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

In the matter of an application under Article 140 of the Constitution for a mandate in the nature of Writ of Mandamus.

Bowhill Hydro Power (Pvt) Ltd
No. 382/7, Vidyaloka Mawatha,
Hokandara South.

PETITIONER

Court of Appeal Case No:
CA/WRIT/29/2022

Vs.

1. Sri Lanka Sustainable Energy Authority,
   No. 72, Ananda Coomaraswamy Mawatha,
   Colombo 07

2. Sulankshana Jayawardena
   Director-General,
   No. 72, Ananda Coomaraswamy Mawatha,
   Colombo 07

3. Janatha Estates Development Board,
   No 55/75,
   Vauxhall Street,
   Colombo 02.

4. Wg. Cmdr. (Rtd.) Buwaneka. D. Abeysuriya
   Chairman,
   Janatha Estate Development Board,
   No 55/75,
   Vauxhall Street,
   Colombo 02.

5. Land reform Commission,
   C82, Hector Kobbekaduwa Mawatha,
   Gregory's Road, Colombo 07.

6. Surveyor General,
   Surveyor General's Department,
   No. 150, Kirula road,
   Colombo 05.

7. Ramya Nirmali Ilayperuma

8. Bathiya Ajith Ilayaperuma
   Both of 141, Ketawalamulla Road,
   Colombo 09.

9. Hon. S. M. Chandrasena,
   Minister of Lands and Land Development

10. Kokila Hemachandra,
    Director – Land Acquisition,
    Both of,
    Ministry of Lands and Land Development,
    "Mihikatha Medura", Land Secretariat,
    No. 1200/6, Rajamalwatta road,
    Battaramulla.

11. Sameera Nuwan Rathnayake,
    Divisional Secretary,
    Pasbage Korale Divisional Secretariat,
    Pasbage Korale,
    Nawalapitiya.

RESPONDENTS

Before: C.P Kirtisinghe, J
Mayadunne Corea, J

Counsel: Uditha Egalahewa P.C., Damitha Karunarathne & Miyuru Egalahewa for the Petitioner
Shiloma David SC for the 1st, 2nd, 6th, & 9th Respondents
Harshika Samaranayake for the 5th Respondents

R. Gunarathne for the 7th Respondent

Supported on: 29.03.2020

Delivered on: 07.04.2022

Mayadunne Corea J

Petitioner Company is operating a mini hydropower project in a land in Nawalapitiya. The said land is a part of Bowhill Estate. The Petitioner has leased part of the Bowhill Estate for a period of 30 years. The said lease agreement was between the Petitioner and the Janatha Estates Development Board who is the 3rd Respondent in this case. The Petitioner's contention is that the land on which the hydropower project was constructed, was originally owned by the Land Reform Commission 5th Respondent, who had leased it to the Janatha Estates Development Board 3rd Respondent. The Janatha Estates Development Board on 06.08.2008 had entered into a lease agreement with the Petitioner to lease part of the estate which consists of A3 R3 P4.7 to the Petitioner. Petitioner alleges that subsequent to leasing out the land, he had obtained approval from the relevant stakeholders and had constructed a mini hydropower project. Subsequently, the Petitioner found that pursuant to the Court case, the title of the land had shifted from the Janatha Estates Development Board to the 7th and 8th Respondents. The Petitioner's main allegation is that there is an imminent danger of the 7th and 8th Respondents who are private individuals, taking possession of the hydropower plant in view of the change of ownership of the land. Thus, the Petitioner had filed this writ application.

In summary, what the Petitioner is seeking among other grounds are as follows;

(a) Writ of mandamus against the 1st and 2nd Respondents to take the necessary action as stipulated by section 25 of the Sri Lanka Sustainable Energy Act No 35 of 2007, to take necessary actions to vest the absolute ownership of all renewable energy resources as declared in P15.

(b) Writ of mandamus against the 11th and the 6th Respondents to conduct a survey of the landmarked as P17(A)

(c) Writ of mandamus directing the 9th Respondent to take the necessary action as stipulated by section 5 of the Land Acquisition Act.

(d) For an interim order staying and or preventing 7th and or 8th Respondents and any one or more of the other Respondents from entering the areas of the mini-hydro power project, disturbing and or preventing its operations.

(e) Interim order staying 1–11 Respondents from taking any actions or measures in contravention of Act No 35 of 2007 until the final determination of this application.

At the commencement of submissions, the Petitioner's counsel submitted that as the acquisition process of the land has now commenced, he is containing his relief to prayers G and H of the Petition against the 7th and 8th Respondents. Which in essence is to prevent the Respondents from disturbing and or preventing the operations of the mini-hydropower project and taking any action or measure in contravention of Act No 35 of 2007. It was also submitted that presently steps have been taken to acquire the land and section 2 notice under Land Acquisition Act had already been published (P17 A, B, C).

This case was originally fixed for support on 02.03.2022 and subsequently was refixed for support on 22.03.2022. Thereafter it was taken up for support on 29.03.2022. On this day, the 7th and 8th Respondents made submissions objecting to the granting of notice. Their main objection was that as per the District Court case, the title to the land in question, where the hydropower plant is located, is vested with them. However, the Petitioner has failed to enter into any agreement pertaining to the hydropower plant with the present owners of the land. Accordingly, the 7th and 8th Respondents submitted that the Petitioner is a trespasser as far as they are concerned and submitted that this Court should not issue notice. We find that even though this case was called on several days before it was fixed for support, the 7th and 8th Respondents had not filed any objections to the interim relief sought. However, as stated earlier the learned Counsel who appeared for the 7th and 8th Respondents vehemently objected to the interim relief being granted.

The learned Counsel for the Petitioner contended, that in view of section 4 of the Sustainable Energy Authority Act No 35 of 2007, it is an objective of the 1st Respondent to identify, assess and develop renewable energy resources with a view to enhancing the energy security and contended that, Korawak Oya had been identified as such a source. The Petitioner had been given the authority to construct a hydropower plant at Bowhill estate, with this approval, the Petitioner has constructed the said power plant and it is presently in operation. The learned Counsel for the Petitioner brought the attention of the Court to section 12 of Act No 35 of 2007 and contended that pursuant to the said section, the area where the Bowhill hydropower plant is situated has been identified and declared as an energy development area. The attention of this Court was drawn to Gazette No 1858/2, where the Korawak Oya had been gazetted as an energy development area. It was the contention of the Petitioner, that pursuant to the publication of the gazette, by operation of section 15 of the statute, the development area is vested with the State and therefore contended that by operation of law, the 7th and 8th Respondents cannot claim ownership to this particular area of the estate.

The learned Counsel also submitted that in view of section 14 of the Sri Lanka Sustainable Energy Authority Act, the owner or the occupier is prohibited from performing certain acts in the development area. It was also brought to the attention of this Court, that under sections 62 and 63, a person who contravenes the provisions of this Act can be legally dealt with.

The Petitioner contended that through P15, an energy development area had been declared and the said area is vested with the State. Accordingly, a land area extending up to 500 meters towards the landside on either side of the median of the rivers and branchers are caught up under this gazette. It was also submitted to this Court, that pursuant to the provisions available in the Sustainable Energy Authority Act, the 1st Respondent has taken steps to acquire a portion of 3R and P4.11 to the State. The notice under section 2 of the Land Acquisition Act was tendered and marked as P17.

This Court has considered the submissions of both parties and we are of the view that formal notice of this application must be issued to all Respondents.

Now, this Court will consider the application for interim relief.

The Petitioner contended that they are seeking interim relief prayed in prayer G and H, where it is sought to restrain or prevent 7th and 8th Respondents from entering the area and disturbing and or preventing the work of the mini-hydropower project. In this instance, we will be guided by,

Billimoria v, Minister of Lands and Land Development & Mahaveli Development and two Others 1978-79-80 (1) SLR (SC)10 at page 15 pertaining to interim orders where it was held **"*it would not be correct to judge such orders in the same strict manner as a final order. Interim orders by their very nature must depend a great deal on a judge's opinion as to the necessity for interim action".***

The grounds a Court should consider in an application for interim order were discussed in **Duwearahchi and another vs Vincent Perera and others 1984 (2) SLR 94, w**here attention was given to 3 grounds namely;

a) Will the final order be rendered nugatory if the petitioner is successful?
b) Where does the balance of convenience lie?
c) Will irreparable and irremediable mischief or injury be caused to either party?

As contended by the Petitioner, pursuant to the gazette notification, 500 meters towards landside on either side of the median of the rivers and branches specified therein, have been vested with the State. However, both parties have failed to demonstrate whether this project exceeds the extent contemplated in the Gazette or is within the prescribed 500 meters. The Petitioner contended that as at 10th October 2014, section 2 notice has been issued pertaining to the acquisition of the land. The said notice demonstrates that an area of 3R and 4.11 P is to be acquired.

The 7th and 8th Respondents who are private individuals contended that, the entire land is now vested with them pursuant to the District Court case. Thus, in the absence of any material to demonstrate the extent of the Petitioner's project, we find that, if the area contemplated in Prayer (G) exceeds the prescribed 500 meters extent, then if we issue an interim order, the result would be that, the Petitioner would be enjoying a portion of the land that is owned by the 7th and 8th Respondents, without making any payments until the acquisition proceedings are completed. The said Respondents would not be benefited financially by the Petitioner's occupation and would be deprived of enjoying the possession of the said portion of land.

If the project is within the prescribed 500 meters zone, then as per section 14 of the Act the owner or occupier is prohibited from carrying out certain acts within the said zone. Hence in our view, Section 14 read with sections 62 and 63, of Act No 35 of 2007, addresses the Petitioner's concern of any imminent danger to the project as a result of the change of ownership.

The Petitioner has drawn the attention of the Court to document P6, whereby the 7th and 8th Respondents have sent a letter of demand through their attorneys to the Petitioner. The last paragraph of the said letter states as follows,

"Therefore, any occupation or any operations by your company without my client's written permission on this property beyond the above date of agreement shall be considered illegal and my client will take steps to eject from the premises".

In view of the said last paragraph of the letter, the Petitioner has failed to demonstrate to Court, whether the permission of the new owners has been sought as requested by P6, to occupy and operate the project and or whether it had been refused.

In the absence of such permission being sought and refused, if this Court issues an interim order, it would result in the 7th and 8th Respondents who are private individuals and owners of the Bowhill Estate being deprived of enjoying their land and would allow the Petitioner to freely occupy 7th and 8th Respondent's land.

Also, in view of the above-mentioned provisions contained in the Act, we do not think that the final order even if it is in favor of the Petitioner, would be made nugatory by not issuing the interim order.

The Petitioner's prayer for interim relief has to fail also on another ground. The Petitioner is seeking the relief of a writ of mandamus against all the Respondents other than the 7th and 8th Respondents. The Court is not inclined to grant interim relief as per prayer G and H as the Petitioner is seeking only interim orders against the 7th and 8th Respondents. The Petitioner has refrained from seeking any substantive relief against the 7th and 8th Respondents who are private individuals. It is trite law that interim injunctions or restraining orders should not be granted in the absence of any substantive relief being prayed against a party.

In **Mallika De Silva Vs. Gamini De Silva 1999 (1SLR) 85** It was held "***Interim injunction is a relief that cannot be granted solely or independently without any final or substantive relief. The respondent who had not sought any substantive relief has no right in law to seek an interim injunction, as it cannot be a relief by itself but is only a mechanism to assist and protect final relief***"

In this instance, as stated earlier, Petitioner's main relief of seeking a writ of mandamus is directed against all the other Respondents except the 7th and 8th Respondents.

In this case, we are called upon to grant interim relief against two private individuals in a writ application where no substantive reliefs are prayed against them. Therefore, we are inclined to follow the principle set out in Mallika De Silva's judgment.

Considering the submissions of the learned Counsel and the material submitted, we find that the Petitioner has failed to establish that the balance of convenience is with him and also that the equitable considerations favor the Petitioner to obtain the interim relief. Therefore, for the reasons set out above, we are not inclined to grant the interim stay order. Hence, we see no legal basis to issue the interim orders prayed for.

Judge of the Court of Appeal

C.P Kirtisinghe, J

I agree

Judge of the Court of Appeal