

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

In the matter of an application for mandates in the nature of Writs of Certiorari and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

**CA (Writ) Application No: 53/17**

1. Bhathiya A Udugampola,  
No 56/1, Deltara, Piliyandala.
2. Bhathiya Trading Company (Pvt.) Limited,  
No 7, Katukurundawatte Road,  
Ratmalana.

**PETITIONERS**

- Vs -

1. Central Environmental Authority.
2. Prof. Lal Mervin Dharmasiri,  
Chairman, Central Environmental Authority.
3. K.H Muthukudaarachchi,  
Director General,  
Central Environmental Authority.  
  
1<sup>st</sup> – 3<sup>rd</sup> Respondents at “Parisara Piyasa”,  
104, Denzil Kobbekaduwa Mawatha,  
Battramulla.
4. Kesbewa Urban Council.
5. K. Tharagna Gamlath  
Secretary, Kesbewa Urban Council,  
  
4<sup>th</sup> and 5<sup>th</sup> Respondents at  
Samarakoon Mawatha, Piliyandala.

6. P.M.P Udayakanatha  
Surveyor General.
7. K. R Sarath,  
Senior Superintendent of Surveys  
(Colombo) Division  
Surveyor General's Department.
8. Land Surveys Council,  
Surveyor General's Department.  
  
6<sup>th</sup> – 8<sup>th</sup> Respondents at  
150, Kirula Road, Colombo 5.
9. L. A Kalulapuarachchi,  
Divisional Secretary  
Kesbewa.
10. Srinath Samarakoon,  
Officer in charge of Piliyandala Police  
Station, Piliyandala.
11. N. D Erandi Gimhani,  
Grama Niladhari,  
564, Delthara West, Piliyandala.
12. Eng. S.S.L Weerasinghe,  
Director General of Irrigation,  
230, Bauddaloka Mawatha, Colombo 7.
13. Anurudha Jayaratne,  
Deputy Minister of Mahaweli and  
Environment,  
82, Samathpaya, Rajamalwatte Road,  
Battaramulla.

## **RESPONDENTS**

**Before:** Arjuna Obeyesekere, J / President of the Court of Appeal  
Mayadunne Corea, J

**Counsel:** Uditha Ehalahewa, P.C., with Vishwa Vimukthi for the Petitioners  
Ms. Chaya Sri Nammuni, Senior State Counsel for the Respondents

**Argued on:** 17<sup>th</sup> February 2021 and 3<sup>rd</sup> March 2021

**Written Submissions:** Tendered on behalf of the Petitioners on 20<sup>th</sup> April 2021  
Tendered on behalf of the Respondents on 12<sup>th</sup> May 2021

**Decided on:** 3<sup>rd</sup> June 2021

**Arjuna Obeyesekere, J., P/CA**

This application was taken up for argument together with CA (Writ) Application No. 125/2017. The learned President's Counsel for the Petitioners and the learned Senior State Counsel for the Respondents agreed that the issues that arise in both applications are identical and that it would suffice for this Court to deliver its judgment in this application, and that the parties in CA (Writ) Application No. 125/2013 would be bound by this judgment.

The 1<sup>st</sup> Petitioner states that in April 2014, he purchased a property bearing assessment Nos. 47/08 and 49, St. Michel, 2<sup>nd</sup> Lane, Delthara, Piliyandala, in extent of 115.5P. The Petitioners state that the said land is depicted as Lot Nos. 1, 8, 9, 10 and 11 in Plan No. 1084 dated 28<sup>th</sup> February 1971, marked '**P3**'. It is noted that the aggregate extent of these lots is 115.5P. The southern boundary of Lot No.1 is the Bolgoda Lake. The Petitioners state that title to the said land can be traced upto a deed executed in 1896.

The 2<sup>nd</sup> Petitioner is a private limited liability company, the majority shares of which are owned by the 1<sup>st</sup> Petitioner. The Petitioners state that in February 2006, the 2<sup>nd</sup> Petitioner purchased a property in extent of 40P bearing assessment No. 56/1, Delthara, Piliyandala. Here too, the Petitioners state that the title to the said land can be traced unto 1884. The western boundary of this land is the Panadura River.

Acting in terms of the powers vested in him by Section 24C and Section 24D of the National Environmental Act No. 47 of 1980, as amended, the Minister of Environment and Natural Resources had made an Order, published in Extraordinary Gazette No. 1634/23 dated 30<sup>th</sup> December 2009 marked 'P11', in terms of which *inter alia*:

- a) The area of land, the limits of which are described in Schedule I shall be an environmental protection area for the purposes of the aforesaid Act and shall be called the "Bolgoda Environmental Protection Area";
- b) A reservation area of at least forty (40) feet in width, from the **existing** high flood level of the water body in the Environmental Protection Area should be maintained along the banks of the lake/river.
- c) No permanent or temporary construction activities shall be allowed within the reservation area.

There is no dispute that the aforementioned lands owned by the Petitioners fall within the "Bolgoda Environmental Protection Area". Accordingly, the Petitioners state that they have maintained the 40 foot reservation from the existing boundary of the Lake.

The issue that culminated with this application commenced in 2010, when a group of environmentalists acting in the public interest filed CA (Writ) Application No. 177/2010 in this Court complaining that the Bolgoda Lake, the vegetation areas and mangroves surrounding the Lake are being filled and reclaimed in an unauthorised manner. The petitioners in that application had pointed out that the Bolgoda Lake system plays a critical role *inter alia* in the irrigation of water and control of flooding in the area and that due to the said unauthorised activity, the stability of the eco system of the Bolgoda Lake and the areas surrounding the lake was severely affected.

In order to support its position that there is unauthorised filling, the petitioners in CA (Writ) Application No. 177/2010 had filed two tracings bearing Nos. C/KSM/SUB/2001/233 and C/KSM/SUB/2001/234 prepared by the Survey Department, which the petitioners claimed identified at least eleven persons who had encroached onto the Bolgoda Lake. The petitioners had named as respondents to their petition, four such persons who had engaged in such unauthorised development. It was in that background that the petitioners had sought *inter alia* the following relief in CA (Writ) Application No. 177/2010:

- a) A Writ of Mandamus directing the Urban Council, Kesbewa to forthwith take action against all unauthorised constructions in the protected area of the Bolgoda Lake – paragraph (b) of the prayer;
- b) A Writ of Mandamus directing the Central Environmental Authority to forthwith act against all unauthorised land filling in the Bolgoda Lake System – paragraph (c) of the prayer;
- c) A Writ of Mandamus directing the Central Environmental Authority to act in terms of Section 24B of the NEA Act – paragraph (d) of the prayer;
- d) A Writ of Mandamus directing the Divisional Secretary to recover the State Land which had been encroached upon as a result of the said unauthorised land filling – paragraph (e) of the prayer;
- e) A Writ of Mandamus directing the Urban Development Authority to institute legal action to evict all persons who are illegally within the Bolgoda Lake reservation area – paragraph (e) of the prayer.

By its judgment delivered on 30<sup>th</sup> May 2014 marked '**P14**', this Court issued Writs of Mandamus on the Sri Lanka Land Reclamation and Development Corporation, the Central Environmental Authority and the Divisional Secretary, Kesbewa in terms of paragraphs (c), (d) and (e) of the prayer to the petition. Thus, although action had been filed against four specific persons who were said to have encroached upon the Bolgoda Lake and engaged in unauthorised development of the Lake, in terms of '**P14**', the respondents were required to take steps to prevent all unauthorised land filling in the Bolgoda Lake Area, institute legal action to evict all persons who are

illegally within the Bolgoda Lake reservation area and recover the State Land which had been encroached upon as a result of the said unauthorised land filling.

The learned Senior State Counsel submitted that in order to implement the judgment of this Court marked 'P14', it was necessary for the Respondents to identify the boundary of the Bolgoda Lake.

It was submitted further by the learned Senior State Counsel that although it was initially decided to use the two tracings prepared in 2001 for the above purpose (i.e. CO/KSB/SUB/2001/233 and CO/KSB/2001/234), it was discovered that those boundary markers could not be physically identified on the land, and that a fresh tracing had to be prepared. It was admitted by the Respondents that the Plans prepared in 2001 are based on a Field Sheet, a fact which was not known to this Court at the time it delivered the judgment 'P14'.

Thus, in order to identify the boundaries of the Bolgoda Lake and implement 'P14', as well as to enable the filing of action under the State Lands (Recovery of Possession) Act to evict those who had encroached or in other words, in order to comply with 'P14', the 9<sup>th</sup> Respondent, by his letter dated 1<sup>st</sup> February 2016 marked '6R5' had sought the services of the Survey Department. In that letter, the 9<sup>th</sup> Respondent had specifically requested the Survey Department to demarcate the boundary of the Lake so that the 40 foot reservation declared by 'P11' can be enforced.

For the purpose of demarcating the boundary of the Lake on the *ground*, the Survey Department had used the aforementioned Field Sheet prepared over a hundred years ago which depicted the boundary of the Lake as it then existed. While I would advert later on in this judgment to the drawbacks of using the Field Sheet, it was submitted by the learned Senior State Counsel that the Field Sheet was used as it was the earliest documented material available with the Survey Department relating to the boundaries of the Lake.

Using the Field Sheet, the Survey Department had produced Tracing No. CO/KSB/2016/109 dated 23<sup>rd</sup> November 2016, marked '6R11'. I have examined '6R11' and observe the following:

- a) Demarcated in orange on the far left of '6R11', is the **existing boundary line of the lake**;
- b) Using the "old" Field Sheet Nos. L 16/15-16-23-24, the Survey Department has demarcated the "old" lake boundary in black. The black line is situated on the right of the above orange coloured line. In other words, the boundary of the Lake as is said to have existed over a hundred years ago has shifted away from the Lake towards the land. If this black line is applied as being the correct boundary of the Bolgoda Lake, then, areas which are currently land would become part of the Lake;
- c) Situated on to the extreme right of the above black line is another line which is the 40 foot restricted area gazette by the CEA. This 40 feet has been measured from the 'old' lake boundary marked in black and referred to in (b) above;
- d) The result is that the land in between the orange line and the first black line was identified as "State land" and the occupants thereof have been categorized as "encroachers".

Having prepared the relevant plans including '6R11', the Survey Department had requested the 9<sup>th</sup> Respondent to inform the members of the Public that steps would be taken to place on land markers to demarcate the boundary lines shown in '6R11' in black colour. In effect, what was sought to be done was to carry out a physical demarcation of boundary lines based on the field sheet of the late 19<sup>th</sup> Century, and thereafter demarcate the 40 foot reservation based on this line.

The Petitioners state that in early 2017, the 9<sup>th</sup> Respondent, the Divisional Secretary of Kesbewa had distributed leaflets informing the residents that officers of the Survey Department would be visiting their lands to erect markers of the Bolgoda Lake boundary on their lands. It is at this stage that the residents of the area protested to the said course of action.

Aggrieved by the decision of the 9<sup>th</sup> Respondent to demarcate the boundary based on an old tracing, the Petitioners filed this application, seeking *inter alia* a Writ of

Prohibition prohibiting the Respondents from relying on the tracings prepared in the late 19<sup>th</sup> century for the purpose of determining the boundaries of the lake.

At the time this matter was supported, the learned Senior State Counsel for the Respondents had given an undertaking that the steps already taken relating to the demarcation of the boundary of the Bolgoda Lake would not take place until the conclusion of this application. Although not intended, the entire process of demarcating the boundary came to a standstill, as the issue raised in this application applied across the board. The filing of this application prompted the 1<sup>st</sup> Petitioner in CA (Writ) Application No. 177/2010, in whose favour this Court had delivered judgment to complain to this Court that the 1<sup>st</sup> and 9<sup>th</sup> Respondents in this application, who were also respondents in the said application, have not complied with the said judgment and are guilty of contempt – vide CA Contempt of Court Application No. COC/05/2018. As this application arises from the steps that the Respondents took *inter alia* to implement the said judgment, the said Contempt of Court Application was mentioned with this application and CA (Writ) Application No. 125/2013.

The issue that arises for the consideration of this Court is whether the decision of the Respondents to have applied the Field Sheet prepared in the late 19<sup>th</sup> century in deciding the boundaries of the Bolgoda Lake is arbitrary or unreasonable.

Lord Diplock in **Council of Civil Service Unions v. Minister for the Civil Service**,<sup>1</sup> classified three grounds upon which administrative action is subject to judicial review, namely 'illegality', 'irrationality' and 'procedural impropriety'. Having identified the above three grounds, Lord Diplock went onto describe 'irrationality' as follows:

*"By 'irrationality' I mean what can now be succinctly referred to as 'Wednesbury unreasonableness.'<sup>2</sup> It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. "*

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<sup>1</sup> [1985] 1 AC 374.

<sup>2</sup> Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] (1) KB 223



However, Courts have attempted to reduce the rigour of “*Wednesbury unreasonableness*” over the years. The case of **Secretary of State for Education and Science v Tameside Metropolitan Borough Council**,<sup>3</sup> decided prior to the **GCHQ case** provides for what can be considered a more *balanced test*<sup>4</sup>;

*“In public law, “unreasonable” as descriptive of the way in which a public authority has purported to exercise a discretion vested in it by statute has become a term of legal art. To fall within this expression it must be conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.”*

Let me now consider whether the decision of the Respondents can be classified as *conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt*.

The learned President’s Counsel for the Petitioners submitted that the Petitioners have not encroached onto the Lake nor have they engaged in any unauthorised development of the land. In support of this position, he submitted that the extent of land that is being presently enjoyed by the 1<sup>st</sup> Petitioner is the same extent of land that is shown in the Plan prepared in 1971. The learned President’s Counsel for the Petitioners submitted further that the Petitioners have made representations on several occasions to the Officials of the Survey Department who had admitted that the equipment that may have been used at that time may not have been sophisticated as what is presently being used and that there can be natural changes to the boundary of the lake over a long period of time.

The rationale for adopting the Field Sheet prepared over a century has been explained by the learned Senior State Counsel in her written submissions. It was submitted that the general procedure adopted by the Survey Department in determining a boundary is to refer to old plans, either final or preliminary. However, it was submitted that in this instance, there was neither. Available to the Survey

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<sup>3</sup> [1977] AC 1014.

<sup>4</sup>See Colonel U.R. Abeyratne v. Lt. Gen. N.U.M.M.W. Senanayake and Others, CA (Writ) Application No. 239/2017; CA Minutes of 7th February 2020; KIA Motors (Lanka) Limited v. Consumer Affairs Authority, CA (Writ) Application No. 72/2013; CA Minutes of 26th May 2020; U.A.A.J Ukwatte and another v. Minister of Education and others, CA (Writ) Application No. 403/2019; CA Minutes of 12th June 2020.

Department however were the aforementioned Field Sheet. The Survey Department has accordingly used the Field Sheet in the preparation of '6R11'. The learned Senior State Counsel submitted that '*a field sheet is a rough plan that is drawn up and used by the surveyor when in the field, which has not formerly been converted into a Plan and verified against the field notes*'. She submitted further that *Field sheets contain no boundary stones* and have been prepared prior to the State Landmarks Ordinance. Furthermore, the field sheet has not been amended to denote subsequent surveys/plans that may have been carried out in relation to the boundary of the Lake.

It is therefore *clear* that it is not entirely safe to rely on the said field sheet in order to demarcate the present boundary of the Bolgoda Lake, nor is it reasonable to do so where the Petitioners are able to demonstrate that the extents of land enjoyed by their predecessors have not increased over the years. I am therefore of the view that a Writ of Prohibition should issue preventing the Respondents from applying the boundary of the Bolgoda Lake as it existed towards the end of the 19<sup>th</sup> century (i.e. the first black line in '6R11') in demarcating the boundary of the Bolgoda Lake adjoining the land owned by the Petitioners.

The learned Senior State Counsel submitted that the legal challenges to the adoption of the boundary based on the field sheet have resulted in the Respondents facing a greater issue. The first is the failure to continue with the steps taken to implement the judgment of this Court in CA (Writ) Application No. 177/2010. The second is, in the absence of a proper survey plan, the inability to prevent fresh encroachments and reclamation of the Bolgoda Lake. She therefore submitted *that immediate and swift action is needed to be taken by the authorities to safeguard the boundary*, as it would at least ensure that the boundary of the Bolgoda Lake can be enforced on the strength of the orange coloured line/ boundary in '6R11' prepared in 2016. In other words, as an immediate first step, the boundary of the Bolgoda Lake, as set out by the orange line in '6R11' should be frozen as it prevailed in 2016. This would enable legal action to be taken in respect of any encroachments from the preparation of '6R11' in 2016. This would however not prevent the Respondents from taking legal action where there is evidence that encroachment of the Lake has in fact taken place.

The learned Senior State Counsel submitted that the process of surveying, preparation of plans with the existing boundaries and demarcating the boundaries on the ground has come to a standstill in view of the uncertainty arising from the adoption and use of the Field Sheet being challenged in this application. She submitted further that just like the Petitioners have done, other landowners may also object to the Field Sheet being used, and that each time an objection is taken by way of litigation, it will not be possible to cause an inquiry into the exact extent of land that is owned or for a super imposition of the landowners survey plan to be done on the plans of the Survey Department. It was submitted further that the Survey Department cannot enter private land for the purpose of surveying and that each time a landowner refuses to grant access, the process of surveying will come to a standstill. The learned Senior State Counsel submitted that the Respondents are keen to continue the process of demarcating the boundary of the Bolgoda Lake and thereby continue to comply with the judgment of this Court in CA (Writ) Application No. 177/2010. I agree with this submission of the learned Senior State Counsel and take the view that any further delay will only frustrate the entire process and the continued implementation of the judgment of this Court in CA (Writ) Application 177/2010.

I am of the view that adopting the boundary of the Bolgoda Lake as it prevailed in 2016 should not prevent legal action from being taken against those who have encroached onto the Lake prior to 2016. This is a matter that can be addressed by the 9<sup>th</sup> Respondent on a case by case basis depending on the availability *inter alia* of evidence regarding reclamation and unauthorised filling of the Bolgoda Lake. In addition, the 9<sup>th</sup> Respondent may institute legal action against those who have encroached on to the Lake after the preparation of '6R11' in 2016, as well as complete the demarcation of the 40 foot protected area expeditiously and without further challenges.

In the above circumstances, I issue a Writ of Prohibition prohibiting the Respondents from relying on the said field sheet for the purpose of determining the boundaries of the lake adjoining the Petitioners land. For the reasons that I have already adduced, the 9<sup>th</sup> Respondent may proceed to demarcate all other lands coming under the Divisional Secretary area of Kesbewa and falling within the Bolgoda Environmental

Protection Area in accordance with the boundary of the Bolgoda Lake as it prevailed in 2016, as evidenced by the line demarcated in orange in '6R11'.

I make no order with regard to costs.

**President of the Court of Appeal**

**Mayadunne Corea, J**

I agree

**Judge of the Court of Appeal**