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

Public Interest Law Foundation,
2nd Floor, Vidya Mandiraya,
No. 120/10, Wijerama Mawatha,
Colombo 7.
Petitioner

CASE NO: CA/WRIT/527/2015

Vs.

1. Central Environmental Authority,
   No.104, Denzil Kobbekaduwa
   Mawatha,
   Battaramulla.
2. The Chairman,
   No.104, Denzil Kobbekaduwa
   Mawatha,
   Battaramulla.
3. The Director General,
   No.104, Denzil Kobbekaduwa
   Mawatha,
   Battaramulla.
4. The Conservator General,
   Forest Department,
   No.82, Rajamalwatta Road,
   Battaramulla.

5. The Divisional Secretary,
   Divisional Secretariat,
   Kalawana.
6. The Land Commissioner General,
   Land Commissioner General's
   Department,
   Mihikatha Medura,
   No.1200/6,
   Rajamalwatte Road,
   Battaramulla.
7. Waste Management Water Power
   (Pvt.) Ltd.,
   No. 115,
   Pirivena Road,
   Boralesgamuwa.
8. Director General,
   Sri Lanka Sustainable Energy
   Authority,
   Block 5, 1st Floor,
   BMICH, Bauddhaloka Mawatha,
   Colombo 7.
9. Sri Lanka Sustainable Energy
   Authority,
   Block 5, 1st Floor,
   BMICH, Bauddhaloka Mawatha,
   Colombo 7.

   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Anandalal Nanayakkara for the Petitioner.

Dr. Charuka Ekanayaka, S.C., for the 1st-6th and 8th-9th Respondents.

Manohara de Silva, P.C., with Dhammika Jayanetti for the 7th Respondent.

Argued on: 11.02.2020

Decided on: 24.02.2020

Mahinda Samayawardhena, J.

The Petitioner filed this application as public interest litigation seeking to quash by certiorari the approval given by the 1st Respondent Central Environmental Authority (P10B) to a mini hydro power project proposed by the 7th Respondent in the Koskulana river at Kalawana. In addition, the Petitioner seeks mandamus (a) directing the 1st-6th Respondents to take appropriate measures for restoration and/or reparation of the location and its surrounding environment; and (b) directing the 5th and 6th Respondents not to renew the annual Permit of occupation issued to the 7th Respondent.

In the first place, I must make the following general observations.

This Court in the exercise of writ jurisdiction cannot decide on administrative decisions where the facts involved are in dispute. Simply stated, when major facts are in dispute writ will not lie.

It was held in *Thajudeen v. Sri Lanka Tea Board [1981] 2 Sri LR 471*:

> *Where the major facts are in dispute and the legal result of the facts is subject to controversy and it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct, a writ will not issue.*

This was referred to with approval in the Supreme Court case of *Dr. Puvanendran v. Premasiri [2009] 2 Sri LR 107.*

It is not the task of this Court in exercising writ jurisdiction to consider whether the decision is right or wrong but whether the decision is legal or illegal. *Vide Kalamazoo Industries Ltd v. Minister of Labour & Vocational Training [1998] 1 Sri LR 235 at 248-249, Public Interest Law Foundation v. Central Environmental Authority [2001] 3 Sri LR 330 at 334.*

The writ Court is ill equipped to handle delicate specialised subjects. Granting approval to a power project by the Central Environmental Authority is one such specialised area.

In *Public Interest Law Foundation v. Central Environmental Authority [2001] 3 Sri LR 330,* the Petitioner (who is the same Petitioner in the instant application) sought to quash by certiorari the decision of the Central Environmental Authority approving the construction of the Southern Expressway on the basis of failure to analyse or consider reasonable and environmentally friendly alternatives, and that the

Environmental Impact Assessment Report did not provide proper intelligible and adequate reasons for the rejection of alternatives to the project. By refusing the application, this Court at 333 stated:

> *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.*

With this in the background, let me consider the Petitioner's application. The Petitioner's case is predicated on the basis that this mini hydro power project is in the Sinharaja forest reserve. The Petitioner has dedicated 4 ½ pages of the petition to emphasise the importance of Sinharaja as a UNESCO World Heritage site. All the Respondents including the Conservator General of Forests and Director General of Sustainable Energy Authority say otherwise—that the project is not in the Sinharaja forest. There is no proper Plan tendered by the Petitioner to say that the project is within the Sinharaja forest reserve except a Map marked P5 allegedly depicting the Sinharaja World Heritage site, on which learned counsel for the Petitioner, at the argument, pointed with his pen to show, according to his guess, where the project is located. To say the least, such an irresponsible approach on the part of the Petitioner to challenge the project approval marked P10B is outrageous against the

number of Plans and Maps tendered by the Respondents, especially the 7th Respondent who is the project proponent. *Vide* the Plans marked 7R16B, 7R16D, 7R17A, 7R17B, 7R17C, 7R19, 7R20 tendered with the statement of objections of the 7th Respondent in addition to the Plans tendered with the limited statement of objections. If I may highlight one, the Plan marked 7R16B is a Plan prepared by the Surveyor General, which proves that the project is not in the Sinharaja forest reserve. The Plan marked 7R20 also strongly supports the Respondents' position. The Conservator General of Forests and the Director General of the Sustainable Energy Authority are very firm in their positions. The Conservator General of Forests by tendering 4R1 says that P5, which is relied upon by the Petitioner and available on the UNESCO World Heritage website, depicts both the forest reserve and the proposed forest reserve of Sinharaja, and the proposed forest reserve cannot be named as the Sinharaja forest reserve. The Petitioner has not tendered any Plan countering this position. This Court cannot decide whether the Petitioner or the Respondents are correct on this issue. That is outside the purview of this Court. When this main ground upon which the Petitioner's whole case is based is in dispute, can this case be maintained? I think not. Nevertheless, I will consider the rest.

The main relief sought by the Petitioner concerns the Initial Environmental Examination (IEE) Report marked P10A submitted by the project proponent to the Central Environmental Authority for the purpose of approval of the project. Approval has been given by the Central Environmental Authority by P10B.

The Petitioner has several concerns on P10A.

One concern is that the Central Environmental Authority should have asked not for the IEE Report but for an Environmental Impact Assessment (EIA) Report, which is more comprehensive. There is no issue that it is the Project Approving Agency, the Central Environmental Authority, which has the authority and expertise to decide, in the given facts and circumstances of each individual case, whether to call for an IEE Report or EIA Report. This Court has no specialised knowledge to consider the correctness or otherwise of that decision. The necessity of calling for an EIA Report in this instance is set out by the Petitioner in paragraph 28(e) of the petition in this manner:

> *Therefore an examination of irreversible and irretrievable commitment of resources such as the irreversible adverse impacts on Sinharaja representing as it were on of the fragile and least resilient eco system in the world is best carried out through an EIA process and not IEE.*

Explaining further, the Petitioner in paragraph 28(g) states:

> *Taking all these concerns into consideration, projects that have significant impacts such as the present project impacting on the Sinharaja World Heritage Site as well as the Koskulana River, ought to go through an EIA report where all significant impacts can be scrutinized properly and completely and where the public including external experts get an opportunity to provide their feedback in relation to the said report should they wish to do so.*

Thus it is clear, according to the Petitioner, that an EIA Report is essential because the project is in the Sinharaja forest. However, as I have explained before, it has not been established that the project is in the Sinharaja forest or Sinharaja World Heritage site. Then there is no validity to the claim that an EIA Report is essential for this mini hydro power project.

The Petitioner has mentioned Koskulana River in the said paragraph to give weight to its cause. That is to say, a power plant based on Koskulana River needs special attention. There is no dispute this power project is centered on Koskulana River.

However, according to Gazette No. 1858/2 dated 17.04.2014 marked 8R2, Koskulana River has been declared an Energy Development Area under section 12 of the Sri Lanka Sustainable Energy Authority Act, No.35 of 2007. *Vide* also 7R15A and 7R15B tendered with the statement of objections of the 7th Respondent. The 9th Respondent Sustainable Energy Authority has approved the project and stated that the project is situated within the energy development area gazetted in terms of the Sustainable Energy Authority Act. *Vide* 7R15C and 7R15D.

As the long title of the Act states, the Sri Lanka Sustainable Energy Authority Act was enacted *inter alia* to develop renewable energy resources, to declare energy development areas, to implement energy efficiency measures and conservation programmes, to promote energy security, reliability and cost effectiveness in energy delivery and information management.

The Petitioner does not challenge the decision in 8R2. Then can the Petitioner maintain this action practically? I think not.

I reject the argument of the Petitioner that an EIA Report instead of an IEE Report should have been called for by the Central Environmental Authority in this instance.

Another concern of the Petitioner in relation to the IEE Report is that it was not submitted within one and a half years from the date of issue of the Terms of Reference (TOR).

The Petitioner has clung onto a printed part of the TOR annexed to the IEE Report as "Annex I" which says "*This TOR is valid only for one and half years from the date of issue. The IEE report should be submitted within the validity period.*" The date of issue of the TOR is not mentioned in Annex I but the Petitioner in reference to some other documents says that it was not submitted within time.

The Regulations made by the subject Minister under section 23CC read with section 32 of the National Environmental Act, No. 47 of 1980, as amended, have been published in Gazette No.772/22 dated 24.06.1993 marked 3R4. These Regulations do not impose a time limit to submit the IEE Report.

The Petitioner has tendered an extract from the Central Environmental Authority website marked P12 regarding another issue, which I will advert to later.

Although the Petitioner did not refer to P12 on this issue, there is a reference in P12 to the time limit within which the IEE/EIA Report shall be tendered after the issuance of the TOR.

P12 says "*Time allowed for the PAA (Project Approving Agencies)*" for "*Scoping (Determining the scope of the EIA/IEE study and*

issuing of Terms of Reference)" is "*14 days for IEE and 30 days for EIA*." Then regarding time allowed for "*Preparation of the EIA/IEE report*", it says "*No time limit has been given since the project proponent is responsible for this*."

This means, there is no time limit to submit the IEE Report after issuing the TOR.

The Petitioner cannot highlight one document and suppress another on the same matter, especially when both documents were tendered by it. The Petitioner shall act with *uberrima fides* when seeking discretionary relief such as writ. Suppression or misrepresentation of material facts warrants denial of a discretionary remedy.

According to the Petitioner (as seen from paragraph 29(c) of the petition), submission of the Report within the stipulated time is important because "*with fragile eco system such as Sinharaja the conditions and concerns keep changing and the validity period for submission of an environmental assessment is not indefinite*."

There again, the Petitioner's argument is based on the assumption that the project is in Sinharaja, which was disproved by the Respondents with overwhelming documentary evidence.

The Petitioner states that the IEE Report had been submitted almost four years after the TOR. This goes to show that the IEE Report was not prepared overnight but is a considered Report. If it were produced within a short period of time, I am certain that the Petitioner would have argued otherwise.

In any event, the time limit stated in Annex I to P10A cannot be treated as mandatory, and failure to adhere to the time limit shall not vitiate the Report.

It seems to me that the Petitioner is engaging in a fishing expedition.

The main objection of the Petitioner to the IEE Report is found in paragraph 29(d) of the petition. It reads as follows:

> *Further the said approval letter P10B indicates that the said report had been submitted for evaluation on 5th February 2013, and it had been approved the very next day, i.e. 6th February 2013. The Petitioner states that the CEA website itself indicates that 21 days are required for the Technical Review of an IEE Report and 30 days for an EIA Report. A copy of the relevant pages from the website of the 1st Respondent is annexed hereto marked P12 and is pleaded as part and partial of this Petition. In the event of sensitive projects with complicated impacts the time for consideration could be considerably more. However the said present project had been submitted to the CEA on 5th February 2013 and approved the very next day. In the circumstances the Petitioner states that clearly a full evaluation of the impacts could not have taken place.*

In short, what the Petitioner states is that the Central Environmental Authority approved the IEE Report the very next day after its submission, which is procedurally and substantively wrong. The Petitioner states that a full evaluation of the impact could not have taken place in one day, and

suggests that the Central Environmental Authority should have taken 21 days for approval. This is the main argument of the Petitioner against the Central Environmental Authority approval marked P10B, which is sought to be quashed in these proceedings. That is the main relief sought.

In my view, the argument of the Petitioner in the petition that "*21 days are required for the Technical Review of an IEE Report*" is a misleading statement. It presupposes that the Authority must take 21 days to assess the IEE Report. This is not so.

The Petitioner has referred to P12 to convince his assertion. P12—an extract from the Central Environmental Authority website—says "*The time allowed for the PAA (Project Approving Agencies)*" for "*Technical review*" is "*21 days for IEE and 30 days for EIA*." This does not say nor can it be taken to mean that technical review of the IEE Report shall mandatorily take 21 days. P12 gives the maximum time limit to complete the task. It can be in one day or any day within 21 days.

Here again, in my view, the time stipulated is not mandatory but given for the benefit of the project proponent in order for him to plan out his project. If the technical review were to take more than 21 days, that would not invalidate the whole process which culminates in granting or refusing approval by the Central Environmental Authority.

What is stated in the website is a simplified version of the Regulations made by the Minister under the National Environmental Act marked 3R4. Learned counsel for the Petitioner drew the attention of the Court to Regulation No.9.

This Regulation in its original form clearly fortifies my view. It says "the Project Approving Agency shall within a period of [21 days]" either grant or refuse to grant approval. The operative word is "within".

The 1st-3rd Respondents in paragraph 11 of their statement of objections and the 7th Respondent in paragraph 6 of its statement of objections have given their account of events. The Director General of the Central Environmental Authority in his corresponding affidavit states: P10A is the final version of the IEE and not the first; upon being informed to tender a draft IEE Report by letter dated 17.03.2009 marked 3R1, the 7th Respondent had submitted the first draft on 28.09.2008 (3E2); after evaluation, the 7th Respondent tendered the second draft IEE Report on 14.11.2012 (3R3); thereafter the final IEE Report (P10A) was tendered on 05.02.2013. There is no reason to disbelieve what the Director General of the Central Environmental Authority says in this regard.

Learned counsel for the Petitioner during the course of the argument stated that no "independent assessment" can take place within one day. Let me pose this question: Can an IEE Report be independently assessed within 21 days? Given the intricacies involved in that process, it cannot. It is not like writing a report at the office. It is a practical environmental assessment as opposed to a theoretical one. To my mind, the 21-day ceiling is predominantly, but not necessarily, for formal final approval because by that time several interim reports tendered by the project proponent would have been considered by the Authority. The fact that it is a formality is clear by page

49 of P10A, where it is seen that the Report was submitted to the Authority not by the experts who prepared it but by the project proponent who has no expertise to prepare the Report.

At the argument, it was submitted on behalf of the Petitioner that the letter of the Ceylon Electricity Board dated 21.11.2012 attached to the IEE Report P10A belies the 7th Respondent's assertion in paragraph 6 of the statement of objections that the final IEE Report was tendered on 14.11.2012, and the Managing Director of the 7th Respondent signed P10A on 05.02.2013 as a formality, as required by the Central Environmental Authority.

Whatever the 7th Respondent has stated in paragraph 6, the fact remains that the final IEE Report was signed on 05.02.2013. The said letter of the Ceylon Electricity Board is dated prior to that date. I see nothing suspicious or mischievous there.

The Petitioner is clutching at straws.

For the aforesaid reasons it is abundantly clear that this Court cannot quash by certiorari the approval given by the Central Environmental Authority marked P10B.

In addition, the Petitioner has sought to direct the 5th and 6th Respondents by mandamus not to renew the annual Permit issued in the name of the 7th Respondent marked 5R3 and 7R16A.

These annual Permits refer to a Surveyor General's Plan No. R/KLW/2013/574. This Plan has been marked 7R16B. By this Plan it is clear that the land in respect of which the annual Permit has been issued is not a forest reserve but a land

inhabited by villages. I see no compelling reason to issue mandamus preventing issuance of annual Permits subject to conditions, for otherwise the 7th Respondent will not be able to proceed with the project.

The Petitioner also seeks to direct the 1st-6th Respondents by mandamus to take appropriate measures for restoration and/or reparation of the location and its surrounding environment. This need does not arise in view of the aforesaid findings.

The Petitioner finally seeks an order compelling the 1st-3rd Respondents to develop process guidelines for the identification of projects that require approval in terms of the IEE and EIA procedure. This Court has no mandate to do that.

Public interest litigation is a hallowed concept. Nevertheless, public interest litigation shall not be converted to public vexatious litigation. Frivolous and vexatious applications cost the judiciary and Government agencies dearly. Such applications *inter alia* impede the efficacy of the Courts by detracting from the limited time and resources available to devote to cases which legitimately deserve attention. Public interest litigation shall be a boon not a bane.

The Petitioner cannot succeed in this application. In my view, the Petitioner's application is vexatious.

I dismiss the application of the Petitioner with costs.

Judge of the Court of Appeal