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, Mandamus and Prohibition under and in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/120/2022

Y.P.J. Warnakulasuriya
No. 1/3, Upeksha Mawatha,
Daaraluwa,
Bemmulla,
Gampaha.

Petitioner

Vs.

1. Chandana Suriyabandara
   Director General,
   Department of Wildlife Conservation,
   811A, Jayanthipura,
   Battaramulla.

2. C.P. Athuluwage
   Chairman,
   Road Development Authority,
   No. 216, Denzil Kobbekaduwa
   Mawatha, Koswaththa,
   Battaramulla.

3. Devani Jayathilake
   District Forest Officer,
   District Forest Office,
   Gampaha.

4. Attorney General,
   Attorney General's Department,
   Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : Nagananda Kodithuwakku for the Petitioner

Navodi de Zoysa, SC for the 1st, 2nd and 4th Respondents

Supported on : 25.03.2022

Decided on : 30.03.2022

Sobhitha Rajakaruna J.

The Petitioner in this application seeks for a writ of prohibition preventing the decision purportedly taken by the 1st & 2nd Respondents to remove the '*pandu karanda*' tree under the Binomial name *Crudia zeylanica* ('Tree') marked in the document 'X1' which is annexed to the Petition. A writ of mandamus is also being sought to prevent the 1st & 2nd Respondents removing the said Tree from the place it has been propagated. The Petitioner claims that the said Tree is an endangered plant species and the 1st & 2nd Respondents are taking steps to remove the said Tree paving way for the construction of the Central expressway between Kadawatha and Meerigama without changing the right of way of the relevant portion of the said expressway.

Although the 1st, 2nd & 4th Respondents are represented by the learned State Counsel, the 3rd Respondent District Forest Officer is absent and unrepresented. The learned Counsel for the Petitioner informs Court that the 3rd Respondent had intimated to him the fact that the notice of this case had been received by her. The said 3rd Respondent has not retained the Attorney General or any other Counsel to represent her in Court.

The contention of the learned Counsel for the Petitioner is that the 1st & 2nd Respondents have violated the responsibility vested in those Respondents under Article 4(d), 27(2) and 28(f) of the Constitution of the Republic. On perusal of the several paragraphs of the Petition and also based on the submissions made on behalf of the Petitioner, it implies that the legal basis for the Petitioner to invoke the discretionary jurisdiction of this Court in the instant application for judicial review, is the purported violation of the said Articles of the Constitution by the 1st & 2nd Respondents.

The said Article 4 of the Constitution stipulates that the sovereignty of the people shall be exercised and enjoyed in the manner mentioned in the said Article. The Article 4(d) reads;

> *"the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided"*

The other Constitutional provisions highlighted by the learned Counsel for the Petitioner are Articles 27(2) & 28(f) of Chapter VI of the Constitution and the said Article 27(2) deals with the Directive Principles of State Policy whereas, the Article 28(f) stipulates that, it is the duty of every person in Sri Lanka to protect nature and conserve its riches. Though the learned Counsel relies upon the provisions of those Articles, it is pertinent to note that the Article 29 of the Constitution declares that the provisions of the said Chapter VI do not confer or impose legal rights or obligations and are not enforceable in any court or tribunal. In ***Re Thirteenth Amendment to the Constitution and the Provincial Councils Bill [(1987) 2 Sri. L.R. 312 (at p. 326)*** the Supreme Court has observed that the Directive Principles require to be implemented by legislation.

Further, it is important to note that in terms of Article 126(1) of the Constitution, the Supreme Court shall have sole and exclusive jurisdiction to hear and determine any question relating to the infringement or imminent infringement by executive or administrative action of any fundamental right or language right declared and recognized by Chapter III or Chapter IV of the Constitution.

This Court exercises the writ jurisdiction in applications for judicial review under Article 140 of the Constitution by which the Court of Appeal shall have full power and authority to grant and issue orders in the nature of writs of Certiorari, Mandamus etc. However, in terms of the said provisions of Article 140, the Court of Appeal is empowered to grant and issue such writs only according to law. Therefore, a Petitioner in a judicial review application should emphasize the legal basis upon which he is entitled to the reliefs under Article 140 of the Constitution. In ***Nicholas vs. Macan Marker Limited (1985) 1 Sri. L.R. 130 (at p.139),*** the Court has held that the question before the Court in a judicial review application is whether the impugned decision or order is lawful and whether it is according to law. In ***Kalamazoo Industries Limited and others vs. Minister of Labour and Vocational Training and others (1998) 1 Sri. L.R. 235 (at p.249),*** Jayasuriya J. has observed the

principles laid down by Prof. H.W.R. Wade in ***"Administrative Law"*** (12th Edition at pages 34 & 35) wherein the author has stated as follows;

> *"Judicial review is radically different from the system of appeals. When hearing an appeal, the Court is concerned with the merits of the decision under appeal. But in judicial review, the Court is concerned with its legality. On appeal, the question is right or wrong. On review, the question is lawful or unlawful****.....judicial review is a fundamentally different operation****."* (Emphasis added)

In ***Public Interest Law Foundation vs. Central Environmental Authority and another (2001) 3 Sri. L.R. 330 (at p.334),*** Gunawardena J. has held;

> *"Under judicial review procedure, the Court of Appeal is not concerned with the merits of the case, that is, whether the decision was right or wrong but whether the decision is lawful or not. In the words of Lord Brightman: "Judicial Review is concerned, not with the decision but with the decision-making process." (Chief Constable of North Wales Police vs. Evans [1982] 1 WLR 1155 at 1173)* ***It is worth observing that the review procedure is not well suited to determination of disputed facts-factual issues arising in this case being imprecise and disputed****"* (Emphasis added)

Therefore, I am of the view that the objective of this Court upon the instant application for judicial review is to consider whether the purported decision of the 1st & 2nd Respondents is lawful or unlawful. On careful perusal of the Petition and the Affidavit of the Petitioner, it emanates that nowhere in such pleadings the Petitioner has averred that any decision of the 1st & 2nd Respondents is ultra vires or unlawful etc. In spite of averring any ground of review, the Petitioner in paragraph 9 of the Petition, categorically indicates that the 1st & 2nd Respondents have violated a constitutional responsibility. Other than such averments the Petitioner has not pleaded any ground of review in order to establish the decision-making process of the 1st & 2nd Respondents was unlawful.

As mentioned above, the Petitioner has come before this Court based on a purported violation of the aforesaid Articles of the Constitution. If the Petitioner alleges an infringement of any fundamental right, as mentioned in Article 4(d), then the sole and exclusive jurisdiction to hear and determine such question relating to the infringement of fundamental rights is solely, in terms of the aforesaid Article 126(1), vested in the Supreme Court. Moreover, it doesn't appear that there is prima facie and acceptable evidence before us of an infringement or imminent infringement of the provisions of Chapter III or Chapter

IV by the 1st & 2nd Respondents, for this Court to refer this matter under Article 126(3) of the Constitution for determination by the Supreme Court. It is apparent that no such application has been made by the Petitioner under the said Article 126(3).

Thus, I hold that the Petitioner's application for judicial review is misconceived in law based on my above findings.

Anyhow, I need to advert to the objections raised by the learned Counsel for the Petitioner, against the documents filed on behalf of the 1st & 2nd Respondents. Firstly, referring to the Rule No. 3(5) of the Court of Appeal Rules (published in the Extraordinary Gazette Notification No. 645/4 on 15.01.1991), he submits that those documents filed by the Respondents have not been supported by an affidavit. The said Rule 3(5) reads;

> "3(5) Every respondent who lodges a statement of objections, and every petitioner who lodges a counter affidavit shall forthwith serve a copy thereof, together with any supporting affidavit and exhibits on every other party (other than a party who waives the right to receive the same)."

The above Rule referred to by the said learned Counsel deals with statements of objection and the counter objections and accordingly, I cannot see the said Rule having any relevancy to the above objections raised. When this matter was taken up for support on 24.03.2022, the learned Counsel for the Petitioner moved to get the matter refixed for support on a specific ground based on another important Rule of the Supreme Court Rules and on the same day the Court permitted the 1st, 2nd & 4th Respondents to file necessary documents by way of a motion with notice to the Petitioner. Upon such permission being granted the 2nd Respondent has filed documents marked 'X1' to 'X10' along with a motion of which a copy has been duly served on the Petitioner. At the time of granting such permission for the Respondents, the Court was mindful of the Rule No. 3(8) of the above Court of Appeal Rules which reads:

> "3(8) A party may, with the prior permission of the Court, amend his pleadings, **or file** additional pleadings affidavits or **other documents**, within two weeks of the grant of such permission, unless the Court otherwise directs. After notice has been issued, such permission shall be not be granted ex parte." (Emphasis added)

Therefore, in view of the prior permission granted by the Court and also based on the circumstances of this case, I am unable to accept the proposition of the Petitioner who demands for the requirement of an affidavit by the 2nd Respondent at this stage. On the

other hand, it is observed that the Petitioner relied only upon the documents marked 'X1' to 'X4' among which a single compact disc has been marked as 'X2' and 'X3'. The learned Counsel for the Petitioner intimated to Court that he was unable to establish the authenticity of the document marked 'X1' although, the Petitioner claims that the 'X1' had been prepared by the 3rd Respondent. The publication dates of the purported news items contained in the said compact disc also have not been divulged. The 'X4' is an 'email' copy of a letter allegedly written by the Petitioner wherein he has stated that there was a move by the authorities to remove the said Tree.

It is important to bear in mind that the documents which are accompanied to the Petition should be submitted in terms of Rule No. 3(1)(a) of the said Court of Appeal Rules. Accordingly, the originals of such documents or duly certified copies thereof should be submitted to Court and if a Petitioner is unable to tender any such document, he should state the reason for such inability and seek the leave of the Court to furnish such documents later. No such application has been made by the learned Counsel in open Court or by the Petitioner in his Petition. However, it is observed that all the copies of the documents submitted by the 2nd Respondent marked as 'X1' to 'X10'[1] are duly authenticated and certified as true copies. In the light of the above, the objections raised by the learned Counsel of the Petitioner, in my view, are not tenable.

Furthermore, I need to examine the particular submissions made by the learned Counsel for the Petitioner citing the order in ***SC(FR)109/2021 (Centre for Environmental Justice and others vs. Hon. Mahinda Rajapaksa and others, decided on 01.12.2021).*** The learned Counsel highlighted the last four paragraphs of the said order in support of the Petitioner's claim in the instant application. The said order of the Supreme Court has been made to resolve the issues pertaining to the objections raised by the State upon an amended Petition filed by the Petitioner in that case. The crux of the above order of their Lordships is that the Court should not allow procedural defects of the nature alleged in that matter to shackle its constitutional duty to examine the allegations of the Petitioner at the leave to proceed stage. Hence, I cannot understand the direct relevancy of the said order to the instant application as there was no application by the Petitioner to amend his Petition and also due to the fact that this is not a Fundamental Rights application.

[1] Both the Petitioner as well as the 2nd Respondent have marked the respective documents using the letter 'X'.

Although, I have already come to a conclusion as stated before that the application of the Petitioner is misconceived in law, I am of the view that for the best interest of justice, it is necessary to ascertain whether the Petitioner has presented a prima facie case at this threshold stage, for this Court to issue notice on the Respondents based on the arguability principles.

In this context, I now advert to examine the documents submitted on behalf of the 1st, 2nd & 4th Respondents. I can summarize the contents of those letters, submitted by the 2nd Respondent, pertaining to the issue in question of this application, as below.

1) The Director General of Department of National Botanic Gardens in response to a request made by the Director, Environment and Social Development Division of RDA (Road Development Authority), for an opinion with regard to removal of the said Tree within the proposed right of way of the Central highway, has stated, by way of a letter dated 20.08.2020 (marked 'X2') that such removal will not in any way result in extinction of the said plant species. He has made an observation therein that six plantlets have been raised successfully from an earlier exploration from which 2 were planted at the Royal Botanic Gardens, Peradeniya.

2) The RDA through letter dated 18.09.2020 (marked 'X3'), has requested permission from the Department of Wildlife Conservation to remove the said Tree within the right of way of the proposed Central highway on the strength of the opinion expressed by the National Botanical Gardens, that such removal of the said Tree will not harm the existence of the said plant species.

3) The Department of Wildlife Conservation through letter bearing the reference no. වජ/6/1/2/879 (marked 'X4') has expressed that they have no objections for removing the said Tree subjected to the condition that the said Tree should be planted in an appropriate place as prescribed therein.

4) The Central Environmental Authority ('CEA') by letter dated 05.02.2021 (marked 'X5') has indicated that it's the responsibility of the RDA to adhere to the recommendations of the relevant authorities when carrying out the removal of the said Tree. Further, the CEA has requested the RDA to provide a detailed report on the mechanism that would be adopted in removing the said Tree.

5) As per the Report at 'X6', the expert team of Department of National Botanic Gardens and the resource persons have been able to identify additional set of the said Tree in other places such as Magalegoda, Doranagoda, Minuwangoda-Handimahara, Biyagama, Kadirana, Malwana in the country.

6) The Director General of Department of Wildlife Conservation through letter dated 16.04.2021 (marked 'X7') has reiterated that there is no change in his position in allowing the said Tree to be removed from the existing place and relocating it.

7) The 'X8' is the minutes of the virtual meeting of the Advisory Committee who discussed on the relocation of the said Tree and the conservation measures, on 16.11.2021 via 'zoom'.

In view of the foregoing, my attention drifts to the principles of sustainable development which, in my view, is very much relevant to the issues of this application. It is a duty of the Environmentalists to raise concerns to protect the environment whilst the rulers may focus on the infrastructure development of a country. In any society, striking a balance by the relevant stakeholders, between the economic development and the consequential environment destructions is essential. The UNESCO claims that the Sustainable development is the overarching paradigm of the United Nations. 'The concept of sustainable development was described by the 1987 Brundtland Commission Report[2] as "development that meets the needs of the present without compromising the ability of future generations to meet their own needs."[3]

In ***Essar Oil Ltd. vs. Halar Utkarsh Samiti and others, AIR (2004) SC 1834 (at p.1843 para 27),*** the Supreme Court of India referred to the Stockholm Declaration while elucidating on the principle of sustainable development. Justice Ruma Pal, in this case observed;

> *"This, therefore, is the aim - namely to balance economic and social needs on the one hand with environmental considerations on the other. But in a sense all development is an environmental threat. Indeed, the very existence of humanity and the rapid increase in the population together with consequential demands to sustain the population has resulted in the concreting of open lands, cutting down of forests, the filling up of lakes and pollution of water resources and the very air which we breathe. However,* ***there need not necessarily be a***

[2] A report of the World Commission on Environment and Development
[3] https://en.unesco.org/themes/education-sustainable-development/what-is-esd/sd

deadlock between development on the one hand and the environment on the other. The objective of all laws on environment should be to create harmony between the two since neither one can be sacrificed at the altar of the other. *This view was also taken by this Court in Indian Council for* ***Enviro-Legal Action vs. Union of India (1996) 5 SCC 281, 296*** *where it was said:*

"while economic development should not be allowed to take place at the cost of ecology or by causing wide spread environment destruction and violation, ***at the same time the necessity to preserve ecology and environment should not hamper economic and other developments. Both development and environment must go hand in hand, in other words, there should not be development at the cost of environment and vice versa but there should be development while taking due care and ensuring the protection of environment****"* (Emphasis added)

Having considered the above principles of sustainable development, one may raise a question whether this Court should grant an interim relief that the Petitioner has sought. Irrespective of my earlier findings that the application of the Petitioner is misconceived in law, I draw my attention to the submission made by the learned State Counsel who contended that the balance of convenience would not lie in favour of the Petitioner. The learned State Counsel brought to the attention of this Court the contents of the letter dated 17.12.2019 (marked 'X1') written by the Project Director of RDA on the issue of the said Tree, wherein it is stated that changing the proposed right of way of the said highway would cause socio-economic complications.

Upon a query maid by this Court, the learned Counsel for the Petitioner indicated that the Petitioner had filed the instant application on the basis that the said Tree is an extremely rare plant species and there is a risk of getting it destroyed. However, it has been established by 'X2' and 'X6' that the said Tree is not the only plant species available in the country and the RDA is taking measures to relocate the same. There is no contrary argument raised by the Petitioner against the position reflected in the documentation filed by the 2nd Respondent. Accordingly, there is no viable reason to disregard the measures taken by the RDA to relocate the said Tree adopting a secured methodology in view of the expert opinion expressed by;

i. Director General of Department of National Botanic Gardens
ii. Director General of Department of Wildlife Conservation

iii. Director General of Central Environmental Authority

Therefore, I am convinced with the submissions made by the learned State Counsel based on the tests applicable in issuing interim relief by this Court.

In the circumstances, I refuse the application for issuance of notice on the Respondents as I am not satisfied that there is an arguable ground for judicial review which has a realistic prospect of success. I am influenced by "***The Administrative Court Judicial Review Guide 2021"***[4] of England and Wales, where guidelines are laid down in order to refuse permission at the threshold stage of a judicial review application.

Professor Johannes Chan of University of Hong Kong (Faculty of Law), in his article ***"Application For Leave For Judicial Review: A Practical Note"*** published in Law Lectures for Practitioners 1999 p.165 (at p.167) states that;

> *"The test for granting leave is potential arguability, that is, whether the materials before the trial judge disclose matters which might, on further consideration, demonstrate an arguable case for the grant of the relief claimed*[5].

Application is dismissed.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal

[4] Sixth edition of the Judicial Review Guide- July 2021 which applies to cases heard in the Administrative Court wherever it is sitting and in the Administrative Court Offices ("ACOs") across England and Wales.

[5] Also see - R vs. Direction of Immigration, ex parte Ho Ming-sai (1993) 3 HKPLR 157