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DIGEST

ENVIRONMENTAL FOUNDATION LTD. AND OTHERS V. MAHAWALI AUTHORITY OF SRI LANKA AND OTHERS

SUPREME COURT
J. A. N. DE SILVA C. J.
MARSOOF. J.
RATNAYAKE. J.
SC 459/08 (FR)
OCTOBER 21, 2009
DECEMBER 2, 18 2009

Constitution–Art 12(1), Art 27(14), Art 28(f)–Public Interest Litigation–Construction of residential buildings on lands reserved for the reservoir – Special areas – Directive principles of state policy – Public Trust Doctrine – Mahaweli Authority – Act 23 of 1979 – Section 3(1), Section 12, Section 22 (1), Section 54, Fauna and Flora Protection Ordinance 44 of 1964 amended by Act 15 of 1968 amended by Act 52 of 1982 – Public property to be used for public purpose

The petitioners filed the application in the public interest complaining of a violation of Art 12 (1) in the alienation of lands within the 'special area' declared under the provisions of the Mahaweli Authority Act and further complaining that the construction of houses do not fall within the prescribed projects.

Held

(1) The origin of public trust doctrine can be traced to Justinians Institutes where it recognizes that things common to mankind – air, running water and sea. These common property resources were held by the rulers in trusteeship for the free and unimpeded use of the general public.

The public trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tide lands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust.

Per Ratnayake. J.

> "Although it is expressly declared in the Constitution that the directive principles and fundamental directions – Cap VI of the Constitution and Art 27 (14) do not confer or impose legal rights or obligations and are not enforceable in any Court or Tribunal, Courts have linked the directive principles to the public truth doctrine and have stated that these principles should guide state functuaries in the exercise of their powers".

(2) The public trust doctrine requires the respondents to exercise their powers only in furtherance of the functions of the Mahaweli Authority. They should not indulge in any activity in the performance of their functions which would be detrimental for the realization of the functions of the Mahaweli Authority.

The lands which are the subject matter of this case and which fall within the reservation area should be utilized exclusively to ensure the realization of the objections of the Mahaweli Authority.

Per Ratnayake. J.

> "It is clear that the alienation of the lands and the granting of permission to construct houses in the lands which are the subject matter of their application have been done in violation of the applicable laws and regulations in an arbitrary manner by the 1st respondent authority thereby violating Art 12 (1)."

APPLICATION under Art 126 of the Constitution.

Cases referred to:

(1) *M. L. Mehtha vs. Kamal Nath* 1997 – 1 SCC 388

(2) *National Andobon Society vs. Superior Court of Alpine Country* (Mono Lake Case) 33 Ca. 3 d 419

(3) *Sugathapala Mendis vs. Chandrika Bandaranayke Kumaranatunge* – SC FR 352/2007

(4) *Wattegedera Wijebanda vs. Conservator General Forests and others* – SC 188/2004 – SCM 5.4.2007

Nishantha Sirmanna with *Wardani Karunaratne* for petitioners.

Nihal Jayamanne PC with *Uditha Collure* for 8th respondent

Palitha Kumarasinghe PC with *Chintaka Mendis* for 1- 4 respondents.

Indika Demuni de Silva DSG for 5th, 6th, 11th, 12th, 13th and 14th respondents.

Cur.adv.vult

June 17th 2010

RATNAYAKE, J.

The Petitioners in this case have filed this application in the public interest complaining of a violation of Article 12(1) of the Constitution in the alienation of the lands referred to therein and the granting of permission for construction of buildings on such lands. The 1st Petitioner is a non-profit making company incorporated under the laws of Sri Lanka and according to the Memorandum of Association annexed marked 'P1B' to the Petition, the objects include the monitoring of State Departments and Regulatory Agencies so as to ensure that the public interest in protecting the environment is fully considered in their administrative actions. The 2nd and 3rd Petitioners are persons who are residing in close proximity to the Victoria Reservoir. The Petitioners allege that the alienation and granting of permission for construction of buildings in the lands which are the subject matter of this application had been done in an arbitrary and adhoc manner in violation of the applicable legal provisions and guide lines.

Petitioners state that the lands which are the subject matter of alienation and granting of permission for construction fall within the "Special Area" declared in terms of Section 3(1) of the Mahaweli Authority Act No. 23 of 1979. According to them the said land also fall within the 100 m. reservation from the full supply level of the Victoria Reservoir which is one of the important reservoirs falling within the "Accelerated Mahaweli Program" described in the document annexed as 'P3' to the petition of the Petitioners. They also contend that

the concerned lands also fall within the "Victoria – Randenigala – Rantabe Sanctuary" created under Section 22 of the Fauna and Flora Protection Ordinance (Cap. 469) as amended by Act 44 of 1964 and Act No. 1 of 1970. Accordingly the Petitioners allege that unlike other state lands different and more stringent provisions apply for the alienation of such land and the granting of permission for construction on the lands falling under the above regimes, and that one or more of the Respondents have violated these provisions.

This Court which granted Leave to Proceed in this application in respect of the alleged violation of Article 12 (1) of the Constitution also on 17th December 2008 granted interim relief as prayed for by the Petitioner in paragraphs **'m'** and **'n'** of the prayer to the petition which states as follows:-

(m) *Issue an interim order until the final determination of this Application, restraining the 1st to 6th Respondents and/or any one or more of them from issuing any instruments of alienation/disposition, including annual permit, to any person(s), in respect of any lands located within 100 meters from the full supply lever of the Victoria Reservoir and vested in the Mahaweli Authority and/or declared as constituting "Special Ares", and/or for the purposes of erecting buildings and/or permanent structures thereon and/or subject to the imposition such terms and conditions that may be deemed fit and appropriate by Your Lordships' Court; and/or*

(n) *Issue an interim order until the final determination of this Application, restraining the 1st to 10th Respondents and/or any one or more of them from permitting and/or authorizing in any manner whatsoever, the erection/construction of any buildings. structures on any lands located with 100 meters from the full supply level of the Victoria*

Reservoir and/or on any lands located within 100 meters from the boundaries of the 'Victoria Randenigala – Rantambe Sanctuary', except in strict compliance with the conditions/Guidelines laid down by the Special Committee in 1997 (as contained in the document marked P12), and/or with EIA or IEE approval obtained therefore from the Mahaweli Authority and/or the Department of Wildlife Conservation, prior to commencing such construction(s); and/or staying the operation of any building approvals/permits that have been granted/issued by any of the said respondents in breach/violation of the said requirement;

This application deals with two aspects, namely –

(1) alienation of the lands in question and

(2) granting of permission for construction.

In order to carry out the functions falling within the "Accelerated Mahaweli Program" the government of the day created a State Corporation by the name of Mahaweli Authority of Sri Lanka (hereinafter referred to as the Mahaweli Authority) by Act No. 23 of 1979. The 1st Respondent in this case is the said Mahaweli Authority and the 2nd and 3rd Respondents are officials of the Mahaweli Authority. The 1st Respondent Corporation, which has wide and extensive powers, was entrusted with the following functions by the Mahaweli Authority of Sri Lanka Act No. 23 of 1979;

"12 (a) *to plan and implement the Mahaweli Ganga Development Scheme including the construction and operation of reservoirs, irrigation distribution system and installations for the generation and supply of electrical energy";*

Provided, however, that the function relating to the distribution of electrical energy may be discharged

by any authority competent to do so under any other written law;

(b) to foster and secure the full and integrated development of any Special Area;

(c) to optimize agricultural productivity and employment potential and to generate and secure economic and agricultural development within any Special Area;

(d) to conserve and maintain the physical environment within any Special Area;

(e) to further the general welfare and cultural progress of the community within any Special Area and to administer the affairs of such area;

(f) to promote and secure the participation of private capital, both internal and external, in the economic and agricultural development of any Special Area; and

(g) to promote and secure the co-operation of Government departments, State institutions, local authorities, public corporations and other persons, whether private or public, in the planning and implementation of the Mahaweli Ganga Development Scheme and in the development of any Special Area."

The area of authority of the Mahaweli Authority is given in Section 3(1) of the above Act in the following manner.

"The Minister may, with the approval of the President from time to time by Order published in the Gazette declare any area which in the opinion of the Minister can be developed with the water resources of the Mahaweli Ganga or of any major river to be a special area (hereinafter referred to as "Special Area" in or in relation to which the Authority may, subject to

the other provisions of this Act, exercise perform and discharge all or any of ts powers, duties and functions."

The Government Gazettes dated 15.6.1979 and 06.11.1981 specify the "Special Areas" declare under the above Provisions and the said Gazettes have been annexed marked as "CA5A" and "CA5B" to the counter affidavit of the Petitioners. It is common ground that the lands which are the subject matter of this application falls within the 'Special Area' as declared by the two Gazette Notifications referred to above. In respect of the 'Special Areas' Section 22 (1) of the Mahaweli Authority of Sri Lanka Act grant the following special powers.

"22 (1) The written laws for the time being specified in Schedule B hereto shall have effect in every Special Area subject to the modification that it shall be lawful for the Authority to exercise and discharge in such area any of the powers or functions vested by any such written law in any authority, officer or person in like manner as though the reference in any such written law to the authority, officer or person empowered to exercise or discharge such powers or functions included a reference to the Authority".

The written laws specified in **Scheduled B** above are as follows:-

Agricultural Development Authority Incorporation Order
Agrarian Services Act
Animals Act
Co-operative Societies Law
Entertainment Tax Ordinance
Fauna & Flora Protection Ordinance
Flood Protection Ordinance
Forest Ordinance

Irrigation Ordinance
Land Development Ordinance
Mahaweli Development Board Act
Mines and Minerals law
National Water Supply & Drainage Board Law
Paddy Marketing Board Act
River Valleys Development Board Act
Sale of State Lands (Special Provisions) Law No. 43 of 1973
State Lands Ordinance
State Lands (Recovery of Possession) Act
Thoroughfares Ordinance
Tolls Ordinance
Vehicles Ordinance
Water Resources Board Act
Wells and Pits Ordinance
Written Law enacted under any of the aforesaid enactments.

Accordingly the power to alienate lands under the Land Development Ordinance vest in the Mahaweli Authority and its authorized officials. The Petitioners contend that the above powers of alienation have been exercised by the 1st Respondent and officials of the 1st Respondent in an *"adhoc and arbitrary manner".*

The Petitioners have annexed to their petition marked as "P 15"a report prepared by an official of the 1st Respondent pursuant to a complaint made to the 1st Respondent by the 1st Petitioner. The report is dated 23rd May 2006. This report states that the lands alienated are situated within the 100m. Reservation Area from the full supply level of the Victoria Reservoir. It also states that the lands which are the subject matter of this action and referred to in this report fall within the "Buffer Zone" of the Victoria-Randenigala-Rantabe Sanctuary declared under the Fauna and Flora Protection

Ordinance as amended. These facts are not disputed by the Respondents. It is also common ground that these lands have been given on standard permits issued under the Lands Development Ordinance.

If appears from P22 which is a copy of a permit issued, Clause 12 thereof has been amended granting authority to the permit holder to construct buildings on the said lands alienated on annual permits and the permit holders were entitled to obtain a grant or long term lease of the said lands, if constructions commence within 6 months from the date of the Annual Permit.

The Petitioners have annexed marked as 'P7' the Regulations framed under Sections 54(1) and 54(2) of the Mahaweli Authority of Sri Lanka Act No. 23 of 1979 dated 10th December 1976. Clause 7 of the said Regulations prohibit the construction of buildings and structures in close proximity to reservoirs in the following manner;

Clause 7 – *Buildings and Structures* –

(a) No person shall engage in the construction of a building or structure below the high flood level of a reservoir without prior permission of the Authorised Officer.

(b) No person shall engage in the construction or provision of buildings and structures in and around a reservoir without prior approval of an Authorised Officer and in the construction carried out after approval to conform to such terms and conditions laid out in the approval."

The word "Reservoir" is defined in the said Regulation in the following manner. "Reservoir" means an expanse of water resulting from manmade constructions across a river

or stream to store or regulate water. Its environs will include that area extending to a distance of 100m. from full supply level of the reservoir inclusive of all islands fallings within the reservoir." It is common ground that the lands which are the subject matter of this application falls within the area referred to in Clause 7 of the above regulations and accordingly, construction of buildings and structures are prohibited without permission of the authorized officer.

Petitioners have produced many documents and contended that the construction of buildings in the lands which are the subject matter in this application attract Section 23 BB (1) of Part IV (c) of the National Environmental Act No. 47 of 1980 as amended. According to this provision an initial environmental examination report or an environmental impact assessment report is required to be submitted to the project approving agency prior to the approval for construction is granted. They also contend that no such report was obtained by the 1st Respondent prior to approval being granted for the construction of the buildings.

Part IV (C) of the National Environmental Act No. 47 of 1980 as amended deals with approval of projects. In terms of Section 23(z) coming under Part IV (c) of the Act the Minister by Order published in the Gazette shall specify the projects and undertakings in respect of which approval would be necessary under the provisions of Part IV (c) of the Act. Section 23BB (1) of the National Environmental Act states as follows:-

23BB(1)"It shall be the duty of all project approving agencies to require from any Government department, Corporation, Statutory board, local authority, company, firm or individual who submit any prescribed project for its

approval to submit within a specified time an initial environmental examination report or an environmental impact assessment report as required by the project approving agency relating to such project and containing such information and particulars as may be prescribed by the Minister for the purpose."

The Petitioners have produced marked 'P8' the order made by the relevant Minister under Section 23(z) of the National Environmental Act dated 18th June 1993. Parts I, II, and III deal with the prescribed projects, which require approval under the provisions of Part IV C of the National Environmental Act.

The Respondents have contended that the construction of houses do not fall within the prescribed projects described in 'P8'. After the conclusion of the pleadings and arguments in this application the Petitioners by way of a motion dated 4th December 2009 have produced an Order made by the relevant Minister under the National Environmental Act Section 23(z) whereby the earlier order is amended and a new Clause is added as Clause 32 (a) to the following effect;

32 (a) "Construction of all commercial buildings as defined by the Urban Development Authority Law, No. 41 of 1978 and the construction of dewelling housing units, irrespective of their magnitudes and irrespective of whether they are located in the coastal zone or not, if located wholly or partly within the areas specified in Part III of this Schedule"

Clause 2 of Part III of the Schedule states as follows:-

"Within the following areas whether or not the areas are wholly or partly within the Coastal Zone:

Any erodible area declared under the Soil Conservation Act (Chapter 450).

Any Flood Area declared under the Flood Protection Ordinance (Chapter 449) and any flood protection area declared under the Sri Lanka Land Reclamation and Development Corporation Act, No. 15 of 1968 as amended by Act No. 52 of 1982.

60 meters from the bank of a public stream as defined in the Crown Lands Ordinance (Chapter 4545) and having a width of more than 25 meters at any point of its course.

Any reservation beyond the full supply level of a reservoir.

Any archaeological reserve, ancient of protected monument as defined or declared under the Antiquities Ordinance (Chapter 188)

Any area declared under the Botanic Gardens Ordinance (Chapter 446).

In these regulations unless the context otherwise requires –

"hazardous waste" means any waste which has toxic, corrosive, flammable, reactive, radioactive or infectious characteristics.

"reservoir" means an expanse of water resulting from manmade constructions across a river of a stream to store or regulate water. Its "environs" will include that area extending up to a distance of 100 meters from full supply level of the reservoir inclusive of all islands falling within the reservoir."

Based on the above Gazette Notification Petitioners contend that the construction of houses within the lands which are the subject matter of this action fall within the "prescribed projects" for which approval need to be obtained in terms of Part IV C of the National Environmental Act, and accordingly an Initial Environmental Examination (IEE) report or Environmental Impact Assessment (EIA) report is required by the Project Approving Agency prior to granting approval. They also contend that the 1st Respondent or its officials did not have such a report before the alienation of the lands or granting approval for the constructions in the land. It may appear that the contention of the Petitioner may be well founded but the Court will not venture to make any pronouncement adverse to the Respondents in this regard as the relevant Gazette Notification has been submitted after the closure of the pleadings and the conclusion of the arguments in this case and accordingly Respondents have not been heard on this matter.

In any event the production of the above mentioned gazette notification is not necessary to contend that part IVC of the National Environmental Act is applicable to the construction of buildings in the lands which are the subject matter of this case due to the following facts and documents produced by the Petitioners.

The Petitioner has submitted the Gazette Notification marked 'P 10' containing the order dated 30th January 1987 made by the relevant Minister under Section 2(2) of the Fauna & Flora Protection Ordinance declaring the area described in the said Gazette Notification under the heading "Victoria-Randenigala-Rantabe Sanctuary" as a Sanctuary for the purposes of the Fauna & Flora Protection Ordinance. They have produced marked 'P11' an Order dated 16th February

1995 made by the relevant Minister under Section 23(z) of Act No. 47 of 1980 as amended. They contend in paragraph 20 of the petition that in terms of this order "No house (irrespective of its magnitude) can be constructed within any area extending up to a distance of 100m. from the boundary or within any area declared as a sanctuary under the Fauna & Flora Protection Ordinance, without obtaining approval from the relevant Project Approving Agency under and in terms of Part IV C of the said Act. As such any person who proposes to engage in any construction activity within the said reservation area must obtain, inter alia Environmental Impact Assessment (EIA) or Initial Environmental Examination (IEE) with their application for approval from the Department of Wildlife Conservation prior to effecting any such constructions". The 1st to 4th Respondents in their statement of objections have admitted the above contentions of the Petitioners. In paragraph 55(i) of the Petition the Petitioners contend that they "verily believed that EIA of IEE approval has not been obtained from the respective Project Approving Agencies prior to or after the construction of any of the said building/structures on the said lands". It is surprising to observe that the 1st to 4th Respondents have merely stated that they are unaware of this contention. If such approvals were obtained this fact should necessarily have been within the knowledge of the Respondents. Accordingly, it is obvious that such approvals have not been obtained prior to the alienation of the lands and the granting of permission for constructions.

The Petitioners have also submitted annexed marked as 'P 35 A' to 'P 35C' certain directives issued by the Presidential Secretariat and the 1st Respondent Authority dealing with allocation of State lands. Clause 10 of 'P35A' contains a directive not to lease lands falling within natural water

ways, natural reserves and wildlife sanctuaries. 'P35B' and 'P35C' which have been issued by the Director General of the Mahaweli Authority dated 30th July 2000 require certain procedures to be adopted in selecting allotees for alienation of land. The Petitioners contend that these directives guidelines and procedures have also not been followed by the Respondents.

The Petitioners have submitted to Court annexed marked as 'P12' to the Petition a document dated 18.06.1997 containing guidelines for the construction of houses in private lands formulated by a special committee appointed by the Director General of the Mahaweli Authority. The guideline inter alia state that there should be a minimum land area of 20 m. between two houses. By the letter dated 08.11.2006 annexed marked as 'P 19' to the Petition the Director General of Mahaweli Authority quoted the legal advice given by the Hon. Attorney General to the effect that the Director General has no legal authority to permit any construction in violation of these special committee guidelines. The alienation of these lands and the granting of permission to construct buildings have been made in violation of these guidelines. Paragraph 36 of the petition of the Petitioners states as follows:-

> *"Futhermore the Petitioners state that even when owners of private lands, which are situated within the said reservation area, are desirous in engaging in any construction activity, they are required to first obtain the permission of the Mahaweli Authority of build on such lands and also adhere to the stringent building guidelines/conditions stipulated by a special committee in 1997. The Petitioners state without any prejudice to the foregoing that, in any event these guidelines have also been violated, in as much as, inter alia;*

(*a*) *the lands alienated on annual permits to the said persons are clearly 15.30 perches each in extent, whereas 1997 guidelines require each land to be a minimum of 20 perches in extent if constructions is to be effected thereon.*

(b) Some of the said constructions had been affected not for residential purposes but clearly for commercial purposes.

(c) The guidelines require the minimum distance between two buildings to be 20 meters whereas in some instances the distance between two buildings is only 2 meters"

In the statement of objections the 1st to 4th Respondents have admitted this paragraph. They only make an attempt to justify the alienation of lands in allotments less than 20 perches in their objections in their objections in the following manner.

Paragraph 8 (c)

"the alienation has been made in allotments in less than 20 perches in view of the decisions taken by the then Director General of the 1st Respondent on the basis that there are large number of applicants and by sub dividing the land into 15 perches of allotments, larger number of applicants could be given lands; True copies of the minute dated 5th April 2005 and letter send by then Director General to the Resident Project Manager-Victoria are filed herewith marked '1R2A and 1R2B' are pleaded as part and parcel of this statement of objections.

8(d) The said decision has been taken in good faith in order to provide land for a larger number of deserving citizens who has no lands to construct houses for their residences."

The Petitioners go further and contend that the guidelines in 'P12' were meant to apply to private land owners whose lands fell within the "Special areas" created under the Mahaweli Authority Act and who owned those lands prior to the creation of these 'special areas'. Therefore, the guidelines contained concessionary terms to satisfy those land owners. Accordingly they contend that the mere satisfaction of the guidelines in 'P12' is not sufficient by any means when granting of permission for constructions in the lands which are the subject matter of this case are being considered. The Court agrees with the contention of the Petitioners. In that context it is observed that even the concessionary guidelines which are applicable when granting permission for constructions to private land owners have not been followed when granting permission for constructions in the lands which are the subject matter of this case.

In paragraph 32 of the petition filed by the Petitioners it is stated as follows:-

"In November 2006, the 1st Petitioner caused a further site visit to be carried out in respect of the Theldeniya area and the said unlawful constructions and a detailed report was prepared in pursuance thereof. The said Report contains the following conclusions;

(a) All constructions referred to in the said Report are contained within the Reservation areas of the Victoria-Randenigala-Rantambe Sancturary."

(b) The plans pertaining to the said constructions have not been approved by the relevant pradeshiya Sabha.

(c) Soil erosion has escalated as a result of the trees being completely removed from the said lands for the purpose of effecting the said unauthorized construc-

tions in steep areas within the said reservation areas. The layers of soil get washed away with ran water and get deposited as sediment in the Victoria Reservoir.

(d) Due to unauthorized constructions being effected in steep area, the said areas are susceptible to earth slips and landslides.

A true copy of the said Site Visit Report dated 27.11.2006, together with the annexures thereto, are annexed hereto marked 'P21' and pleaded as part and parcel of this petition"

The 1st to 4th Respondents in their objections have admitted this paragraph. If the position contended by the Petitioners were incorrect it was upto the 1st to 4th Respondents who are the relevant officials having the required information and or the resources to obtain the required information in their custody to have disputed this position and submitted to Court material to establish that the statements made by the Petitioners are incorrect. They have failed to do so.

In the circumstances referred to above I accept the facts as stated in the said paragraph 32 of the petition and contained in the report annexed marked as "P21" to the petition. These facts clearly illustrate the extent and seriousness of the damage caused to the environment due to the unlawful acts that have been committed.

In recent times Court has emphasized the applicability of the public Trust Doctrine to state functionaries in the exercise of their powers.

The origins of Public Trust doctrine can be traced to Justinien's Institutes where it recognizes three things common to mankind i.e. air, running water and sea, (including the

shores of the sea). These common properly resources were held by the rulers in trusteeship for the free and unimpeded use of the general public.

The applicability of the Public Trust doctrine was expressly recognized by the Supreme Court of India in the case of *M.C. Mehta Vs. Kamal Nath.*[1] *The Supreme Court of California too in the case of National Audubon Society Vs. Superior Court of Alpine Country (the Mono Lake case)*[2] summed up the doctrine as follows:-

> "Thus the Public Trust is more than an affirmation of state power to use public property for public purposes. It is an affirmation of the duty of the state to protect the peoples common heritage of streams, lakes, Marshlands and tidelands, surrendering the right only in those rare cases when the abandonment of the right is consistent with the purposes of the trust".

Under Chapter VI of the Constitution which deals with Directive principles of State Policy and fundamental duties in Article 27(14) it is stated that "The State shall protect preserve and improve the environment for the benefit of the community". Although it is expressly declared in the Constitution that the Directive principles and fundamental duties 'do not confer or impose legal rights or obligations and are not enforceable in any Court of Tribunal' Courts have linked the Directive principles to the public trust doctrine and have stated that these principles should guide state functionaries in the excise of their powers. *(Vide Sugathapala Mendis vs. Chandrika Bandaranayake Kumararunga)*[3] and *Wattegedara Wijebanda Vs. Conservator General of Forests and others.*[4]

The Public Trust Doctrine requires the 1st to 4th Respondents to exercise their powers only in furtherance of the

functions of the Mahaweli Authority. They should not indulge in any activity in the performance of their functions which would be detrimental for the realization of the functions of the Mahaweli Authority. Therefore the lands which are the subject matter of this case and which fall within the reservation area should be utilized exclusively to ensure the realization of the Mahaweli Authority.

Section 12 of the Mahaweli Authority of Sri Lanka Act lays down the functions of the Mahaweli Authority in relation to 'Special Areas' declared under Section 3(1) of the Act. Section 12(b) and 12(d) states as follows:-

"The functions of the authority in or in relation to any 'Special Area' shall be

(a) .....

(b) to foster and secure the full and integrated development of any 'Special Area'

(c) .....

(d) to conserve and maintain the physical environment within any 'Special Areas' .

The 1st to 4th Respondents have not provided this Court with a rational or justifiable basis for alienating reserved lands of the reservoir and granting permission for constructions as referred to above to private parties. It is the view of this Court that such alienation of lands and granting permission for constructions cannot facilitate the achievement of the objects specified in Section 12 of the Mahaweli Authority of Sri Lanka Act.

The Respondents have not sought to justify the alienations and permission granted for constructions of the lands

which are the subject matter of this application except to say that the power of alienation of such lands are with the Mahaweli Authority and its authorized officials.

From the aforesaid, it is clear that the alienation of the lands and the granting of permission to construct houses in the lands which are the subject matter of this application have been done in violation of the applicable laws and regulations in an arbitrary manner by the 1st Respondent Authority thereby violating Article 12(1) of the Constitution.

Due to the above reasons, I hold that the 1st Respondent Authority has violated Article 12(1) of the Constitution by (i) alienation and (ii) granting of permission to construct houses in respect of the lands which are the subject matter of this application.

There are no specific allegations that have been established against the 2nd Respondent. In paragraph 8(b) of the Statement of Objections of the 1st to 4th Respondents it is stated that the "Alienations have been made prior to the present Director General assumed duties." There is no denial of this position by the Petitioner.

From the pleadings it appears that the impugned actions have been taken not by the 3rd Respondent who is the present Resident Project Manager but by other officials who were his predecessors as referred to in paragraph 9(c) of the Statement of the Objections of the 1st to 4th Respondents. There are also no particular allegations established against the 4th, 5th, 6th, 8th, 9th, 10th and 11th Respondents.

The letter annexed marked 'P34' to the petition of the Petitioner clearly set out the circumstances under which the 7th Respondent the Medadumbara Pradeshiya Sabha was

compelled to grant permission for the construction of the houses.

The Central Environmental Authority which is the 12th Respondent cannot be found fault with as the Project Approving Agency in terms of the regulations made under the National Environmental Act, in respect of the area comprising the lands and building which are the subject matter of this action, is the Mahaweli Authority of Sri Lanka, the 1st Respondent. This position is stated is the document annexed marked 'P11' to the Petitioner's petition.

It is also clear that the 13th Respondent who is the Director of Wildlife Conservation did not have any powers under the laws and regulations referred to by the Petitioners in respect of the lands which are the subject matter of this application and this position has been conveyed to the 1st Petitioner by the letter of the 13th Respondent dated 18th September 2006 annexed by the Petitioners themselves to their petition marked as 'P 18(b)'.

In paragraphs (g) and (h) of the prayer to the petition, the Petitioner have prayed for relief as follows:-

"(g) Declare and direct the 1st to 10th Respondents and/or anyone or more of them to forthwith revoke/cancel all permits and instruments of alienation/disposition issued in respect of the said lands and/or building approvals issued to the occupants of the said lands and/or issued in breach/violation of the condition/guidelines formulated by the special committee in 1977 (as contained in the document marked P12); and/or"

(h) Declare and direct the 1st to 4th and/or 7th and/or 8th and/or 9th and/or 10th Respondents to forthwith take steps and *measures according to law to eject the occupants of all the said lands and recover vacant possession of the said*

lands and/or to demolish all the buildings and permanent structures erected thereon and/or to demolish any such buildings/permanent structures that had been erected thereon in breach of the conditions/ guidelines formulated by the special committee in 1997 (as contained in the document marked P 12) and buildings and structures in respect of which the Mahaweli Authority has not granted EIA or IEE Approval; in so far any such demolition does not cause any further harm or damage to the environment;"

This Court will not be able to make the orders referred to above as the grantees and/or the occupants of the lands have not been made parties to this application. When the main allegations of the Petitioners are the arbitrary and adhoc alienation of the lands and the permission granted to construct the buildings, it is necessary that the grantees and/or the persons in occupation of the lands whose interests would be directly affected be made parties. This has deprived the Court the ability of making a suitable order in respect of such alienations and the permission granted to construct the buildings.

The Petitioners make specific reference in paragraph 33 of the petition, of 3 allotments of land identified as lots 13, 14 and 15, each containing in extent 15.30 perches situated within the said 100m. area from the Victoria Reservoir which had been allegedly alienated by the former Resident Project Manager to private parties. The Site Visit Report annexed marked 'P21' to the Petition of the Petitioners identified the names of the persons who are in possession as permit holders. But the permit holders, grantees or the former Resident Project Manager have not been made parties to this application. Paragraph 4 of the Petitioner's petition states that "The Petitioners have instituted this application in the best interest of the public, having regard, inter alia to article 28(f) of the Constitution. The Petitioners further state that a meaningful

and positive result from these proceedings will also benefit the public and most significantly the environment." The Court whilst appreciating the service done by the Petitioners in filing this application nevertheless observes that not naming as parties the persons referred to above have affected the ability of Court to grant more positive and meaningful results.

In the circumstances mentioned above, this Court makes order as follows:-

(a) The 1st Respondent has violated the fundamental right to equality and equal protection of the law as guaranteed to the Petitioners by Article 12(1) of the Constitution,

(b) Court directs that a proper investigation be conducted by the 2nd Respondent and suitable action be taken against the officials responsible for the unauthorized alienations and the granting of permission to construct buildings in violation of the applicable legal provisions,

(c) Court holds that no further allocation of lands in the subject area be made without following the procedure laid down under Part IV C of the National Environmental Act No. 47 of 1980, and the regulations made their under,

(d) Court also holds that the guide lines contained in the document annexed marked as "P12" to the petition be followed in the future when granting permission for the construction of residential buildings,

(e) Court also orders that the 1st Respondent shall pay each of the Petitioners a sum of Rs. 25,000/- as costs.

J. A. N. DE SILVA, C. J. – I agree.

MARSOOF, J. – I agree.

Relief granted

FERNANDO AND OTHERS
FRANCIS FERNANDO AND ANOTHER

SUPREME COURT
J. A. N. DE SILVA C. J.
SRIPAVAN, J. AND
IMAM, J.,
S. C. APPEAL NO. 81/2009
FEBRUARY 9TH, 2010

Supreme Court Rules – Rule 30 (1) and Rule 30 (6) – filing of written submissions – Rule 34 – failure to serve the written submissions on the Respondents – non compliance – appeal is liable to be dismissed.

The Appellant duly filed five copies of written submissions in the Registry, but failed to serve copies of written submissions on the Respondents as required on Rule 30 (6). Does it amount to a failure to exercise due diligence as provided in Rule 34?

Held

(1) Rule 30 (1) mandates that no party to an appeal shall be entitled to be heard unless he has previously lodged five copies of his written submissions in terms of Rule 30(5).

"The use of the words "foregoing provisions" in Rule 30 (5) by necessary implication shuts out imposition of any sanction in the subsequent provisions to Rule 30(5). (emphasis added). In the event of non-compliance of the said provisions of the Rules, the only sanction imposed by Rule 30 (1) is that such party shall not be entitled to be heard. However, in an appropriate case, the Court may consider the dismissal of an appeal or application under Rule 34 for failure to show due diligence in prosecuting the appeal or application."

(2) One of the tests for determining the nature of a Rule is to see whether it entails any penal consequences and in cases where the disobedience of a Rule carries a sanction it could safely be said that the said rule is mandatory.

Per Sripavan, J.

> "In the case of Rules framed by Court for regulating its own procedure, I am of the view that one should look for greater degree of reasonableness and fairness."

(3) As the appellants in this appeal have tendered their written submissions to the Respondents once the failure to tender written submissions had been brought to their notice, it amounts to an appropriate case for the preliminary objection to be overruled and to fix the application for hearing.

Case referred to:

(1) Muthappan Chettiar vs. Karunanayake and others (2005) 3 SLR 327

(2) Priyani de Soyza vs. Arsacularatne (1999) 2 SLR 179

(3) Priyadasa and Others vs. Land Reform Commission, S. C. Appeal No. 30/97-SCM 8.7.1998.

(4) Union Apparels (pvt) Ltd. v. Director General of Customs and Others (2000) 1 SLR 27

Special leave to appeal from a judgement of the Court of appeal - on a preliminery objection raised.

Sanjeewa Jayawardane for the Defendants – Respondents – Appellants.

Ms. Chamanthe Weerakoon Unamboowe for the substituted Plaintiff-Appellant – Respondent.

Cur.adv.vult.

April 30th 2010

SRIPAVAN. J.

When this appeal was taken up for hearing on 9th February 2010, Learned Counsel for the substituted-Plaintiff-Appellants-Respondents (hereinafter referred to as the Respondents) took up a preliminary objection to the effect that the Defendants-Respondents-Appellants (hereinafter referred to as the Appellants) had failed to serve a copy of their written submissions on the Respondents as required by

Rule No. 30 (6) of the Supreme Court Rules 1990 and that the Appellants' appeal should be dismissed *in limine* in terms of Rule 34 thereof.

It is not in dispute that five copies of the Appellants' written submissions were duly lodged in the Registry of this Court on 4th August 2009, in terms of Rule 30(1), read with Rule 30(6). However, the only matter to be considered is whether the Appellants' failure to serve the said written submissions on the Respondents would amount to a failure to exercise due diligence as provided in Rule 34.

It is a well known principle in the construction of the Rules, that effect must be given to the language irrespective of the consequences. No doubt when the intention is clear it must unquestionably be so construed in order to achieve the result which has been manifested in express words. One of the tests for determining the nature of a Rule is to see whether it entails any penal consequences and in cases where the disobedience of a Rule carries a sanction it could safely be said that said rule is mandatory. In the case of Rules framed by Court for regulating its own procedure, I am of the view that one should look for a greater degree of reasonableness and fairness.

It should be borne in mind that Rule 30 (1) mandates that no party to an appeal shall be entitled to be heard unless he has previously lodges five copies of his written submissions complying with the provisions of this Rule. Rule 30(5) further provides that submissions not in substantial compliance with the "foregoing provisions" may be struck out by the Court, whereupon such party shall not be entitled to be heard. (emphasis added)

The use of the words "foregoing provisions" in Rule 30(5) by necessary implication shuts out imposition of any sanction

in the subsequent provisions to Rule 30(5). (emphasis added). In the event of non-compliance of the said provisions of the Rules, the only sanction imposed by Rule 30(1) is that such party shall not be entitled to be heard. However, in an appropriate case, the Court may consider the dismissal of an appeal or application under Rule 34 for failure to show due diligence in prosecuting the appeal or application.

In this appeal, both Counsel agreed that the Appellants have lodged their written submissions within six weeks of the grant of Special Leave to Appeal as provided in Rule 30(6). However, inadvertently or otherwise, a copy of the Appellants' written submissions had not been served on the Respondents prior to the first date of hearing. On the first date of the hearing of the appeal, namely, on 08th October 2009, an application was made on behalf of the Counsel for the Appellants to have the appeal re-fixed for hearing as the learned Counsel for the Appellants was indisposed. Accordingly, the hearing of the appeal was postponed for 9th February 2010. The learned Counsel for the Respondents in the written submissions, have taken up the position that the written submissions of the Appellant was served on the Respondents by registered post after the first date of hearing. Counsel for the Respondents also submitted that under Rule 34, the Court has discretion to proceed with the hearing of the appeal after considering the circumstances of non-compliance and whether the Appellants have rectified any omission as soon as they became aware of it. Counsel for the Respondents relied on the case of *Muthappan Chettiar vs. Karunanayakeand Others,*(1). It may be relevant to reproduce below the observations made by Shirani Bandaranayake, J. (at 334) in the said application –

> *"According to the aforementioned Rules, the appellant should have filed his written submission on or before*