

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

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

CA/WRIT/502/2021

1. Centre for Environmental Justice
(Guarantee) Limited
No. 20/A, Kuruppu Road,
Colombo 08.
2. Withanage Don Hemantha Ranjith
Sisira Kumara
Director and Senior Advisor,
Centre for Environmental Justice,
No. 20/A, Kuruppu Road,
Colombo 08.
3. Pathragoda Kankanamge Dilena
Executive Director,
Centre for Environmental Justice,
No. 20/A, Kuruppu Road,
Colombo 08.
4. Edwin Edward Ragal
Secretary,
All Ceylon Beat Forest Officers Union,
No. 05, Ayurvedic Road, Panwila.
5. Bogala Vidana Rallage Imesh
Gunathilaka Bandara
Secretary,
All Ceylon Joint Wildlife Officers'
Association,
E57/Makura, Hettimulla.
6. Ajith Rathnasiri Ranawaka
Chairman,
Environmental Officers' Association,
Central Environmental Authority,

No 104, Denzil Kobbekaduwa
Mawatha,
Battaramulla.

Petitioners

Vs.

1. G. D. Keerthi Gamage
Land Commissioner General,
Land Commissioner General's
Department, "Mihikatha Madura",
Land Secretariat, No. 1200/6,
Rajamalwatta Road, Battaramulla.
- 1A. Land Commissioner General
Land Commissioner General's
Department, "Mihikatha Madura",
Land Secretariat, No. 1200/6,
Rajamalwatta Road, Battaramulla.
2. Hon. S. M. Chadrasena
Minister of Lands,
Ministry of Lands,
"Mihikatha Madura",
Land Secretariat, No. 1200/6,
Rajamalwatta Road, Battaramulla.
- 2A. Minister of Lands
Ministry of Lands,
"Mihikatha Madura",
Land Secretariat, No. 1200/6,
Rajamalwatta Road, Battaramulla.
3. R. A. A. K. Ranawaka
Secretary – Ministry of Lands,
"Mihikatha Madura",
Land Secretariat, No. 1200/6,
Rajamalwatta Road, Battaramulla.
- 3A. Secretary – Ministry of Lands
"Mihikatha Madura",
Land Secretariat, No. 1200/6,
Rajamalwatta Road, Battaramulla.

4. C. B. Rathnayake
Minister of Wildlife and Forest
Conservation,
Ministry of Wildlife and Forest
Conservation,
No. 1090, Sri Jayawardenapura
Mawatha, Rajagiriya.
- 4A. Minister of Wildlife and Forest
Conservation
Ministry of Wildlife and Forest
Conservation,
No. 1090, Sri Jayawardenapura
Mawatha, Rajagiriya.
5. Somarathne Vidanapathirana
Secretary,
Ministry of Wildlife and Forest
Conservation,
No. 1090, Sri Jayawardenapura
Mawatha, Rajagiriya.
- 5A. Mrs. R. M. C. M. Hearth
Secretary,
The Ministry of Wildlife and Forest
Conservation,
No. 1090, Sri Jayawardenapura
Mawatha, Rajagiriya
6. W. A. C. Weragoda
Conservator General of Forests,
Forest Department,
Sampath Paya, 82 Rajamalwatta Rd,
Sri Jayawardenapura, Kotte.
- 6A. Dr. K. M. A. Bandara
Conservator General of Forests,
Forest Department,
Sampath Paya, 82 Rajamalwatta Rd,
Sri Jayawardenapura, Kotte.

7. Dr. Anil Jasingha,
Secretary,
Ministry of Environment,
“Sobadam Piyasa”, 416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.
- 7A. Secretary
Ministry of Environment,
“Sobadam Piyasa”, 416/C/1,
Robert Gunawardana Mawatha,
Battaramulla.
8. Dr. P. B. Jayasundera
Secretary to the President,
Presidential Secretariat,
Galle Face Center Road,
Colombo 01.
- 8A. Mr. Gamini Sedara Senarath
Secretary to the President,
Presidential Secretariat,
Galle Face Center Road,
Colombo 01.
9. C. D. Wickramaratne
Inspector General of Police,
Police Headquarters,
Colombo 01.
- 9A. Inspector General of Police
Police Headquarters,
Colombo 01.
10. Hon. Attorney General
Attorney General’s Department,
Colombo 01.

Respondents

Before : Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel : Ravindranath Dabare with S. D. Ponnampereuma and Nilmal Wickramasinghe for the Petitioners.

Vikum de Abrew ASG, PC with Suranga Wimalasena DSG and N. De Zoysa SC for the 1st to 7th & 9th Respondents.

Argued on : 06.06.2022, 03.08.2022, 08.09.2022, 22.09.2022

Written Submissions: Petitioners - 26.09.2022

1st to 7th & 9th Respondents- 26.09.2022

Decided on : 28.09.2022

Sobhitha Rajakaruna J.

The Petitioners have filed this application seeking, inter alia, an order in the nature of a writ of Certiorari to quash the decisions contained in Ministry Circular No. MWFC/1/2020 dated 04.11.2020, marked 'P7', issued by the Secretary to the Ministry of Wildlife & Forest Conservation. An order in the nature of a writ of Certiorari is also sought to quash the decisions reflected in letters and guidelines, marked 'P8' to 'P9(f)' & 'P12' made in relation to the said Circular, marked 'P7'. Additionally, the Petitioners are seeking an order in the nature of a writ of Mandamus directing or compelling the 6th Respondent to take necessary measures to institute action against all individuals who have destroyed the forests falling under the provisions of Section 20 of the Forest Ordinance as amended by the Act No. 65 of 2009.

The said impugned Circular has been issued in relation to the Management of State forests other than a 'conservation forest', 'reserved forest' or 'village forest'. The Petitioners' contention is that the improper use of 'other State forests' by the Divisional Secretaries and the District Secretaries in terms of the said Circular, marked 'P7', will decrease the total forest cover of the country which is already at a critical stage. The Petitioners submit that the Divisional Secretaries and the District Secretaries are lack of necessary scientific knowledge to determine and deal with such forests and there appears to be a considerable increase of incidents with regard to deforestation throughout the country during the recent times.

The Secretary to the Ministry of Lands has filed in this application, an Affidavit affirmed on 04.04.2022. He categorically denies several averments contained in the Petition of the Petitioners and submits that the Ministry of Lands and Ministry of Wildlife & Forest Conservation have all times acted in compliance with the joint Cabinet Memorandum, marked 'R1' and the decision thereto, marked 'R2'. Further, he submits that the Circular, marked 'P7', is in accordance with the said Cabinet decision and the orders sought by the Petitioners in this application amounts to stultification of the activities of the Government causing economic hardships to the landless people and hindering utilization of State lands in favour of the public and for the economic development.

The learned Additional Solicitor General ('ASG') who appears for the Respondents explained the intended mechanism embodied in the impugned Circular 'P7' and strenuously argued that no prejudice would be caused to any of the forest land by way of such mechanism. He asserts that the impugned Circular is a result of a Cabinet Memorandum submitted jointly by three Cabinet Ministers who were in charge of the subjects of Wildlife & Forest, Environment and Land and the subsequent Cabinet decision which is still in full force has not been challenged by the Petitioners. The contention of the learned ASG is that even if the impugned Circulars are quashed by this Court, any State agency could issue another circular to implement the said Cabinet decision and therefore, the reliefs prayed for by the Petitioners are futile. The learned ASG relies on the judgements in *Mendis, Fowzie and others vs. Goonawardena and G. P. A. Silva (1978-79) 2 Sri. L.R. 322*, *University of Peradeniya vs. Justice D. G. Jayalath, Chairman, University Services Appeals Board and others (2005) 3 Sri. L.R. 337* and *Anuja Yoganathan vs. University Grants Commission and two others, CA/Writ/664/2011 decided on 13.09.2016* and submits that our Courts have continuously held that a writ of Certiorari is a discretionary remedy and such writ will not be issued if it be futile. The learned ASG expounding the dicta in the above cases and cites the judgement of *Selvamani vs. Dr. Kumaravelupillai and others (2005) 1 Sri. L.R. 99* by which a writ of Mandamus has been refused based on futility.

On a careful perusal of the decision of the Cabinet of Ministers, marked 'R2', it appears that the said decision 'R2' underlies the impugned Circular marked 'P7' and such Cabinet decision is not being challenged in this application by the Petitioners. Such Ministers of the Cabinet also have not been made a party to this application. The learned ASG relying

on *Ravaya Publishers and other vs. Wijayadasa Rajapaksha, Chairman Sri Lanka Press Council 2001 3 SLR 213, Perera vs. National Housing Development Authority (2001) 3 Sri. L.R. 50* asserts that the application of the Petitioners should be dismissed in limine as necessary parties are not before Court.

In such a backdrop, I am inclined to accept the submission made by the learned ASG in respect of futility and on the necessary parties. Therefore, I hold that the Secretary to the Ministry of Wildlife & Forest Conservation has issued the impugned Circular, marked 'P7', without exceeding power and however, subject to the decision of the Cabinet of Ministers ('R2') which is still in force. Both parties at the hearing stage of this case conceded that the impugned documents marked 'P8' to 'P9(f)' emanate from the said Circular, marked 'P7'. I cannot agree with the submissions made subsequently by the learned Counsel for the Petitioners attempting to differentiate 'P8' to 'P9(f)' & 'P12' with the main Circular marked 'P7'. I take the view that the root cause to all subsequent Circulars is the decision of the Cabinet of Ministers and the Circular 'P7' issued based on the said Cabinet decision.

During the midst of the hearing of this application, the learned ASG brought to the attention of this Court the motion dated 16.09.2022 filed on behalf of the Respondents. A draft letter, marked 'X1', which is due to be issued by the Commissioner General of Lands to all Divisional Secretaries/ Provincial Land Commissioners/ Land Commissioner/ Assistant Land Commissioner (Inter-Provincial) is annexed to the said motion. The said draft letter contains a clarification as to how the Circular No. 2020/18 dated 10.11.2020, marked as 'P8', should be proceeded with.

The said draft letter specifically refers to the impugned Circular, marked 'P7' and divulges that the methodology introduced by the Secretary to the Ministry of Wildlife and Forest Conservation by Circular marked as 'P7' does not apply to a (i) Conservation Forest, (ii) Reserved Forest, (iii) Village Forest or (iv) Other State Forests. However, the State lands which comes only within the following classifications will be vested in the management of the Divisional Secretaries. Those classifications are;

- i. the lands which are not identified as the lands to be conserved by Clauses 2.1 and 2.2 of Circular No. 2020/18 (of Commissioner General of Lands) and as

further described by the Conservator General of Forests in the Circular No. 04/2020 dated 24.11.2020 ('P9(a)'); and

- ii. areas not showing characteristics of forests
- iii. State land which cannot be practically managed as forests

For the purpose of clarity, I must reproduce the exact wordings of the third paragraph of the said letter, marked 'X1' which is in Sinhala language;

“වනජීවී හා වන සංරක්ෂණ අමාත්‍යාංශ ලේකම්ගේ අංක MWFC/1/2020 සහ 2020.11.04 දිනැති වකුලේඛය මගින් හඳුන්වාදී ඇති ක්‍රමවේදය සංරක්ෂිත වනයක්, රක්ෂිත වනයක්, ගම්බද වනයක් හෝ වෙනත් රජයේ වනාන්තරයකට අදාළ නොවේ, කෙසේවෙතත්, මේ සම්බන්ධයෙන් වන සංරක්ෂණ ජනරාල් විසින් 2020.11.24 දිනැතිව නිකුත් කරනු ලැබූ 04/2020 වකුලේඛයේ වැඩිදුරටත් විස්තර කර ඇති පරිදි සංරක්ෂණය කළ යුතු බවට මාගේ 2020/18 වකුලේඛයේ 2.1 හා 2.2 වගන්ති පරිදි හඳුනාගනු ලබන ප්‍රදේශ නොවන සහ වනාන්තරමය ලක්ෂණ නොදරන මෙන්ම වනාන්තර සේ කළමනාකරනය කිරීම ප්‍රායෝගික නොවන රජයේ ඉඩම් ප්‍රාදේශීය ලේකම්වරුන්ගේ කළමනාකාරීත්වයට පවරා ගැනීම සඳහා කටයුතු කළ යුතු බවට මෙයින් දන්වමි.”

The averments in paragraph 76 of the Petition, in my view, encapsulate the Petitioners' main claim in this application. In a nutshell, the Petitioners' primary claim is that 'a grave, irremediable, permanent and irreparable loss will be caused to those invaluable 'Other State Forests' which, inter alia, serve as a connectivity tissue between protected areas unless the Circulars, Guidelines and letters marked 'P7', 'P8', 'P9(a)-(e)' and 'P12' are quashed as prayed for in the Petition'.

The learned Counsel for the Petitioner making submissions on the said draft letter 'X1' has categorically submitted that the impugned issues can be resolved by ousting 'other State forests' from all Circulars including 'P7'. The paragraph 39 of the final Written Submissions filed on behalf of the Petitioner reads as follows;

“It is submitted that the Respondents have deliberately made the draft very complex to use it for their ulterior motive. The reasonable settlement to the impugned issue would have been to oust the Other State Forests governed by Section 20 from all circulars including P7. However, the Respondents are agreeable to such.”

To my mind, there is no distinction between the above position of the Petitioners and the substance of the said draft letter 'X1'. The learned ASG repeatedly informed Court that

the category of land “other State forests” will not be affected by the activities of the relevant authorities when exercising their duties and functions under the said Circular ‘P7’. As I found earlier, the Circulars ‘P7’, ‘P8’ to ‘P9(f)’ are interconnected. Hence, I am not agreeable with the submissions of the learned Counsel for the Petitioner, particularly stipulated in below mentioned paragraphs 40 & 41 of the said Written Submissions of the Petitioner.

40) *“It is submitted that the draft circular submitted by the Respondents only alters the circular marked P8 without addressing the P7 and has included section 8 of the Land Development Ordinance which has no relevance to the issue without mentioning the Section 20 of the Forest Ordinance which in the correct legal provision that should have been included.”*

41) *“Furthermore, the Respondents are only agreeable to alter the document marked P8 without altering the document marked P1 and document marked P9(a) – P9(f). Until and unless the document marked P7 is altered there will not be any significant change in status quo due to the commutative effect of all circulars issued based on the document marked P7.”*

In order to simply recognize the category of ‘Other State Forests’, it is important to draw the attention to the Interpretation Section 78 of the Forest Conservation Ordinance (as amended). According to the said Section “Forest” means all land at the disposal of the State (Crown). In terms of the said section the “land at the disposal of the State (Crown)” includes;

- a. all forest, waste, chena, uncultivated, or unoccupied land, unless proof is adduced to the satisfaction of the court that some person-
 - i. has acquired, by some lawful means, a valid title thereto, or
 - ii. has acquired a right thereto as against the State by the issue to him of any certificate of no claim by the State under the State Lands Encroachments Ordinance or the Definition of Boundaries Ordinance, or
 - iii. is entitled to possess the same under a written grant or lease made by or on behalf of the British, Dutch, or Sri Lanka Governments, and duly registered in accordance with law;
- b. all lands resumed by the State under the provisions of the Land Resumption Ordinance, and all lands which have been declared to be the property of the State

by any order passed under “The Waste Lands Ordinances, 1897 to 1903”, the Land Settlement Ordinance, or to which the State is otherwise lawfully entitled;

Now the attention should be drawn to Section 20 of the said Ordinance. The Section 20(1) stipulates the acts which are prohibited in any Forests other than a conservation forest, reserved forest or village forest. Thus, a State Forest other than a Conservation Forest, Reserved Forest or Village Forest can be recognized as ‘Other State Forests’ for the purpose of matters relating to this case, however subject to the 3 classifications discussed above and also mentioned in the draft letter ‘X1’.

In view of the above provisions of law, the Respondents argue that in terms of Section 64(2)(g), the relevant Minister is entitled to make regulations in respect of the matters set out within any forest which is not a conservation forest, reserved forest or village forest. Anyhow, I am of the view that whatever the regulations made by the Minister should not override the expressed provisions of the Forest Conservation Ordinance. The hallmark of the said ordinance is the conservation, protection and sustainable management of the forest resources which comes under whatever heading such as conservation forest/ reserved forest/ village forest/ and other state forests.

At this stage, I advert again to the aforesaid draft letter ‘X1’. The learned ASG indicated to Court on the final date of the hearing of this application that the Commissioner General of Land is willing to formally issue the said draft letter, marked ‘X1’, irrespective of the fact that the Petitioners of this case would consent to it or not. When the learned ASG, on behalf of the Respondents submits that the category of land “other State forests” will not be disturbed as narrated above, there is no necessity, in my view, for this Court to go through a tedious process in discovering and determining on the other particulars, facts and circumstances pleaded by the Petitioners based on the impugned Circulars.

I am aware that this is an application for judicial review and rights of the parties should be decided as at the date of the institution of these proceedings. However, reasonable clarification given by the relevant authorities upon an impugned decision of which the vires is being challenged should be essentially taken into consideration in view of resolving the questions involved. I take the view that the clarifications given by the relevant authorities in the said document, marked ‘X1’, clears any ambiguity on the impugned Circular ‘P7’ and the related Circulars in regard to the operation of such Circulars.

Moreover, I am of the view that the clarifications given in the said letter, marked 'X1', will be an adequate and efficacious remedy in resolving the impugned issues especially because the instant application is a public interest litigation instituted by the Petitioner.

In light of the above, it is important for this Court to make a strong observation that the Commissioner General of Land, Conservator General of Forests, all District Secretaries and all Divisional Secretaries should be bound by the contents in paragraph 3 of the draft letter 'X1'. Further, this Court makes an observation that the Secretary to the Ministry of Wildlife & Forest Resources Conservation is ought to take immediate steps to issue a formal communication particularly with the contents embodied in paragraph 3 of the said draft letter, marked X1, and to communicate such directions to the Forest Conservator General/ Provincial Land Commissioners/ Land Commissioners/ all District Secretaries/ all Divisional Secretaires. The above observations are being made in the best interest of justice and also for the benefit of present and future generations whose duty should be to safeguard the invaluable forests in the country.

On a careful consideration of the whole matter, I have come to the conclusion based on the special circumstances of this case that I should exercise my discretion to refuse the application of the Petitioner subject to the above observations made by this Court.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal