

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

*In the matter of an application for mandates in
the nature of Writs of Certiorari and Mandamus
under and in terms of Article 140 of the
Constitution.*

CA/WRIT/210/2022

1. Sriyangani Sandhya Vanderkoon
17-3-H, Srini Sevana
1st Lane, Lake Road,
Boralasgamuwa.

Petitioner

Vs.

1. M.G.C. Suriyabandara
Director- General
Department of Wildlife Conservation,
No. 811/A, Jayanthipura Road,
Battaramulla.
2. Director General of Forest,
Department of Forest Conservation,
Sampathpaya,
82, Rajamalwatta Road,
Sri Jayawardenepura Kotte.
3. Director General,
Department of Archaeology,
Sir Marcus Fernando Mawatha,
Colombo 7.
4. Director General,
Department of Irrigation,
230, Baudhdhaloka Mawatha,
Colombo 7.

5. Director General,
Department of Agrarian Development,
42, Sir Marcus Fernando Mawatha,
Colombo 7.
6. Deputy Director General (Environmental
Assessment),
Central Environmental Authority,
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.
7. Deputy Director General (Environmental
Pollution Control Unit),
Central Environmental Authority,
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.
8. Director General,
Urban Development Authority,
6th and 7th Floor, "Sethsiripaya"
Battaramulla.
9. General Manager,
Sri Lanka Land Reclamation and
Development Corporation,
Sri Jayawardenepura Mawatha, Welikada,
Rajagiriya.
10. Harsha Sri Krishmal Jayarathna Bandara
Divisional Secretary,
Divisional Secretariat,
Hingurakgoda.
11. R.M.K.N.G.B. Abeysingha
The Secretary,
Pradeshiya Sabha,
Hingurakgoda.
- 11A. Ranawaka Arachchige Hemakanthi,
The Secretary

Pradeshiya Sabha,
Hingurakgoda.

12. Dissanayake Weerasinghe
Assistant Director (Law Enforcement),
Department of Wildlife Conservation,
811/A, Jayanthipura Road,
Battaramulla.
13. Assistant Director (Polonnaruwa) Range
Office,
Department of Wildlife Conservation,
Circle Road,
New Town,
Polonnaruwa.
14. P.B.B. Madugalle
Park Warden,
Minneriya National Park,
Department of Wildlife Conservation,
Ambagaswewa,
Habarana.
15. Assistant Director (Natural Resource),
Department of Wildlife Conservation,
811/A, Jayanthipura Road,
Battaramulla.
16. Wildlife Ranger (Minneriya),
Minneriya National Park,
Department of Wildlife Conservation,
Ambagaswewa,
Habarana.
17. Assistant Director (Girithale),
Department of Wildlife Conservation,
Elahera Road,
Girithale.
18. Wildlife Ranger (Girithale),
Department of Wildlife Conservation,

Elahera Road,
Girithale.

19. Manjula Amararathna
Director (Manage the Reservation Areas),
Department of Wildlife Conservation,
No. 811/A, Jayanthipura Road,
Battaramulla.
20. Higurakgoda Pradeshiya Sabha,
Higurakgoda.
21. D.R. Udawatta
Chairman,
Higurakgoda Pradeshiya Sabha,
Higurakgoda.

Respondents

Before : Sobhitha Rajakaruna J.

M. A. R. Marikar J.

Counsel: Saliya Pieris, PC with Thanuka Nandasiri and Pasindu Tilakarathne for the
Petitioner.

Manohara Jayasinghe, DSG with S. David, SC for the 1st- 4th, 6th – 10th and 12th-
19th Respondents.

Pulasthi Rupasinha for the 11th, 20th and 21st Respondents.

Argued on: 16.06.2023

Written Submissions: Petitioner - 11.08.2023

Decided on: 01.09.2023

Sobhitha Rajakaruna J.

The Petitioner seeks both a writ of certiorari quashing the 1st Respondent's decisions (contained in 'P38' and 'P27') not to grant permission to construct a house and a writ of mandamus directing the 11th, 20th and 21st Respondents to approve the relevant building plan, which was submitted by the Petitioner.

The Petitioner states that she and her family members claim an undisputed title in respect of the subject land for their undivided share for a period of over 80 years. The old house that exists in the said subject land is supposedly the birthplace of her elder brother and sister. The 1st- 4th, 6th- 10th, and 12th- 19th Respondents ('Respondents') deny such averments of the Petitioner on the basis that they are unaware of the respective averments.

The 20th Respondent- Hingurakgoda Pradeshiya Sabha has issued a development license upon an application made by the Petitioner in order to construct a house in the subject land described as Lot 304 in the plan marked 'P6'. When the Petitioner and her family members with such sanction of the Pradeshiya Sabha commenced the construction of the house on 19.04.2016, the entire construction team including the Petitioner has been arrested by a team of Wildlife Officers led by the 4th Respondent.

The Petitioner contends that her private land which is subjected to this case has been included in the National Forest Reserve. Such Forest Reserve has been declared under the name "Kaudulla Minneriya Jungle Corridor" as per the Gazette Notification No. 1343/10 ('P11') published under section 2 (2) of the Fauna and Flora Protection Ordinance ('Ordinance') on 01.06.2004. The Petitioner challenged the said Gazette Notification 'P11' by way of a Writ Application bearing case No. CA/Writ/223/2013. The Attorney General during the pendency of the said case has informed the Court of Appeal that the said Gazette would be withdrawn as it had been issued under a wrong provision of law. The proceedings of the Court of Appeal dated 29.11.2018 are marked as 'P15'.

The argument of the Petitioner in the instant Application is twofold. Firstly, she argues that the Respondents have failed to follow the procedure laid down in section 9A (2) of the said Ordinance, which specifically provides a series of steps to be followed when granting approval for a development activity or trade or business within the areas specified in section 9A (1).

Secondly, the Petitioner asserts that there are several houses and buildings located in the blocks of land adjacent to that owned by the Petitioner. It is further stated that even at present certain constructions are being carried out with the approval of the relevant authorities, within the area of land adjoining the Petitioner's private land. The Petitioner complains that the 1st Respondent while refusing permission for the Petitioner to construct a dwelling in her land has failed to take any steps against the aforesaid constructions. Out of the two points mentioned above the Petitioner's cogent argument is that the decisions reflected in the impugned documents marked 'P37' and 'P38' are contrary to law, as the relevant authorities have failed to adhere to the procedure stipulated in the section 9A when they refused to grant permission in respect of the Petitioner's request. Now I must examine the effect of section 9A of the Ordinance upon the Petitioner's request for permission to put up a dwelling house within the subject land.

Section 9A of the Ordinance imposes restrictions on development activity within a distance of one mile of the boundary of any National Reserve. As per the interpretation section [72(1)] a "development activity" means any activity which has an impact on the physical nature of the land or the natural biological phenomenon of fauna and flora of such land". The provisions of section 9A (1) are subject to section 3A (1) which stipulates that no person shall, within one mile of the boundary of a National Reserve, construct a tourist hotel or provide any services or facilities similar to the services or facilities provided by a tourist hotel. It is paramount to note that the permission sought by the Petitioner was to only put up a dwelling house.

Section 9A-

"(1) Subject to the provisions of section 3A, no person or organization, whether private or State shall within a distance of one mile of the boundary of any National Reserve declared by Order made under section 2, carry out any development activity of any description whatsoever without obtaining the prior written approval of the Director-General.

(2) Upon receipt of an application for a permit to carry out a development activity or trade or business within the area specified in subsection (1), the Director-General may require the applicant to furnish an Initial Environmental Examination Report or an

Environmental Impact Assessment Report, as the case may be, relating to such development activity or trade or business. It shall be the duty of the applicant to comply with such requirements. Every Initial Environmental Examination Report or an Environmental Impact Assessment Report shall contain such particulars as may be prescribed.

(3) The Director-General shall, on receipt of an Environmental Impact Assessment Report or an Initial Environmental Examination Report, as the case may be, furnished to him by an applicant in compliance with any requirement imposed on such applicant under subsection (2)—

(a) submit a copy of such assessment or examination, as the case may be, to the Committee appointed by the Director General in that behalf, for its comments, if any; and

(b) by notice published in the Gazette, notify the place and time at which such assessment or examination, as the case may be, will be available for inspection by the public and invite the public to make comments, if any, thereon.

(4) The Committee shall within sixty days of an Environmental Impact Assessment or an Initial Environmental Examination, as the case may be, being submitted to it under subsection (3), make its comments, if any, thereon, to the Director-General.

(5) Any member of the public may within thirty days from the date on which a notice under subsection (3) relating to such assessment or examination, as the case may be, is published in the Gazette make his comments, if any, thereon, to the Director-General.

(6) In deciding whether to issue a permit under subsection (2) authorizing a person to carry out a development activity or trade or business within the area specified in subsection (1), the Director-General shall have regard to any comments made under subsections (4) and (5) on the environment impact assessment or examination, as the case may be, if any, relating to such activity, trade or business.

(7) the Director-General shall, within sixty days of the receipt by him of any comments made under subsections (4) and (5), make the decision referred to in subsection (6)."

It appears that the above provisions prescribe a clear process that needs to be followed by the Director General of Wildlife Conservation when he receives an application for permission to carry out any development activity within the area described in the section. The Petitioner relies on precedent enunciated in the cases of *Bradbury and Others v. Enfield London Borough Council (1967) 1 WLR 1311 at 1324*, *Associated Provincial Pictures House Ltd v. Wednesbury Corporation (1948)- 1KB 223 at 229*, *Jayantha Wijesekara and Others v. Attorney General and Others SC (FR) 243-245/2006* and *Council of Civil Service Union v. Minister for the Civil Service (1985) AC 374 at 410*. Based on the judgements mentioned above the Petitioner submits that it is imperative that the procedure laid down in the relevant statute should be followed properly.

In support of the aforesaid argument, the Petitioner has placed reliance on the fact that the relevant authorities conducted a field visit without affording an opportunity for the Petitioner to furnish an Initial Environmental Examination Report ('IEE' Report) or an Environmental Impact Assessment Report ('EIA' Report) prescribed in section 9A (2) of the Ordinance. The impugned letters dated 10.03.2021 marked 'P27' ('R3') and letter dated 04.03.2022 marked 'P38' were to refuse the Petitioner's application seeking permission to put up a dwelling house. The letter marked 'R1' discloses that the Petitioner made the said request on 10.12.2019. It is apparent that the said request was initially refused by the letter marked 'P27' based on a field visit carried out by several officials in addition to those of the Department of Wildlife Conservation. The letter marked 'P38' has been issued on a field visit conducted on 23.12.2019. It can be assumed that the previous refusal marked 'P27' has also been issued on the same field visit and there seems to be no dispute among parties on that point. The main reasons for refusal cited in "P27" and "P28" are identical and they appear to be as follows:

1. Inhabitation of wild animals due to non-occupation of the subject land for a long period of time.
2. The recommendation to vest the Petitioner's private land to the Department of Wildlife Conservation, subject to compensation in line with the government valuation criteria.
3. Providing an alternate land to the Petitioner in the event the Petitioner's land is vested.

The report issued consequent to the said field visit is annexed to the Statement of Objections filed on behalf of the said Respondents and it is marked as 'R5'. A perusal of the

aforementioned field visit report reveals that it includes, to a greater degree, only the views and recommendations of various participating government officials. I am puzzled by the recommendation therein to acquire the land of the Petitioner as a consequence of her application for permission to put up a dwelling.

The view expressed by the Divisional Secretary of Hingurakgoda in the said Report is that no permission could be granted in favour of the Petitioner. However, no legal basis has been disclosed to that effect by the said Divisional Secretary. In the meantime, the Project Legal Consultant queries whether the Department of Wildlife Conservation has the power to regulate the other institutions whose approval may be required to grant permission for a development activity. The said Legal Consultant has observed in the Report that the Petitioner owned about ten acres of land and an opportunity should be accorded to the Petitioner to put up a structure using either planks or stilts. He further opines that not permitting such a structure would cause prejudice to the long-standing title of the Petitioner and accordingly he recommends granting an opportunity for the Petitioner provided there is no legal barrier to that effect. Anyhow the representative of the legal division of the relevant Department and the Director (Reservation Management) have stated in the Report that the Petitioner should not be allowed to put up a house at the relevant location. One of the reasons raised by the said two officers was on the pretext that the other landowners of the area would also tend to make similar applications. The same view has been illustrated in clause 4.21 of the impugned letter 'P38'. Moreover, I am unable to find a nexus between the said Ordinance and the alleged zone referred to in the said report by the name "Praeyrana" (ප්‍රේරන කලාපය) and thus, I am not inclined to accept any vocabulary used by the officials on their own assumptions or for their mere convenience. No reasonable explanation has been given as to how they have derived the word 'ප්‍රේරන කලාපය'.

The primary defense taken by the 1st Respondent to justify his decision not to allow the construction commenced by the Petitioner emanates upon the buffer zone of the Minneriya National Park. The 1st Respondent contends that the subject land which is claimed by the Petitioner is located within the said buffer zone. On the contrary, the aforementioned report indicates that the area in which the subject land is located is a wildlife habitat. Anyhow, this court has not received sufficient proof as to whether the subject area is a designated buffer

zone in accordance with section 2 (1) of the Ordinance. Even the Gazette Notification marked 'R2' is not an order issued under section 2 (1) but under section 2 (2) of the Ordinance by which the Minister has the authority to declare a specific area to be a sanctuary or a managed elephant reserve for the purposes of the Ordinance.

On a careful perusal of section 9A (1) of the Ordinance, it is implied that carrying out any development activity as defined in section 72 (1) is not a prohibited act. The word prohibited in its literal sense means any activity which is formally forbidden by law. Carrying out a development activity as specified in section 9A (1) can be classified not as a prohibited activity but as a restricted activity that can be carried out under a license or subject to a condition. One of the underlying purposes of the Ordinance as per its Preamble is to provide for the prevention of commercial or other misuse of such fauna and flora and their habitats. Thus, the refusal of Petitioner's request to construct a dwelling house should be done only according to the procedure laid down in the said Ordinance and not on assumptions or recommendations made without a legal basis. In other words, the decision to refuse or grant permission for a development activity under the said section 9A should be made rationally, reasonably and without illegality.

I am convinced that most of the recommendations that appear in the said field report 'R3' have no legal basis. The learned Deputy Solicitor General attempted to equate fulfilling the requirements stipulated in the said section 9A (2) to submitting the field visit report marked 'R3'. I am unable to agree with such a proposition as the said field visit report cannot be considered a final decision made by the Director General of Wildlife Conservation under section 9A of the said Ordinance. To my mind, the said field report cannot be equated to an IEE Report or an EIA Report. As I mentioned earlier the said report 'R3' is mixed with opinions and recommendations of several government authorities and there is no substantive decision made according to law. In these circumstances, I am compelled to arrive at a conclusion that the decisions reflected in the impugned documents 'P27' and 'P38' have been made without following the due process prescribed in section 9A of the Ordinance and such decisions should not be sustained.

Now I must advert to the second point of the argument raised by the Petitioner who asserts that the Respondents have failed to take any steps against the ongoing construction carried

out with the approval of the relevant authorities within the area adjoining the Petitioner's private land. The Petitioner contends that such construction including houses and buildings is clearly reflected by the photographs marked 'P39(a)' to 'P39(h)'. Generally, fairness is when everyone is treated equally and no one is left out. I take the view that the Director- General when exercising his powers under section 9A is required to strike a balance, lawfully, between the procedure laid down in section 9A and the rules of fairness. However, I need not lengthen this judgement by analyzing the Petitioner's said second argument in a detailed manner as I have already found that the impugned documents 'P27' and 'P38' are liable to be quashed.

In light of the above, I proceed to grant and issue a mandate in the nature of a writ of certiorari quashing the decisions reflected in the documents marked 'P27' and 'P38'. Anyhow, I am not inclined to issue a mandate in the nature of a writ of mandamus as prayed for in the prayer of the petition, as seeking such relief by the Petitioner certainly goes against her own stand that the 1st Respondent has not followed the proper procedure when refusing the Petitioner's application. It is an admitted fact by the Petitioner that in terms of section 9A of the said Ordinance, no person or organization, whether private or state shall within a distance of one mile of the boundary of any National Reserve declared by an order made under section 2, conduct any development activity of any description whatsoever, without obtaining the prior written approval (Vide- Paragraph 23 and 25 of the Petition). Based on all the circumstances of this case I need to make an observation that the 1st Respondent is duty-bound to evaluate any fresh application under section 9A of the Ordinance in respect of the subject land according to law.

Judge of the Court of Appeal

M. A. R. Marikar J.

I agree.

Judge of the Court of Appeal