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

In the matter of an Application under Article 140 of the Constitution to seek Mandate in the nature of Writ of Certiorari.

Case No: CA- WRT 129/20

Mount Vernon Mini Hydro Power Project (Pvt) Ltd,
No.33, Sagara Road,
Colombo 04

Petitioner

Vs.

1. Central Environmental Authority
   "Parisara Piyasa"
   104, Denzil Kobbekaduwa Mawatha,
   Battaramulla.

2. K.P. Welikannage,
   Provincial Director,
   (Central Province)
   Central Environment Authority,
   Central Province Office,
   Polgolla.

3. Sri Lanka Sustainable Energy Authority,
   Block 05 01st Floor,
   BMICH,
   Bauddhaloka Mawatha,
   Colombo 07.

4. Secretary,
   Ministry of Mahaweli Development and Environment,
   No. 416/C/1,
   Robet Gunawardana Mawatha,
   Battaramulla.

5. Attorney General
   Attorney-General's Department,
   Colombo 12.

Respondents

Before : **D.N. Samarakoon, J.**
B. Sasi Mahendran, J.

Counsel : S.Kumarasingham for the Petitioner
Milinda Gunathilake, ASG PC with Sabrina Ahamed, SC for the Respondents

Written Submissions On : 06.09.2022 (by the Petitioner)
12.09.2022 (by the Respondent)

Argued On : 22.07.2022

Decided On : 23.09.2022

B. Sasi Mahendran, J.

The instant application was filed by the Petitioner Company (hereinafter sometimes referred to as "the Project Proponent") on the 22nd of June 2022 to invoke this Court's writ jurisdiction in terms of Article 140 of the Constitution to quash by writs of Certiorari the decisions evinced in the documents marked "P6" (dated 22nd May 2018) and "P16b" (dated 09th September 2019) by which the 2nd Respondent refused environmental approval for the project and the 4th Respondent affirmed the decision of the 2nd Respondent to refuse project approval, respectively.

The Petitioner Company was duly incorporated under the Companies Act No. 17 of 1982 on the 12th of April 2005 for the purpose of installing on grid on renewable energy projects, utilizing identified renewable energy resources in the country. It sought to construct a 1000 kW mini-hydro project on "Punakanda Oya" situated at Mount Vernon in Pathana, Nuwara-Eliya. The electrical energy produced at this facility was to be purchased by the Ceylon Electricity Board as per the 'Standardised Power Purchase Agreement' between Ceylon Electricity Board and the Petitioner Company dated 21st May 2008 marked "P4".

In order to obtain environmental approval, the Petitioner Company submitted an application along with an Initial Environmental Examination Report to the Central Environmental Authority (the 1st Respondent) in 2007. By the document marked "P2" dated 15th June 2007 the Central Environmental Authority, as the project approving agency, granted approval to the Petitioner Company to implement the project, subject to the terms and conditions stated therein. The approval was said to be valid for a period of three years from the date of issuance. The Petitioner contends that this approval to implement the project was final. The land had to be acquired for this purpose, and the Petitioner Company was informed by the Sri Lanka Sustainable Energy Authority (the 3rd Respondent), the relevant authority tasked with acquiring the land, that it had to pay a sum of Rs. 300,000/- as 50% of the expenses likely to be incurred in the land acquisition process, which it paid. The Petitioner Company had to apply to extend the approval granted by the Central Environmental Authority since the acquisition of the land for the project was in progress.

The initial extension (in 2011) was granted, however, the second extension applied for on the 12th of February 2016 declined.

On 22nd May 2018, the Petitioner Company was informed by the Provincial Director, Central Province of the Central Environmental Authority, by the impugned letter marked "P6", that environmental approval was cancelled. This letter states that following a monitoring meeting held on the 20th of March 2018 the Technical Evaluation Committee decided to refuse approval on the basis that **the 'Punakanda' waterfall, listed in the 2015 waterfall list, which is situated in between the proposed weir and the powerhouse can be affected**. The Petitioner contends that this reason is arbitrary and without any basis mainly because the said waterfall was not listed in the waterfall lists of 2011 and 2017, and, additionally, initial approval was granted by the Central Environmental Authority in 2007 (along with other approvals of the Nuwara Eliya Pradeshiya Sabha "P9", the Water Supply and Drainage Board "P10") after having undertaken a comprehensive study. The Petitioner pleads that it was on this approval that the then Minister of Power and Energy issued a 'Generation License' to the Petitioner Company on 03rd July 2007 to "build, own, operate and maintain a Mini Hydro Power Station" to generate electrical energy by using the hydropower potential of Punakanda Oya (marked "P11").

This Court would like to highlight one condition in approval marked P2, as discussed below, which the Petitioner Company itself informed was "practically impossible" marked R1.

The Petitioner appealed the decision to cancel approval to the Secretary of the Ministry of Mahaweli Development and Environment (the 4th Respondent). Consequently, an inquiry was conducted. The 4th Respondent affirmed the decision of the 2nd Respondent. The reasons as set out in the document marked "P16b" state:

"මධ්‍යම පරිසර අධිකාරිය මෙම ව්‍යාපෘතියට අදාලව පාරිසරික අනුමැතිය ලබා දීම ප්‍රතික්ෂේප කර ඇත්තේ 2015 වසරේ දියඇලි ලැයිස්තුවට ඇතුලත් කර ඇති පුනාකන්ද දිය ඇල්ල යෝජිත ව්‍යාපෘතියේ රැඳවුම් බැම්ම හා බලාගාරය අතර පිහිටා ඇති බැවින් බලාගාරය ඉදිකිරීමෙන් එම දියඇල්ලේ පැවැත්මට බලපෑමක් ඇති වන බැවින් හා යෝජිත ව්‍යාපෘති භූමියේ පාරිසරික සංවේදීතාව සලකා බැලීම හේතුවෙනි.

අභියාචනා අවස්ථාවේදී ඉදිරිපත් වූ වාචික හා ලිඛිත සාක්ෂි අනුව, **පුනාකන්ද දිය ඇල්ල 2015 වසරේ දිය ඇලි ලැයිස්තුවට ඇතුලත් කර නොමැති නමුත් එය මීටර් 25 පමණ උසක් සහ එම ස්ථානයට ආවේනික වූ ජෛව විවිධත්වයකින් යුක් ස්වාභාවික වනාන්තරයක් තුල පිහිටි දිය ඇල්ලක් වීමද, ලැයිස්තු ගත කර ඇති දිය ඇල්ලක් වන මව්න්ට වනර්න් දිය ඇල්ලද මීටර් 15ක් පමණ ඉහලින් පිහිටා ඇති බවද,** ප්‍රකාශ විය.

එසේම, **මෙම ව්‍යාපෘතියට 2007.06.15 වන දින පාරිසරික අනුමැතිය ලබා දී ඇති අතර එම පාරිසරික අනුමැතියේ අනවරත ප්‍රවාහය (e-flow) ලෙස තත්පරයට ලීටර් 500 (l/s) ලෙස තාක්ෂණික කමිටුව තීරණය කර ඇත. නමුත් එම අනවරත ප්‍රවාහය පවත්වා ගැනීමට ප්‍රයෝගිකව අපහසු බවත්, අනවරථ ප්‍රවාහය ලෙස තත්පරයට ලීටර් 85 (l/s) ට වඩා අඩු ප්‍රමාණයක් පවත්වා ගැනීමට අවසර ලබා දෙන ලෙස ව්‍යාපෘති යෝජක විසින් 2007.10.04 වන දින මධ්‍යම පරිසර අධිකාරිය වෙත යොමු කරන ඇති ලිපිය මගින් ඉල්ලා ඇත.එසේ වුවද, ඒ සඳහා තාක්ෂණික කමිටුව අවසර ලබා දී නොමැති බැවින් අනවරත ප්‍රවාහය ලෙස තත්පරයට ලීටර් 500 (l/s) ලෙස තීරණය කර ඇත. ව්‍යාපෘති යෝජක විසින් ඉදිරිපත් කරන ලද ජල තත්ත්ව වාතර්ාවේ අන්තගර්ත වී ඇති Flow Duration Curve අධ්‍යනය කිරීමේදී දල වශයෙන් වසරේ දින 365ක් 72.3% ක් වන එනම් දින 264 ක කාල සීමාවක් මෙම ව්‍යාපෘතිය ක්‍රියාත්මක කිරීමේ හැකියාවක් ප්‍රායෝගිකව නොමැති බව මධ්‍යම පරිසර අධිකාරියේ වාතර්ාවේ දක්වා ඇත**. ගණනය කිරීම්වලට අනුව මුළු දින 365න දින 24ක් පමණක් 1 MW ධාරිතාවයකින් ව්‍යාපෘතිය ක්‍රියාත්මක කිරීමට හැකි බවත්, **එබැවින් මෙම තත්ත්වය යටතේ ව්‍යාපෘතිය මුල්‍යමය අතින්ද යෝග්‍ය නොවන බවත්**, මෙවැනි ව්‍යාපෘතියක් ක්‍රියාත්මක කිරීමේදී සාමාන්‍ය වශයෙන් පැය කිහිපයක් Canal path, Forbay tank සහ ponding Area ජලයෙන් පුරවා සුළු වෙලාවක් බල ශක්තිය නිෂ්පාදනය කිරීම සිදු කරන බවත්, **එවැනි තත්වයක් යටතේ ගංගාව හිදීමට ලක්වන බවත්, එකී තත්ත්වය දීසර් කාලිනවා සිදුවීම තුලින් මෙම ගංගාව ආශ්‍රිතව ශාක හා සත්ත්ව ප්‍රජාවන්ට හා එම ගංගාව දෙපස පවතින වනාන්තරයට දැඩි බලපෑමක් ඇති විය හැකි බව වැඩිදුරටත් දක්වා ඇත. එමෙන්ම, මෙම තත්වය මත පුනාකන්ද දිය ඇල්ල සහ ලැයිස්තු ගත කර ඇති මවුන්ට වනර්න් දිය ඇල්ල එක්ව සැදී ඇති සමස්ත දිය ඇල්ලේ දශර්නීය භාවයට හානි සිදු වීමට හැකි බවත් නිරීක්ෂණය වේ.** මෙම ව්‍යාපෘතිය සඳහා 2007 වසරේ සිට අභියාචක වෙත කාලය ලබා දී ඇතත් එම කාලයෙන් ප්‍රයෝජනයක් ගෙන නොමැති බවද ඉදිරිපත් වූ කරුණු අනුව තහවුරු වේ." [emphasis added]

As the Petitioner Company has prayed for a Writ of Certiorari the starting point is the often-cited dictum of Lord Atkin in Rex v. Electricity Commissioners, Ex parte London Electricity Joint Committee Co. [1924] 1 K.B. 171:

"Whenever any body of persons having legal authority to determine questions affecting the rights of subjects and having the duty to act judicially, act in excess of their legal authority they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs."

The Atkinian formula was revised by Lord Diplock in O'Reilly v. Mackman [1982] 3 WLR 1096 by dropping the words "having the duty to act judicially." Lord Diplock held:

"…this phrase gave rise to many attempts, with varying success, to draw subtle distinctions between decisions that were quasi-judicial and those that were administrative only. But the relevance of arguments of this kind was destroyed by the decision of this House in *Ridge v. Baldwin* [1964] A.C. 40, where again the leading speech was given by Lord Reid. Wherever any person or body of persons has authority conferred by legislation to make decisions of the kind I have described, it is amenable to the remedy of an order to quash its decision either for error of law in reaching it or for failure to act fairly towards the person who will be adversely affected…"

Administrative law, the core of which is judicial review, is primarily intended to, in the words of Wade and Forsyth ('Administrative Law' 11th Edition) "keep the powers of government within their legal bounds, so as to protect the citizen against their abuse. The powerful engines of authority must be prevented from running amok".

The classical statement of the grounds of judicial review by Lord Diplock in the landmark judgment of Council of Civil Service Unions v. Minister for the Civil Service [1985] AC 374 (often referred to as the "GCHQ case") sets forth that the principle of judicial review of administrative action is based upon one or more of the following, viz. legality, procedural impropriety, and irrationality. Proportionality was envisaged as a future possibility.

Thus, if a decision is found to be vitiated by illegality, irrationality, procedural impropriety, or is found to be disproportionate, the decision would be nullified.

In terms of the initial approval granted by the Central Environmental Authority on 15th June 2007, which granted environmental approval subject to the terms and conditions therein, a specific condition is Clause B.2.1. states:

"The Project Proponent should undertake to release an adequate volume of water down stream for maintaining a healthy ecology and for utility of down stream users. To maintain the downstream in proper condition a continuous uninterrupted discharge of 500 l/s (base flow of the river) should be released to the downstream from the weir by means of uncontrolled outlets made in several places of the weir to cover the entire width of the river.."

The Petitioner Company by a letter dated 4th October 2007 (marked "R1") to the Central Environmental Authority states that this condition is "practically impossible to maintain as the 80% of the year, the river flow will be less than 500 l/s". A request is made to revise the expected minimum discharge from the weir to more pragmatic levels.

In the Counter Affidavit, it is stated that fixing the e-flow at 500 l/s is a "fundamental flaw and defeats the basic norm scientifically determined by experimental verifications". The Petitioner Company contends that the scientific details arrived at using e-flow at 500 liters/sec. is erroneous. Much ink was spilled trying to prove to this Court that this condition is erroneous and lacks scientific reasoning.

The Petitioner Company may or may not be right in this contention. Yet, for a Court of law exercising its supervisory jurisdiction, it is well beyond our institutional competence to make such a determination. As mentioned above, our supervisory role is circumscribed to the ordinary grounds of judicial review. In the absence of an allegation of the same, we cannot step into the shoes of an expert. This is a well-established position in Administrative Law, the reason being that this Court does not have the benefit of expert evidence to help arrive at the right conclusion. This is a matter that must be litigated in a forum in which expert opinion may be tried and tested.

Another factor that disentitles the Petitioner Company to claim the relief sought is the fact of futility. Suppose if this Court were to quash the decisions of the 2nd Respondent to refuse environmental approval for the project and the 4th Respondent's affirmation of the decision of the 2nd Respondent to refuse project approval, the Petitioner Company would still be unable to meet this "impossible" condition. There is no undertaking that this condition can be met.

In the case of P.S. Bus Co. v. Members and Secretary of Ceylon Transport Board 61 NLR 491 his Lordship Sinnetamby J. held:

"The prerogative writs are not issued as a matter of course and it is in the discretion of Court to refuse to grant it if the facts and circumstances are such as to warrant a refusal. A writ, for instance, will not issue where it would be vexatious or futile."

His Lordship Soza J. in Siddeek v. Jacolyn Seneviratne [1984] 1 SLR 83 held:

"The Court will have regard to the special circumstances of the case before it before issuing a writ of certiorari. The writ of certiorari clearly will not issue where the end result will be futility, frustration, injustice and illegality."

Further, Petitioner Company has other battles to win, especially the acquisition of the land for this project. This is a fact recognized by the Petitioner Company itself which stated in its Counter Affidavit to the Statement of Objections of the 1st and 2nd Respondents (in paragraph 8) that "the mere grant of environmental approval alone will not allow him to implement the project without the land. The land has to be acquired which is not done by the 3rd Respondent."

The lease-holder of the land has not even been made a party to the instant action. In their Statement of Objection, the Respondents have taken the objection that necessary parties such were not before this Court, yet the Petitioner Company never sought the permission of the Court to add them as parties. In a recent Order in Rev. Uturawala Dhammaratana Thero v. Minister of Education, CA Writ 399/2020 decided on 29.07.2020, I agreed with my brother Justice D.N. Samarakoon that the remedy for an alleged failure to add a party is to allow the addition of that party and to have a full hearing but not to dismiss the case at the very commencement. However, this statement must be read in the context and circumstances of that case, which was in its preliminary stage, concerning the issuing or not of notice. In the instant case, this matter has progressed to the merits stage and has been reserved for judgment.

Before we conclude, it must be stated that the Central Environmental Authority and other agencies tasked with the protection and preservation of the environment must act more vigilantly and prudently. If the project does in fact pose a threat to the environment and could cause severe degradation it is appalling how approval (and a subsequent extension) could be granted in the first place.

We are reminded of the landmark 'Eppawela Case' (Bulankulama v. Secretary, Ministry of Industrial Development [2000] 3 SLR 243) in which his Lordship Amerasinghe J. citing the Rio Declaration held that in order to achieve sustainable development **environmental protection shall constitute an integral part of the development process**.

His Lordship held, "The organs of the State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the Constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development."

Her Ladyship Shiranee Tilakawardane J. in Sugathapala Mendis v. Chandrika Kumaratunga [2008] 2 SLR 339 summarises the "Public Trust Doctrine" thus:

"The "Public Trust Doctrine" is based on the concept that the powers held by organs of government are, in fact, powers that originate with the People, and are entrusted to the Legislature, the Executive and the Judiciary only as a means of exercising governance and with the sole objective that such powers will be exercised in good faith for the benefit of the People of Sri Lanka. Public power is not for personal gain or favour, but always to be used to optimize the benefit of the People. To do otherwise would be to betray the trust reposed by the People within whom, in terms of the Constitution, the Sovereignty reposes. Power exercised contrary to the Public Trust Doctrine would be an abuse of such power and in contravention of the Rule of Law."

Thus, the Central Environmental Authority and other environmental agencies as organs of the state must remember that the environment must be protected and preserved for the benefit of the present generation and generations yet unborn. **It is worth reiterating Article 27(14) of the Constitution which provides: "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 rights or obligations and are not enforceable in any Court of Tribunal" Courts have linked the Directive principles to the public trust doctrine and have stated that these principles should guide state functionaries in the excise of their powers. (Vide Environmental Foundation Ltd. v. Mahawali Authority of Sri Lanka [2010] 1 SLR 1)

Thus, we are unable to grant the relief prayed for because it is beyond this Court's institutional competence to make a judgment as to the environmental impact this project can cause, as claimed by the Respondents. Even if the waterfall is 'listed', its close proximity to one that is, and the potential or actual impact on the environment is a matter for a more appropriate forum.

I am mindful that the outcome of this project is said to be effective for 100 days of the year, and the need for a continuous supply of electricity to meet the country's daily requirement and the Court should not be an obstacle in a genuine effort to meet that demand. However, when compared to the potential or actual environmental destruction, whether the right balance in the cost-benefit analysis has been struck is doubtful.

The Indian Supreme Court in Narmada Bachao Andolan v. Union of India 2000 (10) SCC 664 held:

"When there is a state of uncertainty due to lack of data or material about the extent of damage or pollution likely to be caused then, in order to maintain the ecology balance, the burden of proof that the said balance will be maintained must necessarily be on the industry or the unit which is likely to cause pollution. On the other hand where the effect on ecology or environment of setting up of an industry is known, what has to be seen is that if the environment is likely to suffer, then what mitigative steps can be taken to off set the same. Merely because there will be a change is no reason to presume that there will be ecological disaster. It is when the effect of the project is known then the principle of sustainable development would come into play which will ensure that mitigative steps are and can be taken to preserve the ecological balance. Sustainable development means what type or extent of development can take place which can be sustained by nature/ecology with or without mitigation."

For the foregoing reasons, we dismiss this application without costs.

JUDGE OF THE COURT OF APPEAL

D.N.SAMARAKOON,J.

I AGREE

JUDGE OF THE COURT OF APPEAL