

**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 Prohibition under Article 140
of the Constitution of the Democratic Socialist
Republic of Sri Lanka.*

CA/WRIT/97/2021

1. Center for Environmental Justice
(Guarantee Limited)
No. 20/A, Kuruppu Road,
Colombo 08.
2. Dinesh Indika Gunasekara
No. 595/6, Muththettugoda Road,
Thalangama North, Battaramulla.
3. E. O. Samarakkody
No. 263, Batapotha,
Thalangama South, Battaramulla.

Petitioners

Vs.

1. Road Development Authority
Maganeguma Mahamedura,
No. 216, Denzil Kobbekaduwa
Mawatha, Koswatta, Battaramulla.
- 1A. C. P. Athuluwage
Chairman-RDA,
Maganeguma Mahamedura,
No. 216, Denzil Kobbekaduwa
Mawatha, Koswatta, Battaramulla.
2. Central Environmental Authority
No. 104, Denzil Kobbekaduwa
Mawatha, Koswatta, Battaramulla.
- 2A. P. B. Hemantha Jayasinghe
Director General – CEA,
No. 104, Denzil Kobbekaduwa
Mawatha, Koswatta, Battaramulla.

3. Urban Development Authority
6th, 7th and 9th Floors, “Sethsiripaya”,
Battaramulla.

3A. Harshana De Silva
Chairman – UDA,
6th, 7th and 9th
Floors, “Sethsiripaya”,
Battaramulla.

4. Dr. Anil Jasinghe
Secretary – Ministry of Environment,
“Sobadama Piyasa”, 416/C/1,
Robert Gunawardena Mawatha,
Battaramulla.

5. Hon. Attorney General
Attorney General’s Department,
Colombo 12.

Respondents

Before : Sobhitha Rajakaruna J.

Dhammika Ganepola J.

Counsel : R. Dabare, N. Wickramasinghe, S. Ponnaperuma and Samadhi H.
Premasiri for the Petitioners

Romesh De Silva, PC with Ruwanth Cooray for the 1st and 1A Respondents

Suranga Wimalasena SSC for the 2nd to 5th Respondents.

Decided on: 19.01.2022

Sobhitha Rajakaruna J.

When this matter was taken up for support on 09.11.2021, the learned President’s Counsel for the 1st and 1A Respondents pointed out that the Petitioners had filed the instant application based on the Extraordinary Gazette Notification No. 1487/10 published on 05.03.2007. Raising a preliminary objection, he submitted that the said Gazette Notification had already been amended, in effect it is now rescinded. Accordingly, the learned President’s Counsel contended that the Petitioners cannot maintain this

application in view of the subsequent amendments made to the said Gazette Notification No. 1487/10. All parties filed written submissions on the said preliminary objection.

The Petitioners state that Road Development Authority (RDA) together with Urban Development Authority (UDA) has proposed to construct a four-lane elevated highway on columns from Urugodawatta to Athurugiriya. The Petitioners' contention is that the said proposed elevated highway particularly from Rajagiriya to Athurugiriya which is an extension of the originally approved proposal would traverse the Thalangama/Awerihena wetlands, an area gazetted as an Environmental Protection Area. In terms of the powers vested under Section 24C and 24D of the National Environmental Act No. 47 of 1980 (as amended), the relevant Minister has declared by virtue of the said Extraordinary Gazette Notification 1487/10, published on 05.03.2007 (marked P7) that the limits of the area of the land described in the Schedule thereto shall be an environmental protection area for the purpose of the aforesaid Act and shall be called the "Thalangama Environmental Protection Area" (EPA).

The Petitioners have, inter alia, prayed for in the prayer of the Petition dated 11.02.2021 as follows;

- a) Grant and issue an order in the nature of a Writ of Prohibition refraining the 2nd and 2A Respondents from granting permission/approval to 1st, 1A, 3rd and 3A Respondents to construct the elevated highway over the EPA;
- b) Grant and issue an order in the nature of a Writ of Prohibition refraining the 1st, 1A, 3rd and 3A Respondents from constructing the said elevated highway over the said EPA;
- c) Grant an interim order to maintain the status quo of the Thalangama Environmental Protection area/suspend the road construction activities in the area protected by virtue of Gazette Extraordinary No. 1487/10 dated 05.03.2007 until the final determination of this application.

According to the Petitioner, the particular stretch of the proposed highway crosses the said EPA. By virtue of the above-mentioned Gazette Notification, the Minister has set out only 6 permitted activities to be carried out within the said EPA, in its Schedule II, and those permitted activities are as follows;

- i. Cultivation of paddy
- ii. Fishing
- iii. Nature trails

- iv. Construction of towers for the observation of birds
- v. An environmental education information centre and a sales outlet
- vi. Construction of a security post

The Petitioners accordingly averse in their Petition that the construction of an elevated highway within an EPA is not a permitted activity in view of the provisions of the National Environmental Act and the said Gazette Notification No. 1487/10.

The Petitioners by a way of a motion dated 01.12.2021 tendered to Court a copy the Extraordinary Gazette Notification No. 2237/7 dated 19.07.2021 marked Z1 & a copy of the letter addressed to the Director General of CEA by the Attorney General marked Z2. Accordingly, Petitioners have sought permission to refer to those documents when submissions are being made on behalf of the Petitioners.

The Petitioners in paragraph 26 of the Petition states that “a highway will also pave the way to noise pollution and emissions which shall have a detrimental effect on the environment, hydrology and invaluable bio diversity of the wetland, as also on the air quality and health of thousands of inhabitants living on either side of the Thalangama/Awerihena EPA as at present and generations to come.”

Furthermore, the Petitioners annexing an Appeal signed by over 160 concerned citizens (marked P11) asserts that farmers and residents of the area will be affected by the destruction of this environment.

Now I advert to the amendments made to the original order (published in the Gazette Extraordinary No. 1487/10) made in respect of the said Thalangama EPA. The said Gazette Notification No. 1487/10 has been amended by the above Gazette Notification No 2237/7 as follows;

- 1) *By the addition immediately after item 6 of the Schedule II, of the following: -*
“7. construction, operation and maintenance of Four Lane Elevated Highway Construction Project from new Kelani Bridge in Athurugiriya and related constructions of such project”
- 2) *By the addition immediately after item (m) of the Schedule III, of the following: -*
*“(n) construction, operation and maintenance of Four Lane Elevated Highway Construction Project from new Kelani Bridge in Athurugiriya and related constructions of such project, **shall not have adverse impact on the Environmental Protection Area**” (emphasis added)*

A careful examination of the amendments made to the Schedule III (of the said Gazette Notification No. 1487/10) indicates that the construction, operation and maintenance of Four Lane Elevated Highway Construction Project and related constructions of such project is subject to a mandatory prerequisite and that is not to create an adverse impact on the EPA by such construction, operation and maintenance. Therefore, we are of the view, although a new activity has been introduced to the original order of the relevant Minister such new activity has to be carried out without any adverse impact on the EPA.

Furthermore, this Court is mindful of the provisions in Section 24D (4) of the National Environmental Act No. 47 of 1980 (as amended) which reads;

“So long as an Order under section 24 being in force in relation to a protection area no person other than the Authority shall exercise, perform and discharge any powers, duties and functions relating to planning and development within such protection area.”

Therefore, it is necessary to examine not only whether the proposed highway which crosses the said EPA would cause any adverse impact on the EPA but also to ascertain whether the authorized persons are properly involved in this construction, operation and maintenance.

The letter marked P9 addressed to the Ministry of Environment and Renewable Energy by Director General CEA also should be taken into consideration in this regard as the CEA was exploring the possibility of declaring the EPA as a RAMSAR (an international treaty for the conservation and sustainable use of wetlands and also known as the Convention of Wetlands on International Importance) site considering its ecological value. According to the said letter, the CEA has informed the RAMSAR Secretariat in Switzerland about that and have planned to collect more information of the bio-diversity of the EPA with the assistance of experts in this field.

Moreover, we have drawn our attention to paragraph 32 of the Petition of the Petitioners. The said paragraph reads;

“Petitioners further state that whilst acknowledging the need to mitigate the traffic issues, the permanent loss of a bio-diversity hotspot and a unique environmental asset such as the Thalangama / Awerihena Wetlands and EPA playing multiple roles of flood control, carbon absorption and oxygen production for the diverse species and for human life will be far more costly than an alternative route to construct the elevated highway, so as to avoid building over the wetland area and the EPA when the Economic Service Value of the wetland and the EPA

and permanent and irreparable damage to the invaluable ecosystems are considered and ascertained. Therefore, an alternative route should be considered.”

However, the contention of the 1st and 1A Respondents is that the Petitioners have clearly admitted that the Gazette Notification No. 2237/7 changes the status quo and accordingly, the Petitioners’ application has become futile due to the amendment coming into effect permitting the construction of the proposed elevated highway through the Thalangama EPA. The contention of the 2nd to 5th Respondents is also based on the futility and in addition to that, those Respondents averse that the proceedings in this application would be directly challenging a policy decision.

I am of the view that the relevant Minister by the amendment to his original order has made room for investigation by this Court the environmental impact that would be caused due to the proposed construction. Therefore, such investigation by this Court can be done without any hinderance to the relevant Cabinet decision/Policy decision.

In the light of my above findings, the proposition of the Respondents cannot be accepted and I am of the view that, prima facie there is no ground to dismiss the application of the Petitioner merely on the amendments made to the original Gazette Notification No.1487/10, after filing the instant application in this Court. In the circumstances, I am of the view that an opportunity should be afforded to the Petitioner to satisfy this Court on the initial threshold requirement which warrants this Court to issue formal notice of this application to the Respondents. The order on issuance of notice and the interim relief will be issued by this Court after hearing all parties at the support stage.

Judge of the Court of Appeal

Dhammika Ganepola J.

I agree.

Judge of the Court of Appeal