

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

Asia Hydro Power Generation
(Pvt.) Ltd.,
No.282/1, 4th Floor,
CBS Building,
Galle Road,
Colombo 03.
Petitioner

CASE NO: CA/WRIT/359/2017

Vs.

1. Hon. Maithripala Sirisena,
President of the Democratic
Socialist Republic of Sri Lanka,
Minister of Mahaweli
Development and Environment,
No.82, Sampathpaya,
Rajamalwatte Road,
Battaramulla.
2. Anura Dissanayake,
Secretary,
Ministry of Mahaweli
Development & Environmental
Ministry,
No.82, Sampathpaya,

Rajamalwatte Road,
Battaramulla.

3. Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.
4. Gotabhaya Jayaratne,
Director General,
Mahaweli Authority of Sri Lanka,
No.500, T.B. Jayah Mawatha,
Colombo 10.
Battaramulla.
5. Central Environmental Authority,
No.82, Sampathpaya,
Rajamalwatte Road,
Battaramulla.
6. Sustainable Energy Authority,
Block 05, 1st Floor, 3G-17,
BMICH, Bauddhaloka Mawatha,
Colombo 07.
7. Ceylon Electricity Board,
No.50, Sir Chittampalam A.
Gardiner Mawatha,
Colombo 01.
8. Udaya Seneviratne,
Former Secretary,
Ministry of Mahaweli
Development and Environment,
No.82, Sampathpaya,
Rajamalwatte Road,
Battaramulla.

9. Attorney General,
The Attorney General's
Department,
Colombo 12.
Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Ikram Mohamed, P.C., with M.S.P. Wadood
and R. Hettiarachchi for the Petitioner.
Hashini Opatha, S.C., for the 1st-4th and 8th-
9th Respondents.

Argued on: 03.09.2020

Decided on: 22.10.2020

Mahinda Samayawardhena, J.

A policy decision was taken by the then Government in 2002 to develop small-scale hydro power projects to generate electrical energy. By a newspaper advertisement, the 3rd Respondent Mahaweli Authority of Sri Lanka invited proposals to *inter alia* develop a hydro power project in Gatambe, Kandy (on the Mahaweli river), which is the subject matter of this application. The Petitioner was selected as the successful project proponent. The 5th Respondent Central Environmental Authority appointed the 3rd Respondent as the Project Approving Agency. The 3rd Respondent sent the Petitioner the Terms of Reference for the Environmental Impact Assessment Report to be prepared in

order to consider the project for approval. The Environmental Impact Assessment Report marked X was tendered and the Technical Evaluation Committee of the 3rd Respondent, which was appointed to evaluate *inter alia* the impact of this project on the environment, recommended that approval be granted for the project. Accordingly, the 3rd Respondent, with the concurrence of the 5th Respondent Central Environmental Authority, granted approval for the project by P3(f) for a period of three years from 22.02.2002, subject to the terms and conditions set out therein. Pursuant to the said approval, as seen from P4(a)-P4(e), the Ministry of Power and Energy, the Sri Lanka Sustainable Energy Authority, and the Public Utilities Commission of Sri Lanka gave their respective approvals. The Lease Agreement P4(f) was signed between the Petitioner and the 3rd Respondent leasing out an identified portion of land for the project, subject to conditions. Thereafter, the 3rd Respondent sent the Petitioner Notice of Termination of the Lease Agreement on the ground of failure to attain milestones in breach of the terms of the Agreement. Upon a case being filed in the Commercial High Court, as seen from P5(d), the matter was settled, subject to terms.

After this settlement, the Petitioner mobilised its staff and commenced site clearance expeditiously, which included blasting operations onsite. By that time, the approval given for implementation of the project by P3(f) had lapsed and several parties, including members of the general public, the Buddhist clergy and various Government Departments, vehemently protested against the project, and in particular the rock blasting operations on the Mahaweli river, as it presented a devastating

environmental threat. Complaints were also made about damage caused to nearby houses and an ancient temple, *Seema Malakaya*, as a result of the said operations. The 3rd Respondent, tendering 3R7, says it received 47 complaints. The 5th Respondent directed the Petitioner to cease rock blasting operations.

The 5th Respondent refused to grant concurrence for the extension of environmental approval for the project. This was informed to the Director General of the 3rd Respondent by 5R9, which reads as follows:

*GETAMBE MINI HYDRO POWER PROJECT ON MAHAWELI
GANGA*

This has reference to your letter dated 10th May 2011 requesting Central Environmental Authority (CEA) concurrence for the extension of the validity period of environmental approval granted on 22.02.2007 by the MASL for the above project.

The CEA concurred with your decision for granting the aforesaid approval in 2007 after study of the EIA report dated 18.01.2007 submitted by the Asia Hydro Power (Pvt) Ltd. The CEA has now received various complaints from the neighbouring public and organisations on some damages caused by the project to the surrounding environment during implementation of the project. Although the original approval was granted by the MASL with the concurrence of the CEA, several unforeseen impacts seem to have arisen which require to be mitigated prior to further

implementation of the project as specified in Condition Nos. A.11 and A.12 of the environmental approval letter.

The CEA convened meetings on 26.07.2011 and 25.10.2011 together with all stakeholders to discuss the issues raised by the public. Further a field inspection was also carried out on 05.08.2011 to further clarify the issues.

The CEA, having studied the issues discussed at the aforesaid meetings and the field visit, notes the following:

- 1. The project has resulted in the following issues which are of serious concern to the neighbourhood.*
 - Damages to the Seemamalakaya due to rock excavation and blasting for construction of the weir. Since extensive rock excavations are to be done for construction of the canal and the power house further damages could be anticipated.*
 - Threats to land stability and increased erosion of river bank due to heavy earth works within the river stretch causing serious threats to Peradeniya – Katugastota road and Rajasinghe Mawatha. This situation may be worsened with the ponding effect in the upstream area.*
 - Threats to endemic fauna and flora species living within the stretch due to rock blasting activities and change of flow characteristics.*
 - Relocation of people living in the inundation area in an unsuitable site.*

2. *Since some of these issues have arisen fairly recently and have not been considered in the EIA report which was prepared in 2007, no satisfactory mitigatory measures to resolve the above issues have been suggested by the project proponent in the EIA report or in subsequent documents. Further, it appears that due attention has not been paid to the above issues during the Technical Evaluation of the EIA report. Important stakeholders such as the National Building Research Organisation, Natural Resources Management Centre of Dept. of Agriculture, Road Development Authority and the Udarata Amarapura Nikaya Sanga Sabha have not been consulted during the EIA study and the EIA evaluation.*
3. *The socio economic data contained in the EIA report appears to be incorrect and thus needs to be updated with correct data.*

Based on the above observations, the CEA wishes to inform you that the concurrence of the CEA could be considered for issuing of environmental approval for the project only if the above issues are resolved satisfactorily by the MASL.

Accordingly, please submit us your proposal for resolving the above issues in consultation with the project proponent and required experts, in order for us to grant our concurrence.

The 3rd Respondent conveyed the same to the Petitioner by P6(c).

The 3rd Respondent then sent fresh Terms of Reference by P6(e) followed by P6(g) to the Petitioner, requesting a supplementary Environmental Impact Assessment Report to be considered for granting approval for the project.

The Petitioner submitted an Addendum to the Environmental Impact Assessment Report marked P6(h), which was accepted by the Technical Evaluation Committee of the 3rd Respondent, subject to the conditions in P6(i)(1).

Thereafter, the Petitioner tendered a fuller Addendum to the Environmental Impact Assessment Report marked X1 to the 3rd Respondent, who approved the said Report and sent it to the 5th Respondent by P6(n) for the latter's concurrence.

The 3rd Respondent thereafter informed the Petitioner by P9(a) that the 5th Respondent had declined to concur with the decision of the 3rd Respondent to grant approval for the implementation of the project.

The letter sent by the 5th Respondent to the 3rd Respondent refusing approval marked 5R6 reads as follows:

*THE PROPOSED GATAMBE MINI HYDRO POWER PROJECT
ON MAHAWELI GANGA (10MW)*

*ADDENDUM TO THE ENVIRONMENTAL IMPACT
ASSESSMENT REPORT*

*This has reference to your letter No. RBM/CMT/17/1 & 2(A)
dated 29.03.2014 regarding the above project.*

The CEA, having carefully studied the Addendum to the EIA report dated May 2013 submitted to you by the Asia Hydro Power Generation (Pvt) Ltd., written public comments on the report and report of the Technical Evaluation Committee of the Mahaweli Authority of Sri Lanka, has noted that implementation of the proposed project will have serious environmental consequences especially with regard to the following:

- 1. The stretch of the river and its surroundings that will be mainly affected by the project can be classified as a highly sensitive habitat where several rare, threatened, endemic species are found. Some species present in the project area have been protected under the Fauna and Flora Protection Ordinance. Eg. Labio fisherim Lagenendra piatimisse, Podostomacea spp.*

The affected river stretch is one of the few locations where these protected species are recorded at present.

- 2. The river stretch will be severely disturbed / damaged due to extensive rock excavation during construction of the project and low flows during operation of the project. These two causes will have a significant and irreversible impact on the population of endangered, threatened and protected species that inhabit the river.*
- 3. Granting approval for a project of this nature at the identified site would amount to an act of encouragement to destroy legally protected, threatened and endangered species that live in this area.*

In view of the aforesaid reasons, under and by virtue of the powers vested in this Authority under the provisions of the National Environmental Act, this Authority hereby declines to concur with your decision to grant approval for the implementation of the above project.

The Petitioner preferred an appeal marked P9(b)/P10(a) against the said refusal to the Secretary to the subject Ministry, in terms of section 23(DD)(1) of the National Environmental Act. After a hearing, the appeal was dismissed by P11. This means extension of the environmental clearance was denied, and the Petitioner could not proceed with the project.

After the appeal was dismissed, the 1st Respondent, the then President of the Republic who was also the subject Minister, acting in terms of sections 24C and 24D of the National Environmental Act read with Article 44 of the Constitution declared an area in extent of 59.4 hectares comprising the Mahaweli river and all the islands falling within it situated in Kandy, which included the project land, as the *Waratenna-Hakkinda* Environmental Protection Area by the Gazette marked P12. According to schedule II to the said Gazette, the permitted uses for this area do not include a mini hydropower generation project.

The Petitioner filed this application seeking the following reliefs:

(a) To grant and issue a mandate in the nature of a writ of certiorari to quash the order made by the 8th Respondent marked P11, by which the appeal marked P9b made by the Petitioner was rejected.

(b) To grant and issue a mandate in the nature of a writ of mandamus to compel the 5th Respondent to allow the appeal made in terms of section 23(DD) of the National Environmental Act and/or to grant the reliefs sought in the said appeal marked P9b made by the Petitioner and/or to direct the 5th Respondent to approve the Addendum to the Environmental Impact Assessment Report and the responses provided by the Petitioner to the comments made by the public, and/or to grant their concurrence.

(c) To grant and issue a mandate in the nature of a writ of certiorari quashing the Environmental Protection order marked P14 above, made by the 1st Respondent under Section 24 of the National Environmental Act and published in the Government Gazette Extraordinary bearing No.2024/6 dated 19th of June 2017.

According to the Petitioner, the dismissal of the appeal is wrong in law and in fact for the following reasons:

- (i) The 8th Respondent has failed to consider the fact that the Appeal was lodged against the decision taken by the 5th Respondent declining to concur with the findings of the Technical Evaluation Committee that the Addendum to the Environmental Impact Assessment and the responses submitted to the public comments were inadequate.*
- (ii) The 8th Respondent has failed to consider the fact that the parties had in consultation over a number of sittings agreed upon mitigatory measures to be developed and put in place*

which would ensure that the fauna and flora in the area would be unaffected by the construction carried out by the Petitioner.

- (iii) The 8th Respondent has failed to consider the fact that the 5th Respondent had after considerable research and discussion refused to concur with the Technical Evaluation Committee only due to the fact that (1) the stretch of the river and its surrounding area that will be mainly affected by the project can be classified as a highly sensitive habitat where several rare, threatened, endemic species are found and/or (2) the river stretch will be disturbed/ damaged due to extension rock evacuation during construction of the project and low flows during the operation of the project and (3) granting approval for a project of this nature at the identified sites would amount to an act of encouragement to destroy legally protected threatened and endangered species that line in this area and not due to socio-economic reasons.*
- (iv) The 8th Respondent has failed to consider the fact that the 5th Respondent had declined to concur with the Technical Evaluation Committee due to the fear that the Seemamalakaya would be affected by such construction.*
- (v) The 8th Respondent has failed to consider the fact that this project is of national importance and that the 3rd Respondent would be entitled to an annual revenue of Rs. 100 million by this project.*

(vi) The 8th Respondent has failed to take into consideration the national importance of the project and the overall well being of the state and the citizens in making the said order.

The main grouse of the Petitioner against the appeal decision seems to be the opportunity given to third parties by the Secretary to the Ministry, acting as the appellate body, to express their views at the hearing of the appeal, when the appeal was limited to three specific grounds as stated in P9(a)/5R6 quoted above.

I regret my inability to agree with this submission. This appeal under the Environmental Protection Act is unique. The appellate procedure is set out in Gazette No.850/4 dated 20.12.1994. The Regulations set out in the said Gazette are cited as the National Environmental (Appellate Procedure) Regulations of 1994. Regulation 5 thereof says: *“All appeals received shall be entered on a register to be maintained by the Secretary for such purpose. Such register or an extract thereof duly authenticated by the Secretary shall be a public document open for public inspection at the office of Ministry of the Minister in charge of the subject of Environment during any working day.”* Providing for the appeal registry to be a public document open to general inspection makes it clear that any member of the public may raise their concerns over the subject matter. Regulation 11 says: *“The Secretary may also notify the authority, government department, corporation, statutory body, local authority or public officer as the case may be, to submit its comments or observations on the appeal, and may require them to be present and make submissions at any hearing*

through an officer duly authorised in writing or through an Attorney-at-law or the Attorney-General.” Hence, the appeal need not be confined to what is stated by the Petitioner in the Petition of Appeal. This is understandably due to the sensitive nature of the subject being the environment, the protection of which falls on not only successive Governments but each and every individual in society.

The 5th Respondent tenders with its statement of objections an array of documents, 5R1-5R5, 5R11, 5R14, 5R16, 1R6-1R61 etc., received from various Government and non-Government institutions, such as the Pradeshiya Sabha Harispattuwa, *Seema Malakaya Arakshana Bhikshu Saha Gihhi Bala Mandalaya*, Lawyers for the Environment in Kandy, Sri Lanka Young Zoologists’ Association, *Haritha Diyatha* Environmental Association, Director General of Wildlife Conservation, and the Ministry of Environment and Renewable Energy, advocating for the protection of the *Warathenna-Hakkinda* area in which the project of the Petitioner was situated.

As seen from *inter alia* 5R12 and 5R13, before declining concurrence for the implementation of this project, the 5th Respondent summoned a committee comprising experts in the relevant fields, i.e. representatives of the Environmental Council, the Department of Wildlife Conservation, the National Aquatic Resources Research and Development Agency, the Biodiversity Secretariat of the Ministry of Mahaweli Development and Environment, the Department of

Zoology of the University of Peradeniya and the 5th Respondent itself, to understand the issue and consider it from the proper perspective. All the experts recommended protection of the said area and that the project not be allowed to progress. The recommendations made in this regard are found in *inter alia* 5R16-5R19.

Development of a mini hydropower project on the Mahaweli river and its impact on the environment is a specialised subject that this Court is ill-equipped to handle in a writ application.

In *Public Interest Law Foundation v. Central Environmental Authority* [2001] 3 Sri LR 330, the Petitioner sought to quash by certiorari the decision of the Central Environmental Authority to approve the construction of the Southern Expressway *inter alia* on the basis that there was a failure to analyse the relevant data and a lack of consideration of reasonable and environmentally friendly alternatives that would have minimised the damage to the environment, and the Environmental Impact Assessment Report did not provide proper, intelligible and adequate reasons for the rejection of alternatives to the project. Refusing the application of the Petitioner, this Court stated, *inter alia*, at 333:

The Court is ill equipped, in any event, to form an opinion on environmental matters – they being best left to people who have specialised knowledge and skills in such spheres. Even if a matter may seem to be preeminently one of public law, the Courts may decline to exercise review because it is felt that the matter is not justiciable, i.e. not suitable to judicial determination. The reason for non-

justiciability is that Judges are not expert enough deal with the matter.

The appeal decision confirming the 5th Respondent's refusal to give concurrence for the implementation of the project cannot, in the facts and circumstances of this case, be considered erroneous. Therefore, the said decision cannot be quashed by a writ of certiorari.

By the same token, the 5th Respondent cannot be compelled to approve the Addendum to the Environmental Impact Assessment Report by way of a writ of mandamus.

A declaration of land, inclusive of the area that is the subject matter of this application, as an environmental protection area by the President upon the advice and recommendations of experts cannot be considered unreasonable, arbitrary and in violation of the Petitioner's legitimate expectations.

The Petitioner's appeal was dismissed after a hearing. After the said appeal decision, the Petitioner cannot say it should have been heard again prior to the relevant area being declared an environmental protection area.

It may be noted that the Petitioner was to be given only 8.9 hectares for this project; the gazetted land extends up to 59.4 hectares. Hence the Petitioner cannot say the area was declared an environmental protection area in order to deny him the project.

By the time the Gazette was issued, the Petitioner's project was not a live issue, with even the appeal having been heard and

decided against the Petitioner. Section 23(DD)(2) of the National Environmental Act says the appeal decision is final (although I agree that the said decision is subject to judicial review). Hence there was no necessity to grant him another opportunity of being heard prior to the area being declared an environmental protection area.

In the unique facts and circumstances of this case, the Petitioner's claim based on legitimate expectation cannot succeed. During the period approval had been granted for implementation of the project, the Petitioner did nothing. After that period lapsed, when the Petitioner sought approval on the second occasion, the circumstances had changed with the passage of time. Legitimate expectation is not an absolute principle to be applied irrespective of a change in circumstances.

I dismiss the application of the Petitioner without costs.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal