclamation and development area and as a low lying, marshy, waste or surveying area.
- 3rd Respondent has informed those who are carrying out unauthorized filling of lands to immediately stop unauthorized activity.

4th Respondent

- 4th Respondent carried out an inspection of the 8th Respondent premises on 11.6.2009 and 22.4.2010. It revealed that prior permission as required by, low areas not obtained by the 8th Respondent.
- 8th Respondent had carried out development activity on the 40 feet reservation adjoining his land violating the applicable law.
- On 3.4.2009 and 22.4.2010 of premises No. 39/5 Gangabada Road, Piliyandala owned by one Roshan Maddumage, an illegal construction was revealed where a swimming pool and a building had been constructed on the 40 feet reservation.

This court notes that 5th & 6th Respondents have not filed objections to this application. I would briefly consider the position of 8th to 12th Respondents against whom certain allegations are leveled against by the Petitioners. The 8th and 9th Respondents state that 9th Respondent wanted to construct a house and for that purpose obtained all necessary approvals. These Respondents have submitted the approved plan 8R3, UDA approval 8R4, Development permit 8R4A and based on such approvals. 9th Respondent commenced and concluded constructions. 11th Respondent aver that all necessary approval have been obtained and has produced whatever approval obtained by way of documentary proof.

The material placed by the Petitioners in their writ application no doubt raise very important and relevant issues connecting directive principles of state policy and fundamental duties embodied in Chapter VI of the constitution focused and contained in Article 28(F) namely to protect nature and conserve its riches. However such provisions do not confer or impose legal rights or obligations and not enforceable in a court of law (Article 29). Nevertheless I have been invited by the Petitioners to consider the 'public trust doctrine' to state functionaries in the exercise of their powers. Such a doctrine has been discussed in the judgment pronounced by the Supreme

Court, which is very relevant to the case in hand and which could have the effect of overriding Article 29 of the Constitution, since by Article 140, the Court of Appeal is vested with wide powers to issue writs according to law. I will reproduce the judgment decided by the Appex Curt to understand the duty cast on the official Respondent who need to continuously and vigilantly resort to the available legal machinery i.e public and statutory duty vested by statute.

In *Environmental Foundation Ltd. and Others Vs. Mahaweli Authority of Sri Lanka & Others* 2010 (1) SLR 01

“In recent times Court has emphasized the applicability of the public trust doctrine to state functionaries in the exercise of their powers.

The origins of public trust doctrine can be traced to Justinien’s Institutes where it recognizes three things common to mankind i.e. air, running water and sea (including shores of the sea). These common properly resources were held by the rulers in trusteeship for the free and unimpeded use on the general public.

The applicability of the public trust doctrine was expressly recognized by the Supreme Court of India in the case of M.C. Metha v Kamal Nath. (1997 1SSC 388). The Supreme Court of California also too in the case of National Audubon Society v Superior Court of Alpine Country (the Mono Lake Case) (33 ca. 3 d 419) summed up the doctrine as follows;

Thus the public trust is more than an affirmation of state power to use public property for public purpose. It is an affirmation of duty of the state to protect the peoples common

heritage of streams, lakes, marshlands and tidelands, surrendering the rights only in those rare cases when the abandonment of the right is consistent with the purposes of the trust'

Under Chapter IV of the constitution which deals with the directive principles of State Policy and fundamental duties in Article 27(14) it is stated that "the state shall protect, preserve and improve the environment for the benefit of the community." Although it is expressly declared in the constitution that the Directive Principles and fundamental duties do not confer or impose legal right or obligations and are not enforceable in any Court or tribunal. Courts have linked the directive principles to the public trust doctrine and have stated that these principles should guide state functionaries in the exercise of their powers (Vide Sugathapala Mendis v Chandrika Kumaranatunga (Waters Edge Case) (SC FR 352/2007) and Wattegedera Wijebanda v. Conservator General of Forest and Others (SC 188/2004)"

On the jurisdictional aspect of this court discussed in Heather Therese Mundy Vs. Central Environmental Authority S.C 58/2003.

Per Fernando J.

"Before dealing with the Court of Appeal Judgment, it is necessary to consider the scope of the writ jurisdiction – the basis and the grounds, on which executive acts and decisions may be reviewed, as well as the Court's power and discretion in regard to relief – in the light of several Constitutional provisions. Historically the writ jurisdiction had limitations, arising from its linkage to the English 'prerogative' writs in regard to which it has been observed: "..... the development of administrative law remedies in the common law sphere proceeded piecemeal from a variety of historical antecedents and, unto well into the (twentieth) century, without any recognition of the character and needs of administrative justice as a separate legal discipline. In fact, the main traditional remedies are classed as 'extraordinary remedies'" (Friedman, Law in a Changing Society, 1959, P.403)

The jurisdiction conferred by Article 140, however, is not confined to “prerogative” writs, or “extraordinary remedies”, but extends – “subject to the provisions of the Constitution” – to “orders in the nature of” writs of Certiorari, etc. Taken in the context of our Constitutional principles and provisions, these “orders” constitute one of the principle safeguards against excess and abuse of executive power: mandating the judiciary to defend the Sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any defence due to the Crown and its agents. Further, this Court itself has long recognized and applied the “public trust” doctrine: that the powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes (see *de Silva v. Atukorale*, (1993) 1 Sri LR 283, 296-297; *Jayawadene v. Wijayatilake*, (2001) 1 Sri LR 132, 149, 159; *Bandara v. Premachandra*, (1994) 1 Sri LR 301, 312); and that doctrine extends to national and natural resources (such as the air-waves, *Fernando v. SLBC*, (1996) 1 Sri LR 157, 172 and mineral deposits, *Bulankulame v. Secretary Ministry of Industrial Development*, (2000) 3 Sri LR 243, 256-257). Besides, executive power is also necessarily – subject to the fundamental rights in general, and to Article 12(1) in particular which guarantees equality before the law and the equal protection of the law. For the purposes of the appeals now under consideration, the “protection of the law” would include the right to notice and to be heard. Administrative acts and decisions contrary to the “public trust” doctrine and/or violative of fundamental rights would be in excess or abuse of power, and therefore void or voidable. The link between the writ jurisdiction and fundamental rights is also apparent from Article 126(3) – see *Perera v. Edirisinghe*, (1995) 1 Sri LR 148, 156 – which contemplates that evidence of an infringement of fundamental right may properly arise in the course of hearing a writ application, whereupon such application must be referred to this Court which may grant such relief or make such directions as it may deem just and equitable. Thus, although this Court would still be exercising the writ jurisdiction, its powers of review and relief would not be confined to old “prerogative” writs. These Constitutional principles and provisions have shrunk the area of administrative discretion and immunity, and are correspondingly

expanded the nature and scope of the public duties amendable to Mandamus and the categories of wrongful acts and decisions subject to Certiorari and Prohibition, as well as the scope of judicial review and relief.”

“Did the Court of Appeal err in refusing relief in the exercise of its discretion? Although the Court of Appeal seemed to agree that the rights of the Appellants had been infringed, that their sacrifice had not been duly recognized, and that the Court should minimize as much as possible the effect on their rights, nevertheless it felt obliged to choose between two options only: to grant relief or to dismiss the applications. The Court did not take note of the impact of the fundamental rights on its writ jurisdiction. While the circumstances were such that the Court could reasonably have concluded that, on balance, the Final Trace should be left undisturbed, one of the major considerations was cost – as well as delay, which also involved cost. If a judicial discretion was exercised in favour of the State, inter alia, to save costs, it was only equitable that the Appellants should have been compensated for the injury to their rights. Had the matter been referred to this Court under Article 126(3), the Appellants would have been held entitled to compensation in lieu of further Environmental Impact Assessment procedures. That jurisdiction is an equitable one, and since equity regards as done that which ought to have been done, the matter must now be dealt with as if it had been duly referred to this Court. If it is permissible in the exercise of a judicial discretion to require a humble villager to forego his right to a fair procedure before he is compelled to sacrifice a modest plot of land and a little but because they are of “extremely negligible” value in relation to a multi-billion rupee national project, it is nevertheless not equitable to disregard totally the infringement of his rights: the smaller the value of his property, the greater his right to compensation,”

When I compare the gist of the material suggested by the official Respondents, what could be gathered is that 1st & 2nd Respondents merely want to show that they are doing the correct and legally acceptable acts as per

their regulations. The explanations provided is just the bare minimum. The 3rd Respondent whilst emphasizing on a 'development area' as per the statute governing the 3rd Respondent attempt to show that they have informed persons engaged in unlawful and unauthorized filling of earth etc. in low lying, marshy land, to desist in doing such acts. There again no proper acceptable explanation or details are forthcoming by their objections. Only the 4th Respondent has acted and shown some responsibility on their part by referring to a case of illegal construction. However what other statutory steps taken in regard to illegal construction is a question unknown to this court. The 5th & 6th Respondents display their callous attitude by not providing any material to court by way of filing objections. Is it their position that they concede to the several averments of the Petitioners? What steps taken by 5th & 6th Respondents as per the governing law of our country, is unknown to court?

There is no doubt a public/statutory duty need to be performed by all the official Respondents to this application. Each of those Respondents are statutorily obliged to safe guard the interest of the state and the civil society. Article 27(14) of the Constitution has made specific provisions for the state to protect, preserve and improve the environment for the benefit of the community. Further a fundamental duty is imposed as per Article 28(F) of the

Constitution to protect nature and conserve its riches. The above provisions of the Constitution along with other provisions of statutes governing the official Respondent to the application provide all such details and the required state machinery to preserve and act according to law to safe guard the larger interest of the community, as demonstrated by the Petitioners. Further a duty is owed to the community and the Petitioners by all the official Respondents. The official Respondents in the context of this application and in terms of all the circumstances of this case do not display and demonstrate that they have fulfilled all the required statutory steps. Court could observe the lethargic attitude, indifference to official duty and non observance of the statutory scheme, on the part of the official Respondents. The Bolgoda lake and its lake system covers a large area. To preserve its environment, a constant, continuous vigilance on the part of officials would be essential. The Appex Court having developed the 'public trust' doctrine, need to be adopted respected and fulfill such doctrine which is part of law of our country. Further the Survey General's plans P1 & P2 indicates illegal encroachments. What have the officials done and have they provided this court with adequate material with cogent reasons to enable court to arrive at a reasonable decision.

In all these circumstances I would allow the application of the Petitioners as regards a Writ of Mandamus in so far as the 3rd & 4th & 5th Respondents as per sub paras (c), (d) & (e) of the prayer to the petition. The 3rd & 4th Respondents being a body corporate, in terms of the statute governing these organization could sue and be sued. The Chairman and the Board of Directors and/or the General Manager of the Corporation and the Authority itself need to take the responsibility and initiate action accordingly. 5th Respondent has been named and captioned amended (1st February 2012). I also direct the Registrar of this court to forward a copy of this Judgment to the Hon. Attorney General.

Appeal allowed.

JUDGE OF THE COURT OF APPEAL