

**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 in terms of Article 140 of the
Constitution.

Public Interest Law Foundation,
2nd Floor, Vidya Mandiraya,
120/10, Wijerama Mawatha,
Colombo 07.

PETITIONER

Court of Appeal case

No. CA 527/2015 Writ

Vs.

1. Central Environmental Authority,
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.
2. The Chairman,
Central Environmental Authority,
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.
3. The Director General,
Central Environmental Authority,
104, Denzil Kobbekaduwa Mawatha,
Battaramulla.
4. The Conservator General,
Forest Department,
82,
Rajamalwatte Road,
Battaramulla.

5. The Divisional Secretary,
Divisional Secretariat,
Kalawana.
6. The Land Commissioner General,
Land Commissioner General's Department,
Mihikatha Madura,
1200/6,
Rajamalwatte Road,
Battaramulla.
7. Water Management Water Power (Pvt) Ltd,
No. 115, Pirivena Road,
Boralessgamuwa.

RESPONDENTS

Before : A.L. Shiran Gooneratne J.

Counsel : Anandalal Nanayakkara for the Petitioner.

Manohara de Silva, PC for the 7th Respondent.

F. Jameel, A.S.G with Indula Ratnayake, SC for the 1st - 6th
Respondents.

Supported on : 21/09/2017, 10/10/2017

Written Submission on : 12/12/2017

Decided on : 15/03/2018

Order

A.L. Shiran Gooneratne J.

By application dated 23/12/2015, the Petitioner has moved to quash the approval given by the 1st to 3rd Respondents, marked P10B, to operate a Mini Hydro Project in Koskulana in the Ratnapura District and inter alia, is seeking the following interim reliefs in terms of paragraphs (g), (h) and (i) to the Petition,

- g) An interim order, to stay the illegal destruction from the said project and/or directing the maintenance of the status quo of the area in question pending the final determination of this application;
- h) Directing the 1st to 6th Respondents to take steps to prevent any further destruction being caused by the said mini hydro project to the Sinharaja World Heritage Site and and/or the Sinharaja National Heritage Wilderness Area and the buffer areas thereto, contrary to the provisions of the law, pending the final determination of this application;
- i) Restraining the 7th Respondent from carrying out any activity contrary to the provisions of the law negatively impacting the Sinharaja World Heritage Site and/or the Sinharaja National Heritage Wilderness Area and the buffer area thereto pending the final determination of this application;

1st to 4th and the 7th Respondents have filed limited Statements of Objection to the said interim relief sought for by the Petitioner.

The Petitioner submits that,

- a) the location of the said project within the Sinharaja World Heritage Site, the National Heritage Wilderness Area and the buffer area will have serious adverse impacts on its ecology if the said project continues,
- b) the State Agencies which granted the approval to the 7th Respondent (Water Management Water Power (Pvt) Ltd.) to carry out the said project has acted in contrary to the provisions of the law.

The Petitioner further submits that the Koskulana Ganga and the proposed Dam (weir) on the Koskulana river is indicated in the UNESCO World Heritage Site map marked P5, published in its website and the Gazette Notification marked P3, identifies Sinharaja under the National Heritage and Wilderness Areas Act (hereinafter sometimes referred to as the "said Act"). The existence of the said Gazette Notification P3, is admitted by the 1st to 6th Respondents. However the 4th Respondent (The Conservator General Forest Department) in the limited objections filed of record states that, the forest reserve and the proposed forest reserve as depicted in the UNESCO map is not an accurate reflection of the area of the boundaries as presently identified and declared according to the said Act. Accordingly, the Respondents state that in terms of the National Heritage and Wilderness Areas Act and the said Gazette Notification, the Mini Hydro Project is

outside the boundaries of the Sinharaja Heritage Site. The 1st to 6th Respondents further contends that the said Act has no reference to a buffer Zone and the Mini Hydro Project under construction by the 7th Respondent is within the energy development area specified by the relevant gazettes and further states that the relevant gazettes have not been challenged in a court of law to date. The counsel for the 7th Respondent was heard in support of documents marked 7R3A, 7R3B, 7R3C, 7R4, 7R5 and 7R6 in respect of the location of the Hydro Power Project in support of the claim that the said project is outside the boundaries of the Sinharaja Forest.

According to the Respondents, the approval process of the said Mini Hydro Project had commenced in 2008 and the 5th Respondent (The Divisional Secretary, Kalawana) has issued two permits in terms of the State Lands Ordinance to the 7th Respondent to carry out the development activities. This is reflected in documents marked 5R3 and 7R2A. Thereafter the 7th Respondent was given the approval to proceed with the said project by the relevant project approval Authorities /Agencies. In terms of gazette notification number 772/22, marked 3R4, the Project Approving Agency (PAA) as per the guidelines has to decide whether the project needs the certification of a Environment Impact Assessment (EIA) or an Initial Environment Examination (IIE). The criteria applicable to the said decision making process has been set out by the Respondents. Accordingly, the IIE report

states that the project site is away from the boundaries of the Sinharaja World Heritage Site.

Stressing the importance of the commercial nature of this project, the Respondents state that if the Petitioner is granted the stay orders as prayed for, it would frustrate government policy and would compel the government to purchase energy from unsustainable sources at an extra cost. In support the Respondents have referred to the National Energy Policy and Strategies detailed in the extraordinary gazette notification dated 10/6/2008 No. 1553/10, marked C annexed to the written submissions filed of record. The 7th Respondent submits that over 60% of work in the project has been completed and as of now a sum of over Rupees 100 million has been spent over the said project

The Petitioner relies on the UNESCO map marked P5, and the Gazette Notification marked P3, to advance the argument that the said project is within the Sinharaja World Heritage Site. In the limited objections filed of record the Respondents have clearly addressed the issue of the location of the said project and has relied on Plan No. 11368 marked 7R6, to demonstrate that the Mini Hydro Project under construction does not come within the existing boundaries as defined under the present law. The Gazette Notification marked P3, has been compared and distinguished from the existing, forest reserve and the proposed forest reserve. The said definition is not in contravention of the said law. As noted

earlier the said project has been supported by the relevant environmental statutes and by a legal framework to ensure required compliance.

The decision sought to be quash marked P10, is in favour of the 7th Respondent the project proponent. Document P10, has clearly laid down that the onus is on the project proponent to take preventive steps for minimizing the environmental damage that may result from the construction of the dam and buildings. Even though, the project was unanimously supported by the legislature and the relevant statutory agencies/authorities, it would be improper to hold that this court will not interfere with the decision making process. Eventhough the eventual decisions are in favour of the project proponent, the court can inquire into due diligence of the relevant authorities in ascertaining the environmental impact of the proposed project. With the available documentation, the supporting affidavits and the relevant reports maps and data, this court is equipped to assess whether the concerned agencies have taken all necessary steps to study and ascertain the potential environmental costs.

In granting the interim reliefs prayed for by the Petitioner the court should be mindful firstly, if the Petitioner is successful, the order of this Court would not render nugatory the final decision, secondly, where the balance of convenience lie and thirdly, will irreparable and irremediable mischief or injury be caused to either party if the interim order is not granted.

As stated above, it is important that the boundaries of the said project need to be considered according to the statutory and related legal provisions applicable as of now. The Petitioners contention that the northern boundary of the declared area in schedule 1 as per the Gazette marked P3 lies in part along the centre line of the Koskulana River, has been clearly distinguished by the said gazette published in terms of the National Heritage and Wilderness Areas Act No. 3 of 1988. It establishes the fact that the Mini Hydro Project is located outside the boundaries of Sinharaja Forest Reserve. Therefore the court cannot stand in the way of statutory authorities and agencies ensuring the implementation of the environmental statutes and guidelines which are presently applicable. The Petitioner has failed to convince court with reasons to hold otherwise.

There is a need to draw a balance between environmental concerns and the wider public interest in competing developmental needs such as those of generating employment and wealth. In order to decide the balance of convenience, the conservation of forests and wildlife and the prevention of destruction to the environment are vital social justice components of the scale. However, in the absence of compelling reasons in support, such concerns cannot and should not be addressed on personal sensibilities. The potential benefits of the said project cannot be considered lightly given the demand to the development of renewable energy resources, importance of which has been emphasized with facts and figures by the Respondents.

In the circumstances I am of the view that judicial intervention at this stage is not required and as such the interim orders prayed for are refused without costs.

JUDGE OF THE COURT OF APPEAL
