

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

In the matter of an application for an Order in the nature of a Writ of Certiorari against the Valikamam North Pradeshiya Sabha and others under Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.A.D. Perera of
CoolMan Ice Factory of
No. 98/1, Mankuliya Road,
Negombo .

CA WRT Application 37/2020

And of
CoolMan Ice Factory,
Ponnalai, Jaffna

Petitioner

Vs.

1. Valikamam North Pradeshiya Sabha,
Office of the Valikamam North
Pradeshiya Sabha,
Kankasanthurai.

2. S.Sukirthan,
Chairman,
Valikamam North Pradeshiya Sabha,
Office of the Valikamam North
Pradeshiya Sabha,

Kankasanthurai.

Members of the 1st Respondent

3. Ponnampalam Rasenthiram,
4. Pakiyathanar Mariyathas,
5. Sellathurai Kamalanathan,
6. Iyathurai Mayuran,
7. Daniyel Anthonipillai,
8. Merry Anne Sakayarani Kuventhirasa,
9. Saravanamuthu Thanapalasingam,
10. Senathirasa Kalaianathan,
11. Murukan Iyathurai,
12. Sanmugalingam Saseevan,
13. Selvakumar Vijayaraj,
14. Sivapalasanthiran Harikaran,
15. Subaswaran Santhiramathi,
16. Pasupathi Yogarasa,
17. Ponnuthurai Thangarasa,
18. Markandu Mahatheva,
19. Kanthiya Jinathas,
20. Kanthasami Mayurathan,
21. Sokkalinyam Sabesan,
22. Nayalingam Irathinapoopathiu,
23. Sivarasa Thayavathi,
24. Rasarathinam Jeyapalasiniam,
25. Kabivasan Seetharaman,
26. Sivakumaran Senthuran,
27. Premalatha Baskaran,
28. Thiyakarasa Pasetha,
29. Thayumanavar Nikethan,
30. Nallaiya Puratchithasan,
31. Arulampalam Suntharesan,
32. Kengasuthan Piratheepan,
33. Ponnambalam Aathavan,
34. Anusathi Iyathas,
35. Puvaneswaran Vathani,

36. Vanniyasinyam Pivapakaran,
37. Rasarathnam Srithamothararasa,
38. Pakiyarasa Kopinath,
39. Velmurugan Kopinath,
40. Sinnathambi Jeyarathnam,
All members of Valikamam North
Pradeshiya Sabha,
Office of the Valikamam North
Pradeshiya Sabha,
Kankasanthurai.
41. Water Resources Board,
Of No. 2A, Hector Kobbekaduwa Avenue,
Colombo 07.
42. Provincial Manager (North)
Water Resources Board,
Jaffna.

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

Counsel: Dr. Sunil F.A. Coorey with Nilanga Perera for the Petitioner
M.A. Sumanthiran PC with Divya Marasinghe for the 1st-10th , 12th-
14th,10th,17th,19th-27th , 29th-30th , 32nd-34th 36th-37th and 39th -42nd Respondents

Argued On : 15.02.2023

Written 12.04.2023 (by the Petitioner)

Submissions:

On

Decided On : 17.05.2023

B. Sasi Mahendran, J.

The Petitioner, the sole proprietor of COOLMan Ice Factory which is engaged in the business of manufacturing blocks of ice (“P1”), invokes this Court’s writ jurisdiction, conferred by virtue of Article 140 of the Constitution, praying for a writ of Certiorari to quash a resolution of the Respondent Pradeshiya Sabha (Resolution bearing No. 11/21-03-2019 dated 21st March 2019 “P6”) to prevent the transportation of groundwater extracted from a land belonging to the Petitioner (which is situated within the territorial limits of the said Pradeshiya Sabha) to the land on which the factory is situated (which is situated outside the territorial limits of the said Pradeshiya Sabha). The extracted groundwater is required for the purpose of manufacturing ice.

It must be noted that what the Respondent Pradeshiya Sabha has opposed is not the extraction of groundwater but rather the transportation of the extracted groundwater to land situated outside the territorial limits of the Pradeshiya Sabha for a commercial purpose i.e., manufacturing blocks of ice. There was no reason forthcoming at the time of the passing of the impugned resolution nor is there any reason disclosed to this Court as to why the Pradeshiya Sabha objected to the same.

The relevant authority tasked with overseeing the extraction of groundwater, for the purpose of the instant application, is the Water Resources Board (the 41st Respondent). For the purpose of clarity, the Water Resources Board Act No. 29 of 1964, as amended by Act No. 42 of 1999, facilitated the establishment of the Water Resources Board (hereinafter referred to as “the Board”) which is tasked with advising the Minister concerned on the matters set out in Section 12(1) of the said Act, which includes, *inter alia*, the control, regulation, and development of water resources of the country and the prevention of pollution of rivers, streams, and other water resources. Section 12(3) sets out a non-exhaustive list of activities the Board is empowered to perform in order to enable “it to effectually perform its duties” under Section 12(1). These activities include carrying out feasibility studies on the availability of groundwater resources; carrying out hydrogeological investigations to identify groundwater sites for deep tube wells and agro wells; the construction of tube wells in a scientific manner to enable the extraction of groundwater for domestic, agricultural and industrial purposes and the drilling of boreholes to investigate the subsurface strata.

In pursuance of the said statutory functions vested in it, the Board promulgated certain rules under the hand of the Minister concerned, in terms of Section 16 of the said Act. These rules were published in Gazette bearing No. 2010/23 dated 16th March 2017 (“P3”). The rules require any entity that uses groundwater for any commercial purpose to carry out the project with the approval of and under the supervision of the Board. A procedure was adopted by the Board for granting approval, which the Board itself admits (vide motion dated 22nd October 2020) that the Petitioner’s factory has duly complied with. The Petitioner annexed a letter dated 10th December 2019 (bearing reference no. PM/NP/JAF/2019-01 – “P12”) by which the Water Resources Board has granted approval for groundwater extraction.

The chain of events leading to the present application commenced when the 2nd Respondent (Chairman of the Respondent Pradeshiya Sabha) required that an application be made to him for permission to transport the extracted groundwater, which the Petitioner had duly furnished (“P4”). In response to this letter, the 2nd Respondent by letter dated 9th April 2019 (“P5”) wrote to the Petitioner that permission cannot be granted to transport groundwater to a land situated outside the territorial limits of the Pradeshiya Sabha for commercial purposes because a resolution bearing No. 11/21-03-2019 (“P6”) had been passed preventing the same.

It also appears, on a perusal of the statement given to the Police (“P8”) by the Petitioner’s agent, that acting in pursuance of the impugned resolution, the Chairman of the Pradeshiya Sabha had on occasion forcibly prevented the transportation of the extracted groundwater.

It must be reiterated that the actions of the Petitioner are with the due sanction of the relevant authority i.e. the Water Resources Board, which had followed the statutory procedure and approved the extraction of groundwater. The Respondent Pradeshiya Sabha could have, at the least, agitated their concerns to the Water Resources Board by making representations, before passing the impugned resolution. On the contrary, the Respondent Pradeshiya Sabha had written (this too, only after the Respondent Pradeshiya Sabha had refused permission) to the Water Resources Board only inquiring whether the Board had granted permission to the Petitioner’s factory to extract groundwater (“P9”). If there were genuine concerns pertaining to the water reserves of

the area and the Petitioner's usage operating in the mind of the Respondent Pradeshiya Sabha it could have raised its concerns about the groundwater reserves with the Board.

While it has not communicated the same to the Board, if there were any such concerns, the same could have been ideally informed to the Petitioner. In a constitutional structure built on the bedrock principle of the rule of law, instead of resorting to self-help measures or taking the law into one's own hands, the Respondent Pradeshiya Sabha could have exercised civility and informed its concerns to the Petitioner, if they had any concern, before obstructing the transportation of extracted groundwater.

Even at the time of refusal or thereafter, there is no reason forthcoming from the Respondent Pradeshiya Sabha why transportation of extracted groundwater is prohibited. It is not only the Petitioner, but also this Court that is left in the dark, having to guess what those concerns, if any, might have been. This is conduct contrary to the principles of good administration. The absence of any reasons renders the Petitioner's ability to have the decision judicially reviewed nugatory. For instance, in R v. Secretary of State for the Home Department ex parte Doody [1993] 3 WLR 154, [1994] 1 A.C. 531 Lord Mustill found that there was a duty to give reasons, because the reasons would facilitate any judicial review challenge by the prisoner. His Lordship held:

“To mount an effective attack on the decision, given no more material than the facts of the offence and the length of the penal element, the prisoner has virtually no means of ascertaining whether this is an instance where the decision-making process has gone astray. I think it important that there should be an effective means of detecting the kind of error which would entitle the court to intervene, and in practice I regard it as necessary for this purpose that the reasoning of the Home Secretary should be disclosed”.

More fundamentally, the absence of reasons, when there is no apparent legal basis for the decision, will enable us to safely draw the presumption that the decision was arbitrary. In Padfield v. Minister of Agriculture, Fisheries and Food [1968] 2 WLR 924, [1968] AC 997, the House of Lords famously held that if a **prima facie case of unlawfulness was established** by a Petitioner and the Respondent has not given any good reasons for pursuing the impugned course of action the court could infer that there was no good reason to take such a course of action.

De Smith's 'Judicial Review' 8th edition notes:

“Where an applicant seeks to impugn a decision of an administrative authority other than by claiming non-compliance with a duty to give reasons- for example by challenging the legality or rationality of decisions- a failure by that authority to offer any answer to the allegations may justify an inference that its reasons were bad in law or that it had exercised its powers unlawfully. ‘Absurd’ or ‘perverse’ decisions may be presumed to have been decided in that fashion” [emphasis added]

Having analyzed the authorities on the duty to give reasons her Ladyship Dr. Shirani Bandaranayake J. (as she then was) in Hapuarachchi v. Commissioner of Elections [2009] 1 SLR 1 at 13 held:

“On a consideration of our case law in the light of the attitude taken by Courts in other countries, it is quite clear that giving reasons to an administrative decision is an important feature in today’s context, which cannot be lightly disregarded. Moreover, in a situation, where giving reasons have been ignored, such a body would run the risk of having acted arbitrarily, in coming to their conclusion.”

It also appears on a perusal of the documents that the Respondent Pradeshiya Sabha, as alluded to above, sought to ascertain the views of the Water Resources Board only after it had resolved to refuse permission to transport extracted groundwater, substantiating our observation that the decision is arbitrary. An arbitrary exercise of power is the antithesis of the rule of law.

Notwithstanding the aforesaid discussion, what is appalling to this Court is the absence of any legal basis for the conduct of the Respondent Pradeshiya Sabha to pass a resolution to prevent the transportation of extracted groundwater, which has been duly approved by the relevant authority in law tasked with the same. It is trite that the absence of any legal basis for the exercise of power renders that exercise of power *ultra vires*.

If there was a genuine concern as to the scarcity of groundwater in the Jaffna peninsula, it could have been brought to the attention of the Water Resources Board. Nevertheless, we are mindful that Pradeshiya Sabhas are established for the well-being of inhabitants of the localities it governs. If, therefore, there exists a genuine concern as

to the scarcity of groundwater, the Respondent Pradeshiya Sabha is not hindered to raise that concern with the Water Resources Board for the Board to make an assessment, if needed.

For those reasons, we grant the relief prayed for.

JUDGE OF THE COURT OF APPEAL

D. N. SAMARAKOON, J.

I AGREE

JUDGE OF THE COURT OF APPEAL