

THE

Sri Lanka Law Reports

**Containing cases and other matters decided by the**

**Supreme Court and the Court of Appeal of the**

**Democratic Socialist Republic of Sri Lanka**

**[2011] 2 SRI L.R. - PART 13**

**PAGES 337 - 364**

**Consulting Editors** : HON J. A. N. De SILVA, Chief Justice

(retired on 16.5.2011)

HON. Dr. SHIRANI A. BANDARANAYAKE

Chief Justice (appointed on 17.5.2011)

HON. SATHYA HETTIGE, President,

Court of Appeal (until 9.6.2011)

HON S. SRISKANDARAJAH President, Court of Appeal

(appointed on 24.6. 2011)

**Editor-in-Chief** : L. K. WIMALACHANDRA

**Additional Editor-in-Chief** : ROHAN SAHABANDU

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**D I G E S T**

**Page**

**FUNDAMENTAL RIGHTS** – Article 126 (2) of the Constitution – Where a 337

person alleges that his fundamental right has been infringed or is about

to be infringed by executive or administrative action, he may apply to

the Supreme Court within one month thereof, for relief or redress, by

way of petition.

**Wjesekera And 14 Others v. Gamini Lokuge, Minister of Sports and**

**Public Recreation & 20 Others**

**TRUSTS ORDINANCE –** Section 4(1) – A trust may be created for any lawful 340

purpose – Section 98 – Saving rights of bona fide purchasers – Finance

Act – Sections 58(A), 59 – Recovery of the tax deemed to be in default

– In pari delicto potior est condition defendantis.

**Saroja Nisansala v. Aberfoyle**

**WRIT OF MANDAMUS –** Environmental Impact, – Assessment Report 354

[EIAR] - Not approved-National Environmental Act [NEA] 47 of 1980

as amended – Mines and Minerals Act 33 of 1997 – Section 30 –

Industrial Mining Licence? – Non compliance with regulation – Breach

of statutory duty – Unfairness – Abuse of power?

**Dissanayake and others [Uva Magnettetle] vs. Geological Survey**

**and Mines Bureau and others**

**(**Continued in Part 14)

*Wijesekera And 14 Others v. Gamini Lokuge, Minister of Sports*

SCSC *and Public Recreation & 20 Others (Shiranee Tilakawardane, J.)* 337

In *Kottabadu Durage Sriyani Silva v. Chanaka Idda-*

*malgoda* standing was given under Article 126 to the wife

of the deceased. In its frst order dealing with two prelimi-

nary objections, this court stated that every right must have

a remedy and that it would be absurd to contend that a right

ceased and became ineffective due to death, as was alleged

by the Respondent in that case. In *Kottabadu* this Court

further observed that a literal interpretation of the Constitu-

tion must be avoided if it were to produce such an ‘absurd

result’. Accordingly, in its fnal order in the same case this

Court stated that the right to life was implicitly recognized

in the Constitution, especially under Article 13(4). Here this

Court was of the opinion that where an infringement of the

right to life was concerned the Court must interpret the

word ‘person; contained in Article 126(2) broadly, so as to

include even an heir or dependent of the person who had

been put to death.

Accordingly, the opinion of this Court is that, in light of

the aforesaid developments as regards to standing or *locus*

*standi* in fundamental rights Applications, the interest of

justice mandates this Court’s focus on the potential injustice

canvassed by the applicant, and not on the interest of the

applicant and, therefore, in light of the foregoing case law

this Court fnds that so long as the applicant of a fundamen-

tal rights Application comes before this Court in good faith,

on a matter or matters affecting a broad spectrum of people,

and where special and or exceptional circumstances exist,

such as where the matter impacts, as is alleged in this case

– that it is a matter of paramount importance to the youth

who are involved in sports in this country (especially where

the Court is the upper guardian of the children and young

persons) – standing is to be allowed. Applying this princi-

ple to the present case, this Court fnds that the substantive

338 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

injustice alleged to have been suffered upon the Petitioners

of this Application warrants this Court’s review of it. *Locus*

*standi* exists.

The Petitioners in their fundamental rights Application

claim that the Order marked “P6” dissolving the Sri Lanka

Rugby Federal Union and failing to appoint the Petitioner to

the post of Captain of the Sri Lankan team that toured Dubai

for Asian Five Nations Rugby Tournament is an infringement

of the 1st Petitioner’s Fundamental Right guaranteed under

14 (1) (g) of the Constitution, the *“freedom to engage by him-*

*self or in association with others in any lawful occupation, pro-*

*fession, trade, or Enterprise.*” The Respondents, emphatically

state that the Petitioners have failed to establish before this

Court that the aforesaid Fundamental Right of the Petitioners

have, in fact, been violated.

In regards to the case law preferred above, when taken

with the abovementioned rules to give the Court some

latitude to determine inquiry to be in the best interest of

justice, especially in a matter like this which affects the

future of sports which involves, its discipline and the aspira-

tions of young persons, this Court holds that the Petition-

ers have provided in its pleadings matters that need to be at

least considered relating to whether Petitioners are entitled

to relief from violation of their Fundamental Rights guaran-

teed by Articles 12(1), 12(2) and 14(1)(g). Therefore this Court

holds that the Petitioner should be given the opportunity to

be heard before this Court on whether there has been a viola-

tion of his Fundamental Rights guaranteed by Articles 12(1),

12(2) and 14(1)(g) of the Constitution.

Fundamental Rights Applications must be seriously

considered before they are brushed off *in limine* without

affording the Petitioners the opportunity to unfold the

narrative of events. This is particularly so where the claimed

*Wijesekera And 14 Others v. Gamini Lokuge, Minister of Sports*

SC *and Public Recreation & 20 Others (Shiranee Tilakawardane, J.)* 339

rights of parties have purportedly been manipulated and

they have not been afforded the opportunity to be considered

equally, objectively and impartially in the decision making

process of an organization. The common aspirations of all

beings to be enshrouded in the cloak of their guaranteed

right to self-dignity and respect cannot be shorn off by

capricious or arbitrary and subjective decision making.

Such decision-making cannot impact upon the legitimate

expectations of a community of people to be considered on the

basic premise that every being has a right to the paradigm of

being considered equally, especially before the law, and not be

subjected to discrimination, bias, unfair decision making

by the executive. The rule of law is and must after all be

characterized with the principles of supremacy of the law,

the quality of the law, accountability to the law, legal

certainty, procedure and legal transparency, equal and open

access to justice to all, irrespective of gender, race, religion,

class, creed or other status.

In light of the aforesaid, preliminary objections raised

by the Respondents on 15th November 2010 are hereby

dismissed. Case is to be fxed for support.

**Imam, J** – I agree

**SureSh Chandra, J** – I agree

*Preliminary objections overruled.*

340 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

**SAROJA NISANSALA v. ABERFOYLE**

SUPReme COURT

DR. SHIRANI A. BANDARANAyAke, CJ.

SRIPAvAN, J. AND

ImAm, J.

S.C. (APPeAL) NO, 82/2009

S.C(H.C.) C.A.L.A. NO. 35/2009

SP/HCCA/kAG/248/2007(F)

D.C. mAwANeLLA NO. 529/L

JUNe 10TH, 2010

**Trusts Ordinance – Section 4(1) – a trust may be created for any**

**lawful purpose – Section 98 – Saving rights of bona fde purchasers**

**– Finance act – Sections 58(a), 59 – recovery of the tax deemed to**

**be in default – In pari delicto potior est condition defendantis.**

The appeal was agued on the basis of the following questions:

1. Could the Plaintiff – Respondent in the circumstances of the case,

plead a constructive trust?

2. Is the trust alleged by the Plaintiff – Respondent contrary to the

provisions in Sections 4(1) and 98 of the Trust Ordinance?

The two questions referred to above indicate that the issue in question

is as to whether a purchase of a property by a third party for and on

behalf of a foreigner allegedly in order to evade the payment of 100% tax

on the sale, could create a constructive trust on the basis of Sections

4(1) and 98 of the Trust Ordinance*.*

**held:**

(1) No material had been adduced before the Court to show that the

transaction in question had been for an unlawful purpose in terms

of Section 4(1) of the Trusts Ordinance.

(2) Section 58(1) read with Section 59 of the Finance Act had

imposed a tax and expowered the Commissioner of Inland

Revenue to recover the tax if in default due to the non-payment

from the person/s from whom it has become due.

*Saroja Nisansala v. Aberfoyle*

SC *(Dr. Shirani A. Bandaranayake, CJ.)* 341

(3) The Plaintiff – Respondent could in the circumstances of the case,

plead a constructive trust and the trust alleged by the Plaintiff-

Respondent is not contrary to the provisions in Sections 4(1) and

98 of the Trust Ordinance.

(4) An unlawful intention bilaterally entertained is no longer an

absolute bar to restitution.

**Cases referred to:**

(1) *Muniyandy Natchie v. Kayambo* – (1988) 2 CALR 56 (affrmed)

(2) *Fernando v. Ramanathan* – (1913) NLR 337

(3) *Mohideen v. Saibo –* (1913) 17 NLR 17

(4) *Georgiades v. Klompje –* (1943) TPD 15

**appeal** from the judgment of the Provincial High Court (Civil Appeal)

of the Sabaragamuwa Province holden in kegalle.

*Rohan Sahabandu for the Defendant – Appellant – Appellant*

*P.K.T. Perera for the Plaintiff – Respondent – Respondent*

*Cur.adv.vult.*

June 28th 2011

**dr. ShIranI a. Bandaranayake, CJ.**

This is an appeal from the judgment of the Provincial High

Court (Civil Appeal) of the Sabaragamuwa Province holden in

kegalle dated 27.01.2009. By that judgment learned Judges

of the High Court had dismissed the appeal of the defendant-

appellant-appellant (hereinafter referred to as the appellant)

and affrmed the judgment of the learned District Judge of

mawanella dated 03.09.2004, which had granted the reliefs

prayed for by the plaintiff-respondent-respondent (herein-

after referred to as the plaintiff-respondent). The appellant

342 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

preferred an application before this Court for which leave to

appeal was granted.

At the stage of hearing both learned Counsel agreed that

the appeal could be argued on the basis of the following ques-

tions:

1. Could the plaintiff-respondent in the circumstances of

the case, plead a constructive trust?

2. Is the trust alleged by the plaintiff-respondent contrary to

the provisions in section 4(1) and 98 of the Trusts Ordi-

nance?

The facts of this appeal, as submitted by the appellant,

albeit brief, are as follows:

The appellant had been in Dubai where she had been

working in several houses on an hourly basis and had stayed

at the plaintiff-respondent’s house. At the place she had not

paid any rent, and in lieu of rent she had helped to clean

the garden for two hours which belonged to the plaintiff-

respondent. The appellant submitted that, during that period

the plaintiff-respondent had a close intimacy with the appel-

lant. when the appellant returned to Sri Lanka, the plaintiff-

respondent had agreed to purchase a land and a house for

the appellant and he had accordingly carried out the said

purchase and had gifted it to her. The appellant further sub-

mitted that the plaintiff-respondent had purchased the said

land for the beneft of the appellant.

The plaintiff-respondent contended that the appellant

had worked for him as a domestic-aid and he had given her

the money to purchase a property on his behalf. He further

*Saroja Nisansala v. Aberfoyle*

SC *(Dr. Shirani A. Bandaranayake, CJ.)* 343

contended that he had no intention to grant the benefcial

interest of the property in question to the appellant and

therefore she holds the land in trust in favour of the plaintiff-

respondent. It was also submitted that the plaintiff-respon-

dent had requested the appellant through his nominee to

transfer the said land, which had been refused by the appel-

lant and that since 01.06.1998, she had been in possession

of the said land.

Having stated the facts of this appeal and the position of

the appellant and the plaintiff-respondent, let me now turn

to consider the two questions on which leave to appeal was

granted by this Court.

The two questions referred to earlier, clearly indicate that

the issue in question is as to whether a purchase of a prop-

erty by a third party for and on behalf of a foreigner, allegedly

in order to evade the payment of 100% tax on the sale, could

create a constructive trust on the basis of sections 4(1) and

98 of the Trust Ordinance.

It is not disputed that the land in question was bought

in the name of the appellant. It is also not disputed that

the proceeds for the purchase of the said land was provided

by the plaintiff-respondent. The contention of the learned

Counsel for the appellant was that at the time the appellant

returned to Sri Lanka, the plaintiff-respondent had agreed to

purchase a property for her and therefore the said purchase

was a gift from the plaintiff-respondent to the appellant.

The learned Counsel for the plaintiff-respondent relied on

the documents marked as P1 and P2 and contended that the

necessary funds for the purchase of the land belonged to the

plaintiff-respondent as he had obtained money from a joint

344 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

account he had with his wife and to show her that it was a

different transaction he had obtained the appellant’s signa-

ture to a letter whereby she had agreed to re-transfer the

land to a nominee of the plaintiff-respondent. The appellant

submitted that a copy of the said letter was not given to the

appellant.

The appellant had stated that she had never promised

to transfer the land in the name of the plaintiff-respondent

and that she had spent over Rs. 2,000,000/- to renovate the

house. She had also cultivated the land in question and she

had assessed the improvements made to the house and to the

land for Rs. 3,000,000/-.

The plaintiff-respondent stated that the land in dispute

was purchased in the name of the appellant by Deed No. 386

dated 12.07.2004 attested by S.L.m. Halish, Notary Public.

He had paid the consideration amounting to Rs. 2,760,000/-

as referred to in the Deed and also had paid Rs. 170,662.50

as survey fees, Notaries fees and Stamp Duty etc. It was also

submitted that he had purchased the said land in the name

of the appellant as since he is a foreigner he would have to

pay 100% as Tax. His intention was to form a company in

Sri Lanka and thereafter to transfer the said land in the name

of the company. He had not been able to form a company

with the approval of the Board of Investment of Sri Lanka.

However, before the execution of the said Deed he had

obtained a letter from the appellant agreeing to re-transfer

the property in question either to the plaintiff-respondent or

to his nominee.

The document P1 is the Deed of Transfer No. 386, dated

01.06.1998 attested by S.L.m. Halish, Notary Public. The

*Saroja Nisansala v. Aberfoyle*

SC *(Dr. Shirani A. Bandaranayake, CJ.)* 345

schedule to the said Deed refers to lots 1, 2, 3 and 4 in Plan

No. 3851, dated 09.07.1993 made by k.S. Panditharatne of

kegalle, Licensed Surveyor.

The document P2 dated 29.05.1998 is an undertaking by

the appellant to transfer the land either in the name of the

company to be incorporated in Sri Lanka or in the name of

any person nominated by the plaintiff-respondent. The said

document is as follows:

“29th may 1998

**I, deeraSIng araCChIge SarOJa nISanSala**

of “kumari”, Attangalle Road, Nittambuwa, do hereby

declare and state that I received a sum of **rupeeS TwO**

**mIllIOn Seven hundred and SIxTy ThOuSand**

(Rs. 2,760,000/-) from **JOhn lawrenCe rOSe** of

Ducab, Dubai Cable Company Limited, Dubai to purchase

a land, on behalf of the said **JOhn lawrenCe rOSe,**

at Gonawala and depicted as Lots 1, 2, 3 and 4 in Plan

No. 3851 dated 9.7.1993 made by k.S. Panditharatne,

Licensed Surveyor.

I further undertake and agree that, on the instructions

of the said **JOhn lawrenCe rOSe**, to transfer the said

land in the name of the company to be incorporated in

Sri Lanka or in the name of any persons nominated by

the said **JOhn lawrenCe rOSe**.”

It was on the basis of the aforementioned document that

the plaintiff-respondent had pleaded a constructive trust. A

trust creates a situation where one person holds property

for the beneft of another. Describing the concept of trust,

Dr. L.J.m. Cooray refers to the defnition given by keeton,

(Trust, 1971, Pg. 13), which is as follows:

346 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

“The relationship which arises wherever a person called

the trustee is compelled in equity to hold property,

whether real or personal, and whether by legal or equi-

table title for the beneft of some persons (of whom he

may be one and who are termed cestuis que trust) or for

some object permitted by law, in such a way that the real

beneft of the property accrues not to the trustee but to

the benefciaries or other objects of the trust.”

Learned Counsel for the appellant contended that, con-

sidering the provisions contained in sections 4 and 98 of the

Trusts Ordinance, the transaction in this appeal cannot be

treated as one, which created a trust. It was also submitted

that the District Court of mawanella as well as the Provincial

High Court had erred in law on this issue and that the deci-

sion in *Muniyandy Natchie v. Kayambo* (1) on which reliance

was placed by both Courts, was wrongly decided.

Section 4 of the Trusts Ordinance is contained in Chap-

ter II of the said Ordinance, which deals with the creation of

Trusts. Section 4(1), which deals with lawful purpose is as

follows:

*“A trust may be created for any lawful purpose. The pur-*

*pose of a trust is lawful, unless it is –*

*(a) forbidden by law, or*

*(b) is of such a nature that, if permitted, it would defeat the*

*provisions of any law, or*

*(c) is fraudulent, or*

*(d) involves or implies injury to the person or property of*

*another or*

*Saroja Nisansala v. Aberfoyle*

SC *(Dr. Shirani A. Bandaranayake, CJ.)* 347

*(e) the Court regards it as immoral or opposed to public*

*policy.”*

Section 98 of the Trusts Ordinance refers to the saving

rights of bona fde purchasers and reads as follows:

*“Nothing contained in this Chapter shall impair the rights*

*of transferees in good faith for valuable consideration, or*

*create an obligation in evasion of any law for the time be-*

*ing in force.”*

Section 98 of the Trusts Ordinance, it is to be borne in

mind, is contained in Chapter IX of the Trusts Ordinance,

which deals with Constructive Trusts.

Learned Counsel for the appellant strenuously contended

that, the plaintiff-respondent’s action, clearly indicates that

there is a breach of Revenue Law and therefore the respon-

dent cannot seek relief under the Trusts Ordinance. As stated

earlier, section 4(1) of the Trusts Ordinance is specifc with

regard to the creation of Trusts, which could be for any lawful

purpose. The said section has clearly defned the instances,

where a trust could be regarded as unlawful. In such circum-

stances, what is necessary is to examine as to the steps tak-

en by the plaintiff-respondent and whether they would come

within the purview of section 4(1) of the Trusts Ordinance.

It is not disputed that the plaintiff-respondent had sent

the money for the appellant to purchase the property in her

name.

The contention of the plaintiff-respondent was that the

reason for the said decision was to avoid the payment of tax

imposed under the Finance Act. Learned Counsel for the

348 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

appellant contended that both the District Court and the

High Court had held that the breach of Revenue Law is not

within the contemplation of sections 4(1) and 98 of the Trusts

Ordinance and as stated earlier that both Courts had erred

as they had relied on *Muniyandy’s* case, which had been

wrongly decided.

In the light of the above, it is necessary to consider

whether the transaction in question could be treated as an

unlawful transaction.

Dr.L.J.m. Cooray in his work on the subject of Trust

(Trust, L.J.m. Cooray, pg. 91) has discussed the nature of an

unlawful trust. According to Dr. Cooray, if sections 4 and 98

of the Trusts Ordinance had been omitted, the general law

of the land would have prevented the operation of trusts for

unlawful purposes. Referring to trusts for unlawful purpos-

es, Dr. Cooray refers to Prof. weeramantry’s Treatise on the

Law of Contracts (The Law of Contracts, vol. 1). Prof. weera-

mantry, referring to the breach of revenue regulations clearly

states that the mere breach of revenue regulations would not

itself render illegal a contract in respect of which they are im-

posed (The Law of Contract, vol.1, Pg. 340). It could also be

argued that what the plaintiff-respondent intended by pur-

chasing the property in the name of the appellant was not to

breach the revenue legislation, as in any event, at the stage of

a re-transfer and at the stage of registration of the said land,

the plaintiff-respondent would have to make the payment of

tax in terms of the Finance Act.

An act could not be treated as invalid simply due

to illegality. In *Fernando v. Ramanathan*(2), a Full Bench

at that time, had decided that a deed is not invalid

*Saroja Nisansala v. Aberfoyle*

SC *(Dr. Shirani A. Bandaranayake, CJ.)* 349

on the ground of illegality because it is contrary to what may

be termed the policy of an Ordinance. Considering the im-

plied statutory prohibitions, Prof. weeramantry (supra, pg.

337) has referred to the decision in *Mohideen v. Saibo* (3),

*Georgiades v. Klompje* (4) and Pollock (13th edition, pg 275)

and had stated thus:

“where a statute merely imposes a penalty on the

performance of certain acts without declaring such acts

to be illegal or void, the question arises whether such acts

are void. In such cases we must look to the intention of the

legislature to see whether the imposition of the penalty

implies such a prohibition as to make the resulting con-

tract void. The imposition by the legislature of a penalty

on any specifc act or omission is *prima facie* equivalent

according to Pollock to an express prohibition. Such pro-

vision is however, only prima facie evidence and is not

enough by itself to make a contract to do that act illegal

or void.”

Considering the submissions made by both learned

Counsel for the appellant as well as the plaintiff-respondent

it is apparent that no arguments were put forward by the

appellant that if it was allowed, the transaction which took

place between the appellant and the plaintiff-respondent

would defeat the provisions of any law. Similarly no material

was put forward to substantiate the fact that the said transac-

tion is not one which is forbidden by law, fraudulent, involves

or implies injury to the person or property of another and the

Court regards it as immoral or opposed to public policy.

Learned Counsel for the appellant contended that

in terms of section 4(1) of the Trusts Ordinance there is no

possibility of relying on a Trust, when the purpose is illegal.

350 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

Section 4(1) of the Trusts Ordinance as stated earlier

clearly refers to the fact that a trust may be created for any

lawful purpose. The unlawful purposes, which would forbid

a Trust being created, are specifcally referred to in section

4(1). Learned Counsel for the appellant took up the position

that the intention to avoid the payment of 100% as tax on

the land transaction would clearly show the objective of the

plaintiff-respondent’s action. However, unlawful intention

alone cannot make the contract illegal. Referring to unlaw-

ful intentions, Prof. G. L. Peiris (Some Aspects of the Law of

Unjust enrichment in South Africa and Ceylon, pp. 72-73)

states that,

“A signifcant development in the modern law is that an

unlawful intention, bilaterally entertained, is no longer

an obsolute bar to restitution. This principle was recog-

nized for South African law in 1939 in *Jajbhay v. Cassim*

where Stratford, C.J. declared that “the rule expressed in

the maxim *in pari delicto potior est condition defendentis*

is not one that can or ought to be applied in all cases. . .

It is subject to exceptions which, in each case, must be

found to exist only by regard to the principle of public

policy.” watermayer, J.A. said: “the principle underlying

the general rule is that the Court will discourage illegal

transactions, but the exceptions show that where it is

necessary to prevent injustice or to promote public pol-

icy, they will not rightly enforce the rule.” This view has

been authoritatively accepted as applicable to the law of

Ceylon.”

It is therefore evident that, no material had been adduced

before this Court to show that the transaction in question

*Saroja Nisansala v. Aberfoyle*

SC *(Dr. Shirani A. Bandaranayake, CJ.)* 351

had been for an unlawful purpose in terms of section 4(1) of

the Trusts Ordinance.

Learned Counsel for the appellant strenuously contend-

ed that *Muniyandy’s case (supra)* was wrongly decided for the

reason that the transaction in issue cannot be called a trust

in view of sections 4(2) and 98 of the Trusts Ordinance. In

*Muniyandy’s* case (supra) the plaintiffs-respondents desired

to own property that was sold through the estate Fragmen-

tation Board. They were both persons whose application for

citizenship in Sri Lanka were being fnalized by the Register-

ing Authorities of the State. The plaintiffs-respondents were

therefore non-citizens at the time of the sale. Under the Fi-

nance Act. No. 11 of 1963, they were required to pay 100%

tax of they purchased the property as non-citizens. In or-

der to overcome this, the plaintiffs-respondents had paid the

purchase price for the land and had the deed written in the

name of the defendant-appellant, who was their sister and a

citizen of Sri Lanka.

Learned Counsel for the defendant-appellant in that mat-

ter had contended that section 98 read with section 4 (1) of

the Trust Ordinance would prevent the creation of such a

trust in so far as the transfer of property was an evasion of

section 58(1) of the Finance Act. The Court of Appeal; con-

sidering the submissions made, had held that the relevant

provisions of the Finance Act do not impose a prohibition

on the Transfer of land to the class of persons to whom the

plaintiffs- respondents belonged.

An examination of the provisions of the Finance Act No11

of 1963, referred to in muniyandy’s case (supra), clearly show

that appropriate steps could have been taken to ensure that

such person, who had attempted to evade tax, be made to

352 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

pay the relevant dues to the authorities. As correctly point-

ed out in *Muniyandy’s case (supra)* section 58(1) read with

section 59 of the Finance Act had imposed a tax and empow-

ered the Commissioner of Inland Revenue to recover the tax

if in default due to the non-payment, from the person/s from-

whom it has become due. Section 58(1) of the Finance Act,

No. 11 of 1963, referred to the charge of the tax and stated

that,

*“Subject to the provisions of sub-section (4), where there*

*is a transfer of ownership of any property in Ceylon to*

*a person who is not a citizen of Ceylon, there shall*

*be charged from the transferee of such property a tax*

*of such amount as is equivalent to the value of that*

*property.”*

Section 59 of the Finance Act, which dealt with the

effect of the non-payment of the tax, clearly stated that the

Commissioner of Inland Revenue, upon notifcation of such

default by the Registrar of Lands or the Company as the case

may be, shall take steps for the recovery of the tax deemed to

be in default.

The Court of Appeal in *Muniyandy’s case (supra)* had

considered the said position and the non-payment of the

tax above the ordinary stamp duty where the purchase was

made in the Appellant’s name. Consideration was also given

to several decisions by the Court of Appeal. .Considering the

provision of the Finance Act and the other relevant material

referred to above, it would not be correct to state that the

*Muniyandy’s case (supra)* was wrongly decided by the Court

of Appeal. Accordingly, the two questions on which this

appeal was argued are answered as follows:

*Saroja Nisansala v. Aberfoyle*

SC *(Dr. Shirani A. Bandaranayake, CJ.)* 353

1. the plaintiff-respondent could in the circumstances of the

case, plead a constructive trust;

2. the trust alleged by the plaintiff-respondent is not

contrary to the provisions in sections 4(1) and 98 of the

Trusts Ordinance.

For the reasons aforesaid, the appeal is dismissed and

the judgment of the Provincial High Court (Civil Appeal) of the

Sabaragamuwa Province holden in kegalle dated 27.01.2009

is affrmed.

I make no order as to costs.

**SrIpavan, J.** – I agree.

**Imam, J.** – I agree.

*Appeal dismissed.*

354 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

**DISSANAYAkE AND OTHERS**

**[UvA MAGNETTETLE] vS. GEOLOGICAL SURvEY AND**

**MINES BUREAU AND OTHERS**

COURT OF APPeAL

ROHINI mARASINGHe.J

CA 814/2007

JULy 19, 2011

AUGUST 23, 2011

SePTemBeR 30, 2011

OCTOBeR 14, 2011

**writ of mandamus – environmental Impact assessment report**

**[eIar] - not approved-national environmental act [nea] 47 of 1980**

**as amended – mines and minerals act 33 of 1997 – Section 30 –**

**Industrial mining licence? – non compliance with regulation –**

**Breach of statutory duty – unfairness – abuse of power?**

The petitioner sought a writ of mandamus to compel the 7th respondent

– Conservator of Forests to gazette the eIAR under Section 23 BB [4] of

the National environmental Act 47 of 1980.

The petitioner submitted an application to the 1st respondent to obtain

an exploration licence in order to explore iron ore with the intention

of mining iron ore. The petitioner received a licence to explore under

Section 30 of the mines and minerals Act.

After obtaining the exploration licence the petitioner commenced work

– through a company X. After submission of various reports – and after

completion of the exploration work the petitioner made an application

for the Industrial mining Licence.

The respondents did not approve the eIAR and the project could not

be gazetted, as the project is a prescribed project in terms of the law

it requires an eIAR approved by a Project Approving Agency (PAA)

appointed by the Central environmental Authority [CeA].

*Dissanayake and others [Uva Magnettetle] vs. Geological Survey and*

CA *Mines Bureau and others (Rohini Marasinghe J.)* 355

**held:**

(1) Law had provided the manner in which the CeA and the PAA could

object to the eIAR. The procedure laid down in NeA regulations

had not been followed by the PAA.

(2) If a statute imposes on a statutory body to do an act on a specifed

date, it is clear that a failure to do that duty on that date would

constitute a breach of a statutory duty.

If the duty had not been performed simply through lack of interest

the Court is more likely to decide that there had been a breach of

duty.

Per Rohini marasinghe, J.

“In this case the NeA had not acted in compliance with the

NeA regulations after the petitioner had submitted the eIAR in

September 2006 and after it had been recommended and approved

by the Technical evaluation Committee [TeC] of the CeA and PAA”.

Per Rohini marasinghe, J.

“I am of the view that the 7th respondent – the Conservator of

Forests – was in breach of a statutory duty amounting to unfairness

and an abuse of power when he did not comply with gazetting the

project approved by the TeC”.

**applICaTIOn** for a writ of mandamus.

*Kuvera de Soyza* with *Upendra Gunasekera* for petitioner.

*Arjuna Obeysekera D. S. G.,* for respondents.

*Cur.adv.vult*

October 28, 2011

**rOhInI maraSInghe J.**

The Petitioner has fled this application seeking for a writ

of mandamus to compel the 7th respondent to gazette the

environmental Impact Assessment Report under section

356 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

23BB (4) of the National environmental Act 47 of 1980 as

amended. (hereinafter referred to as the NeA)

The contentions put forward by the petitioner are briefy

as follows. The petitioner submitted an application to the 1st

respondent to obtain an exploration license in order to explore

iron ore with the intention of mining iron ore at Pelawatte in

the moneragala District. The Petitioner received the licence

bearing No eL/119 on 21st July 2003. The said license had

been issued in terms of section 30 of the mines and minerals

Act 33 of 1997. By virtue of that licence the petitioner

was permitted to exercise exclusive right to explore iron

magnetite saving and excepting building materials, uranium,

thorium, beryllium, lithium and coral. The exploration area

was specifed in the said license which had been marked as

P3. The proposed license required the petitioner to comply

with certain conditions which were attached as an annexure

to the proposed license eL 119. After obtaining the explora-

tion license from the 1st Respondent the petitioner commenced

the work. The exploration work was done by a company

named Geological Survey and mines Bureau Technical

Services (Pvt) Ltd. Before commencing the exploration work

the petitioner submitted the feasibility report to the ministry

of Lands marked as P5. The feasibility study report included

the manner of construction, the project phases, the land

development, the environmental impact of the mining project

the Socio-economic beneft of the project and such other rele-

vant information. The area in which the Petitioner intended to

commence the work initially was depicted in the plan marked

as P6. The Petitioner had paid a sum of Rs. 1,654,424.29

in total to the said company for their services. The receipts

have been marked as P18A to P18D. Upon conclusion of

*Dissanayake and others [Uva Magnettetle] vs. Geological Survey and*

CA *Mines Bureau and others (Rohini Marasinghe J.)* 357

the said exploration work by the said Company in the area

depicted in P6, a report was submitted to the 1st respondent

which was marked as P19. The petitioner submits that upon

completion of the said exploration work, the 1st respondent

had requested the petitioner to submit an economic viability

Report in relation to the said project. The petitioner had

incurred a sum of Rs. 3,802, 104.54 for the preparation of the

said Report. The economic viability Report was submitted to

the 1st respondent. It is marked as P20. After completion of

the exploration work the Petitioner made an application for

the Industrial mining License (P21). Under the provisions of

the mines and minerals Act and the National environmental

Act (NeA) there is a procedure that should be followed before

the Industrial mining license is issued.

The objections of the respondents to the application of

the petitioner is that the environmental Impact Assessment

Report (eIAR) had not been approved by the project approving

agency (PAA) and on that basis the proposed project cannot

be gazetted under section 23 BB (4) of the NeA.

The reasons for not approving the project are mentioned

in the affdavit of the Central environmental Authority

(Authority) who is the 8th respondent in this application in

paragraph 13 and paragraph 14. The reasons for not approv-

ing the project by the 7th respondent, who is the Conserva-

tor of Forests in the Forest Department (Project Approving

Agency), are contained in paragraphs 14 and 15 of his

affdavit. Identical objections have been raised by both

parties. The objections are mentioned below:

“13 (a) The eIA submitted by the petitioner has proposed

the export of raw iron ore for the frst four years (but this

358 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

was objected to by the public) and export of value added

products would commence only thereafter;

(b) The exact extent of the ore has still not been deter-

mined by the petitioners;

(c) The current policy of the 1st Respondent is that

approval will not be granted for the full export of

minerals that are extracted must be exported only

after value addition is carried out thus ensuring that

the country benefts to the fullest by the export of its

natural resources;

(d) In fact, the mineral Investment Agreement that the 1st

respondent has entered into with other licensees is

also for the export of value added products.”

14 (a) The eIA submitted by the petitioners has not been

approved by the TeC;

(b) The TeC has only decided the following:

(i) To recommend the project on phase out basis

initially for a two year period subject to the terms

and conditions attached in Annexure 1 of the TeC

report;

(ii) A very close monitoring mechanism to be adopted

to monitor and evaluate the proceedings;

(iii) I order to address the public concerns on handing

over this national resource to a single private

sector institution without any competition an

export of the iron ore in raw form during the

initial period, a directive to be sought from the 4th

respondent since these issues relate to policy.

*Dissanayake and others [Uva Magnettetle] vs. Geological Survey and*

CA *Mines Bureau and others (Rohini Marasinghe J.)* 359

(c) Based on the recommendation of the TeC and since

it related to a matter of policy, the Forest Department

sought a directive from the 4th respondent for a policy

decision on handing over this iron ore recourse to

a single private sector institution without any com-

petition ad regarding the export of the iron in raw

form during the initial period of three years without

processing.

(d) The 4th respondent has considered the matter and

keeping with the current policy decided that the ex-

port of raw iron cannot be permitted.

(e) The approval of the eIA must be given by the Project

Approving Agency with the concurrence of the Cen-

tral environmental Authority.

(f) The CeA has so far not granted its concurrence to the

eIA for the reasons set out above and therefore the

eIA cannot be gazetted;

(g) In any event the exploration license issued by the 1st

respondent has expired and the petitioner has sub-

mitted an appeal to the 4th respondent requesting

that it be extended.”

These concerns raised by the respondents are addressed

in the latter part of this judgment.

There are two Statutes that are relevant to this applica-

tion. Namely, The mines and mineral Act 33 of 1992 and the

National environmental Act 47 of 1980 as amended by Act 56

of 1988 any by Act 53 of 2000. It is also relevant to mention

the purposes of these two Statutes. The mines and mineral

360 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

Act 33 of 1992 was enacted to provide for the establishment

of a Geological Survey and a mines Bureau to regulate the

exploration of, mining, transportation, processing, trading in,

or export of, minerals. And the functions of the Department of

Geological Survey were transferred to the Bureau established

by this Act under section 2 of the said Act.

The Part II of the Act deals with the ownership of the

minerals and the issuance of licenses. According to this Act

the ownership of all minerals are vested in the State irre-

spective of any right of ownership of all soil under which the

minerals nay be found. And no person can explore for miner-

als without a license issued under the provisions of this Act.

(vide section 30) After completion of the exploration, and if

the minerals are deposited in the designated area, an applica-

tion may be made by the project proponent for the industrial

mining License under section 35 of the mines and minerals

Act to the 1st Respondent.

when an application is received under this Act the

Bureau, may subject to the provisions contained in section

33, either issue a license to the applicant or for reasons to be

recorded refuse the issue of the license to such applicant. The

license may be issued, subject to the provisions contained in

sections 35(2) (a) (b) (c) 35 (3) 35(4) (a) to 35 (j). Accordingly,

the Bureau (1st Respondent) has immense powers conferred

on the Bureau by the Act to supervise and regulate the proj-

ect to which the industrial mining License had been issued.

Section 37 states that a licence could be cancelled if it con-

travenes any terms or conditions attached to the said license.

The Act further states that the protection of the environment

should be in compliance with the provisions of the NeA (vide

*Dissanayake and others [Uva Magnettetle] vs. Geological Survey and*

CA *Mines Bureau and others (Rohini Marasinghe J.)* 361

section 61) Section 64 gives the minister the power to make

regulations in respect of all matters which are required by the

Act to be prescribed. The provisions in this Act are couched in

such a way that the 1st respondent and the NeA Authorities

are able to monitor and regulate the project as statutory pro-

visions do well stipulate that purpose in these two Statutes.

The mines and minerals Act is designed in such a way that

it has the statutory power to deal with all matters concern-

ing the mines and minerals deposited in the area to which a

license had been issued. It also deals with the environmental

impact of the project.

The National environmental Act No. 47 of 1980 (NeA)

was amended by Act No 56 of 1988 and by Act 53 of 2000.

The purpose of this Act could be ascertained by consider-

ing the preamble and the provisions contained in the Act.

Consequently, the Act is enacted to make provisions for the

protection and the management of the environment. The

Central environmental Authority (CeA) and the environmen-

tal Council are established under this Act. The functions of

the NeA are carried out by the “Authority” called the Central

environmental Authority (CeA) The powers and the duties of

the Authority are contained in Part II of the Act. According to

section 26(1) the Authority may delegate any of its’ powers,

duties and functions under the Act to any Government

Department subject to the provisions contained in section 26.

According to section 23 (Z) of the NeA, the minister of the

subject may by Order, published in the gazette, determine

the projects that are classifed as “prescribed projects”. This

project in issue is a prescribed project under the said section.

The relevant gazette is the Gazette extra-ordinary 772/22

362 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

dated 24th June 1998. The procedures that govern the

approval of prescribed projects are contained in Part Iv C

of the NeA. Along with the gazette the minister of environ-

mental Affairs had made Regulations under section 23CC of

the NeA 47 of 1980.These Regulations (hereinafter referred

to as NeA regulations) are cited as Regulations No 1 of 1993.

These regulations refer to the procedure for the approval of

projects.

As this project is a prescribed project in terms of the law

it requires an environmental Impact Assessment Report.

(eIAR) In terms of the law any project which requires an eIAR,

must have such approved by a Project Approving Agency,

appointed by the Central environmental Authority. (CeA)

In terms of the NeA regulations when the project propo-

nent (petitioner) undertakes a mining project and was actively

making preparations towards that project, should submit to

the Project Approving Agency (PAA) preliminary information

on the project as requested by the appropriate PAA. In terms

of the law the PAA will assess the preliminary information

report. After the assessment, if the PAA considers the pre-

liminary information of the project submitted by the project

proponent is adequate to be an Initial environmental exami-

nation Report, the PAA under the law is permitted to proceed

with that report as specifed in the NeA regulations (NeA

regulations 5 and 6 (iv).

The petitioner (hereinafter referred to as the project

proponent) submitted an application to the 1st respondent

Bureau for a mechanized mining project. The 1st Respondent

by letter dated 10-12-2004 had informed the Director Gener-

al (environmental Pollution Control Division) the following;

(i) The proposed project should undergo an eIAR under

section 23BB of the NeA.

*Dissanayake and others [Uva Magnettetle] vs. Geological Survey and*

CA *Mines Bureau and others (Rohini Marasinghe J.)* 363

(ii) To make arrangements to appoint a project approving

Authority (PAA)

(iii) To instruct the PAA to prepare the Terms of Reference

(TOR) on this subject.

The letter is marked as P 24.

lt is the CeA by law who can designate a PAA. (vide

NeA regulation 2(i). The CeA by letter dated 7-2-2005

designated the Forest Department (FD) as the PAA as the area

of the project considered here belonged to the Forest depart-

ment (P25). The Forest Department consists of Conservator of

Forests, Deputy Conservator of forest offcers.

In terms of the law the PAA (FD) could grant approval to

the eIAR only with the concurrence of the CeA. (NeA regula-

tion 3)

The 7th respondent as the Conservator of Forests is the

head of the Forest Department. He appointed a Technical

evaluation Committee (TeC) to assess and evaluate the eLAR

prepared for the proposed magnetite mining site. Namely,

the Horakagodakanda Range Buttala by the project propo-

nent, seeking environmental clearance for implementation of

the said project. The 7th respondent appointed the following

offcers to the TeC.

1. C.H.e.R. Siriwardena – Deputy Director Geology of

the Geological Survey and mines Bureau.

2. A. m. wimalasiri environmental Offcer attached to

the Butthala Pradeshiya Sabha – an offcer attached

to the ministry of the environmental Affairs.

3. Nilimini Attanayake – environmental Offcer attached

to the CeA. (Authority)

364 *Sri Lanka Law Reports* [2011] 2 SRI L.R.

4. Anura de Silva Deputy Conservator of Forests

attached to the Forest Department (PAA)

5. Anil Peiris Deputy Director of mining Geological

Survey and mines Bureau.

The offcers appointed to the TeC were from the CeA,

(Authority) Forest Department, (PAA) and the 1st Respon-

dent Offcer, who all are holding responsible positions. The

Project Approving Agency (FD) and the CeA (Authority) were

members of the TeC. The document R2 which is titled as

the “Final TeC Report” evaluation of the environmental

Impact Assessment Report (eIAR) For the proposed magnetite

mining Site, Horakagodakanda Range and Buttala Uva

magnetite Company Ltd.” The Final Report on the above

subject was prepared by the said offcers. According to the

document R2 an environmental scoping meeting had been

held at the CeA as far back as 9-12-2004. Additionally, an

environmental scoping had been carried out on 7-2-2005 by

the FD functioning as the PAA.

As stated in R2, the TeC in which both the CeA and

PAA were represented had ‘strongly considered the method-

ology and the available exploration data of the ore-reserve

calculations, environmental and social impacts of the

proposed project” (4)

The TeC had assessed and evaluated the following

concerns as shown in document R2;

1. mining and Ore Reserve estimation (4.1)

2. ecological Impact (4.2)

3. Socio economic Impacts (4.3)

4. environmental monitoring Programme (4.4)

5. Restoration Plan (4.5)