WATTE GEDERA WIJEBANDA VS. CONSERVATOR GENERAL OF FORESTS AND OTHERS

SUPREME COURT
SARATH N. SILVA, C. J.
SHIRANEE TILAKAWARDANE, J. AND
SALEEM MARSOOF,
S.C. APPLICATION NO. 118/2004
SEPTEMBER 7TH, 2005,
OCTOMER 10TH AND 24TH, 2005,
JANUARY 9TH, 2006,
JUNE 5TH, 2006

Fundamental Rights – Constitution – Article 12(1) – Equality before law – Article 27(4) – Directive principles of State policy enjoins the State to protect, preserve and improve the environment – Article 28 – Fundamental duty upon every person to protect nature and conserve its riches – Public Trust doctrine – Present generation holds the natural resources in trust for future generations – National Environment Act No. 47 of 1980 – Section 26(1) as amended by Section 9 of the National Environmental (Amendment) Act No. 56 of 1988 – Permit delegation of the powers and functions of the Central Environmental Authority to any Government Department, Corporation, Statutory Board, Local Authority or any Public Officer – Fauna and Flora Protection Ordinance No. 2 of 1937 – Section 2 – Minister has power to declare a specified area of land to be a national reserve.

The Petitioner was granted leave to proceed in respect of an alleged infringement of Article 12(10) of the Constitution.

The petitioner instituted this application for violation of his fundamental rights, after being refused a permit for quarry mining of silica quartz in an environmentally sensitive area. However, he became aware that one, several or all the 1st to 5th respondents had granted a mining permit to the 6th respondent with respect to the same area to carry out quarry mining. The petitioner claims that the respondents have acted in a discriminatory manner depriving and denying the petitioner of his right to equal treatment.

Held:

(1) The Constitution in Article 27(4) of the directive principles of State policy enjoins the State to protect, preserve and improve the environment. Article 28 refers to the fundamental duty upon every person to protect nature and conserve its riches.

(2) The doctrine of "public trust", recognized that the organs of State are guardians and preservers of the resources of the people.

(3) Under the 'public trust doctrine' as adopted in Sri Lanka, the State is enjoined to consider contemporaneously, the demands of sustainable development through the efficient management of resources for the benefit of all the protection and regeneration of our environment and its resources.

Per Shiranee Thilakawardena, J.

> "Human kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of accountability."

(4) Even if environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to clean environment and the principles of equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12(1) of the Constitution.

(5) Although the Directive Principles of State policy in Article 27(4) of the Constitution, are not specifically enforceable against the State, they provide important guidance and direction to the various organs of State in the enactment of laws and in carrying out the functions of good governance.

(6) Although, the international instruments and constitutional provisions are not legally binding upon governments, they constitute an important part of our environmental protection regime, and the importance and relevance of which must be recognized when reviewing executive action vis-à-vis the environment.

(7) In terms of Article 3 of the Constitution the sovereignty is in the people, and is inalienable and being a representative democracy, the powers of the people are exercised through persons for the time

being only, entrusted with certain functions, and as such must at all times be considered by them as a sacred trust, never to be exploited for short term commercial gain or personal gain even by those holding political power, or exploited for their own personal gain and selfish agendas.

Per Shiranee Tilakawaradena, J .

"The enactment of a law and tolerating its infringement, is at times worse than not enacting a law at all. The continued infringement of law, over a period of time is facilitated by a high level of laxity, tolerance and even collusion on the part of the administrative authorities concerned with the implementation of the law."

(8) The petitioner's right to equality and equal protection of the law under Article 12(1) of the Constitution has been violated through the arbitrary and capricious acts of the respondents in issuing a quarry mining permit to the 6th respondent.

(9) The issuance of an environmental licence with a validity, extending beyond that of the mining permit was a clear violation of established procedure and raised mala fides against the relevant authorities who sanctioned such licence.

(10) Where a Statute requires the power to be exercised in a certain form, the neglect of that form renders the exercise of the power et ultra vires.

(11) The Court would not substitute its discretion for that of the expert, but would interfere with its exercise, if it is sought to be exercised in an arbitrary manner or in the matters outside the limits of the discretionary authority conferred by the legislature or on considerations extraneous to those laid down by the legislature.

(12) That the application of the petitioner for conducting mining activities has been rightly refused by the relevant authority.

(13) The 6th respondent's permit was in any event invalid, as he did not have a valid environmental licence under the National Environment Act.

Cases referred to:

(1) *Som Prakash Rekhi vs. Union of India,* AIR 1981 S.C. 212

(2) *M. C. Mehta vs. Union of India,* AIR 1988 S.C. 1037

(3) *Rural Litigation and Entitlement Kendra, Dehradun vs. State of Uttar Pradesh,* AIR 1988 S.C. 2187

(4) *Damodar Das vs. The Special Officer, Municipal Corporation of Hyderabad,* AIR 1987 Ap 171

(5) *M. C. Mehta vs. Kamal Nath* (1997), S. C. C. 388

(6) *Bulankulama vs. Secretary, Ministry of Industrial Development* (2000) 3 SLR 243

(7) *Danube Case (Hungary vs. Slovakia)* (1997) 1CJ Reports 78

(8) *A. P. Pollution Control Board vs. Nayada* (1992) 2 S. C. C. 718

(9) *Vellore Citizens' Welfare Forum vs. Union of India* (1995) 5 S. C. C. 647

(10) *ICELA vs. Union of India,* AIR 1997 S. C. 3519

APPLICATION under Article 12 (1) of the Constitution.

D. P. Kumarasinghe, P. C. with *Chandana Prematilaka* for Petitioners.
N. Sinnathamby, P. C. with *K. M. B. Ahamed* for the 6th Respondent
Neville Abeyratne with *Samanthi Gamage* for the 8th Added Respondent
Sanjay Rajaratnam, D. S. G. for 1st, 2nd, 3rd, 4th, 5th, 7th & 9th Respondents.

Cur.adv.vult.

Appril 5th 2007

SHIRANEE TILAKAWARDANE, J.

The Petitioner was granted leave to proceed in respect of an alleged infringement of Article 12(1) of the Constitution, on 28.04.2004. The Petitioner pleaded that the acts of one, several or all of the 1st to the 5th Respondents in denying the Petitioner a permit to mine the quarry of silica quartz deposited at Kiriwalhena, in the Gramasevaka Division of Polaththawa, constituted a violation of the Petitioner's right to equality and equal protection of the law guaranteed under Artcle 12(1) of the Constitution.

The Petitioner claims that although his application was rejected by the Respondent authorities, based on grounds set out in document P11 (that the quartz deposit is situated less than a mile from the Girithale Minneriya national reserve; that it is situated close to Sigiriya archeological area; that mining activities at the site may cause damage to wild life and water resources; that watercourses to the ancient Sitiriya Maha Wewa may be altered as a result of the mining and that it is the decision of the Environmental Committee of the Matale District, not to permit quarry mining in the lands surrounding Sigiriya), the 6th Respondent was granted a mining lease with respect to the same land by the Respondent authorities without recourse to the objections contained in P11. It is the Petitioners' contention that by granting a mining license to the 6th Respondent, without applying the same grounds and objections set out in P11, the Respondent authorities have acted in an unreasonable, arbitrary, capricious and discriminatory manner.

In this regard, it is also the Petitioners' contention that he had a legitimate expectation that the same grounds of objections set out in P11, which deprived the Petitioner of a permit, would be equally applied to the mining application submitted by the 6th Respondent. Therefore in failing to apply the same standards and objections to the concerned applications the Petitioner claims that the Respondents have clearly acted in a discriminatory manner depriving and denying the Petitioner of his right to equal treatment.

Originally there were only 7 Respondents in this case. By order dated, 07.09.2005, this court added A. G. Sirisena, the Chairman of Dambulla Predeshiya Sabha at the relevant time, as the 8th Respondent. Furthermore, in consideration of the environmental impact, which was referred to in document P11, the Chairman of the Central Environmental Authority was added as the 9th Respondent and notice was issued to these added parties.

In addition, the 9th Respondent was directed to carry out an inspection of the site at which the mining had taken place, and report on the extent of the mining activities that had been carried out to date, and also to submit photographs depicting the said area, and this is annexed to the docket as "Field Inspectors Report".

Several documents have been submitted by the Respondents to support the sanction granted by the Respondent Authorities for the mining activities of the 6th Respondent. It is pertinent that these documents be subjected to the strictest scrutiny, as the validity and legitimacy of these documents appears to have a direct bearing on the merits of this case.

The 6th Respondent submitted a document marked as 6R13,which was presented as a 'true copy' of the mining permit issued to the 6th Respondent Company by the 4th Respondent. This permit purportedly granted license to the 6th Respondent to "extract quartz in one acre of land" from 06.02.2004 up to 05.02.2005.

A mining permit contains important conditions, which are a prerequisite to the commencement of mining activities. These conditions are displayed on the reverse of the permit. Document 6R13 however does not contain any such conditions on its reverse. Even a superficial comparison of the two documents 8R8, (which is a permit submitted by the 8th Respondent and should be identical in format to the permit 6R13), and mining permit 6R13, clearly shows that the 6th Respondent has suppressed the mandatory conditions, displayed on the reverse of the document, thereby depriving the court of the significance of the 5th condition, which mandates that, "the holder should obtain an Environmental Protection License (EPL) from the Central Environmental Authority, under the National Environmental Act No. 47 of 1980, prior to commencement of mining operations".

The 6th Respondent purported to rely on document 6R14 as the Environmental Protection License. However, this contention is demonstrably false. Paragraph 9 of the environmental license (6R14) refers to the relevant mining permit as bearing No. IML/C/4441, but the mining permit 6R13 relied on by the 6th Respondent is numbered IML/C/MD/19. Clearly the permit referred to in the environmental license, 6R14, is distinct from and bears no relation to the permit 6R13 relied on by the 6th Respondent. The 6th Respondent could therefore not have legally commenced any mining activities on the said land without an environmental license corresponding to the permit 6R13.

I am unable to place any reliance on the affidavit of the 6th Respondent that document 6R13 was the valid permit for this period, for the following reasons:

1. The Chairman of the Dambulla Pradeshiya Sabha has submitted 8R8, bearing No. IML/C/4441 as the permit issued to the 6th Respondent, which bears a different number.

2. The permit does not correspond with the environmental license 6R14, and does not tally with the permit number for which the environmental license was issued. The 6th Respondent produced 6R14 as the relevant environmental license to permit 6R13, and license 6R14 does not match or correspond with the number on the face of the permit 6R13.

3. Two distinct permits for the same period could not have been issued for the same mining activity.

Therefore 6R13 produced by the 6th respondent to this court, as the valid license for his mining activities is not a legitimate document and does not legally authorize or permit any such mining activity.

The 6th respondent has relied on 6R14 as the Environmental Protection License issued in terms of Section 23(B) of the Environmental Protection Act, No. 47 of 1980. This document too cannot be accepted since;

1. This has not been issued to the mining permit 6R13.

2. The validity period of the license has been visibly altered, the altered period is mentioned as between 22.03.2004 and 02.03.2007.

3. The application for the environmental license [marked as 8R3], clearly mentions the period of validity of the mining permit for which the environmental license is sought, as 06.02.2004 to 05. 02.2005.

4. The validity of the environmental license, reflected in page 8 of the document is 02.03.2004 to 02.03.2007.

5. This notably extends for a considerable period beyond that of the mining permit which is valid only up to 05.02.2005. An environmental license cannot be issued beyond the period of the mining permit for which it has been issued. These dates however correspond directly with the altered dates on license 6R14 (also submitted as 8R4).

It is manifest that these inconsistencies are material and affect the veracity and legitimacy of the purported environmental license 6R14, which cannot be accepted as the valid license and has no nexus to the mining permit 6R13 produced by the 6th Respondent.

I also find disturbing evidence of collusion between the 8th and 6th Respondents with respect to the issue of the environmental license 6R14. The issue of an environmental license with a validity period, extending beyond that of the mining permit is in clear violation of established procedure

and raises suspicions of mala fides against the relevant authorities who sanctioned such a license.

Complicity and collusion on the part of the Chairman, Dambulla Pradeshiya Saba the 8th Respondent in this case, is evidenced also by the environmental license issued by him on 02.03.2004, [marked as 8R4]. It is evident that the Inspection Report on the land [marked as 8R6], which should have preceded the issue of the license, has been finalized and submitted only on 20.03.2004, after the issue of the environmental license, dated 02.03.2004. This discloses that the environmental license was issued even prior to the finalization of the survey inspection report by its officers, in clear violation of standard procedure. Such blatant disregard for established procedure undermines the very purpose of the Inspection Report. It is clear that G. M. S. Herath, the Environmental Officer and Wasantha Kumara, the Revenue Administrator, have not conducted a genuine inspection, a fact clearly borne out by a comparison of 8R6 with the Field Inspectors Report tendered to this Court on 24.11.2005.

In paragraph 1.7 contained in page 3 of annexure 'F' to the Inspection Report, it is clearly stated that, "the committee decided not to permit any quarries which are situated in State Lands around Sigiriya and it was advised to inform the Geological Sections of Wildlife Department & Forest Conservation Department on the above decision hereafter." No valid report could have been made which ignored this clear directive against the grant of mining permits on the concerned land, which was a defined natural forest reserve.

The Field Inspector's Report dated 24.11.2005 tendered on the direction of this court, shows that the area concerned with mining activities had been previously demarcated distinctly as a natural forest. The report states that even the teak plantation, which existed on this land, had been cut and disposed of in order to facilitate the silica quarrying that had

been going on in this forest reserve. The stumps of teak trees, which had been felled, were visible with fresh sprouting of sapling leaves on it.

It also appears that another mining permit bearing No. IML/C/MD/1500 has been issued by the 4th Respondent for the period 21.02.2005 – 02.02.2006. This mining permit is annexed to the Field Inspector's Report, of the 9th Respondent as Annexure 'C'. It is curious as to how the 4th Respondent issued another permit for the period 21.02.2005 to 20.02.2006, when the Dambulla Pradeshiya Sabha had issued a trade license to the 6th Respondent only up to 31.12.2005. (Annexure C to the Inspection Report tendered to Court). The 4th Respondent's conduct is inexplicable and it would be prudent if such conduct is investigated. It is also pertinent to examine the actual process by which the mining permit was obtained by the 6th Respondent.

The 6th Respondent has relied on the document marked as 6R7b, which is an application for a permit to quarry quartz. This application has been preferred by the 6th Respondent on 20.12.2000 together with a project report, marked as 6R7c.

The 6th Respondent has admitted that the application 6R7b was submitted in response to an advertisement produced before Court as 6R5. This document 6R5 is clearly a paper advertisement by the Ministry of Forestry & Environment and the Forest Department for "reforestation with private sector participation".

The 6th Respondent's application in response to advertisement 6R5, was forwarded with a covering letter which referred only to the private sector reforestation program – 2nd phase application for 50 hectares of land in block No. 13 – Pollaththawa (SRL No. 104) Dambulla A. G. A. Division – Matale District. The project report 6R7c, annexed to the application appears to have been formulated for the

project of reforestation. The 6th Respondent was granted this project. In terms of the project, several undertakings which relate specifically to the reforestation project have been detailed in paragraphs B2, B3 and B4 of the project report, 6R7C and includes the setting aside of a sum of Rs. 1 Million towards obtaining water for the purpose of reforestation, planting and maintenance, inter-cropping and crop protection etc. The 6th Respondent had failed to honor any of these undertakings, and this is revealed in the Environmental Inspector's Report dated 24.11.2005.

Delays in implementing the terms of the project are referred to in letter dated 01.04.2003 marked as 6R10a, addressed to Mr. Peter Amarasinghe, Chairman of the 6th Respondent Company. Evidently a meeting of the Board of Investment, Sri Lanka has also been held to discuss these delays on the part of the 6th Respondent.

It is clear that the 6th Respondent had no interest whatsoever in the reforestation activities adverted to in the application 6R7b and project report 6R7c. The real purpose behind this application was to gain access to the land upon which quarry mining could be carried out. Instead of submitting a direct application for quarry mining to the relevant authority, the 6th Respondent has gained access to an expanse of protected land under the guise of reforestation and conservation, when in fact the real purpose was the exploitation of the land for commercial purposes.

There is ample proof of the fraud and misrepresentation carried out by the 6th Respondent. As late as 12.12.2002, the company's involvement with the allotted land was represented as being for the purpose of reforestation alone. No mention was made of mining activities in the letter sent by the 6th Respondent to the Conservator of Forests [marked as 6R9a] in which is stated "the delay in getting these details across to you is regretted. However, owing to the prolonged North-

Eastern rains for the past six to eight weeks and which we are still experiencing in the district, the surveyors were prevented from finalizing their surveys and connected documentation". This communication clearly indicates the representations of the 6th Respondent as to the Company's involvement in reforestation activities upon the said land. By letter dated, 12.12.2002, [marked as 6R9b] the 6th Respondent has also made an application seeking another 10 hectares of land.

Documents marked as 6R10b & 6R10c, also specifically advert only to reforestation. Significantly, in 6R10c, which is an extract of a meeting that has been held on 26.05.2003 it appears that while discussing matters relating to the allocation of land from Polaththawa for reforestation, the 6th Respondent has made a casual reference to the necessity of removing a quartz deposit on the land in furtherance of the reforestation scheme. A decision was made to discuss the feasibility and possibility of quartz extraction on the said land with the Conservator of Forests.

Even at this point there appears to have been an implicit understanding that any mining and extraction of quartz contemplated and discussed at the time was only for the purpose of facilitating the reforestation project undertaken by the 6th Respondent. By his letter dated, 21.01.2004, [marked as 6R11] the Conservator General of Forests has recommended the grant of a permit for quarrying an extent of one acre only, subject to 13 conditions.

Even assuming that the 6th Respondent did possess a valid permit for the mining of silica quartz, it would still be mandatory for the 6th Respondent to restore the land to its original position; a fact conceded by the learned senior counsel for the 6th Respondent. Instead, having extracted the valued quartz, the 6th Respondent had merely filled the excavation sites with loose sand and rubble available on the land

and had not carried out any reforestation activities or made any attempt to even at the very minimum, restore the affected land to its original position.

The wrongful conduct of the 6th Respondent and the illegal activities undertaken by the Company could not have taken place without the complicity of certain high-ranking state officials. This must be fully investigated and suitable action be taken against these officials under the direction of the Attorney General.

The 8th Respondent, has acted in complete breach of the duties entrusted to him in issuing the Environmental Protection License 6R14. In the affidavit he has filed 8R3 as the application for an environmental license submitted by the 6th Respondent for the purpose of carrying out mining activities. The 8th Respondent states that he issued the environmental license 6R14 in consequence of this application.

It is apparent that the validity period on 6R14 has been altered and post alteration is mentioned as between 02.03.2004 and 02.03.2007. However it is the submission of the 8th Respondent that the license 6R14 has been issued for the mining permit marked as 8R8, bearing number 1ML/C/4441. The problem lies in the fact that the validity period of permit 8R8 is given as 06.02.2004 to 05.02.2005. This corresponds also with the dates mentioned in application 8R3 with reference to the mining permit to which the application relates.

No environmental license could be granted by the 8th Respondent, which extends beyond the validity period of the permit to which it pertains. Clearly the 8th Respondent could not have been clairvoyant to know that a further permit for the balance period would be granted on 02.03.2004. This has not been explained by the 8th Respondent.

Irregularities are also apparent when one considers the relevant time frame attached to the granting of license and the commencement of mining activities. The application for the environmental license 8R3 has been tendered by the 6th Respondent purportedly on 10.02.2004. However the date of commencement of mining activities had been specified as 11.02.2004, which gives the relevant authorities a single working day within which to examine, process and grant the said license. Although eventually the license 6R14 was granted on 02.03.2004, it appears that mining activities were commenced on schedule on 11.02.2004, prior to the issue of the license.

It is clear that even if for arguments sake, the permit 8R8 was considered as the valid permit for this period as produced by the 8th Respondent (the 6th Respondent relied on an entirely different mining permit 6R13 bearing number IML/C/MD/19 for the same period), mining activities conducted under this permit were in contravention of the law and policy governing such permits, as at the time and date of commencement, no environmental license had been procured by the 6th Respondent.

It is now necessary to consider the involvement of the Conservator General of Forests, the 1st Respondent in this case. In his affidavit the 1st Respondent referred to document 1R2 dated 20.12.2000 as "the application". However it is obvious that this was not for a mining permit but an application for cultivation and reforestation as referred to above. The 1st Respondent went on to state that the 6th Respondent by letter dated, 12.12.2002 [marked as 1R3] requested "10 hectares of land in Pollaththwa division to quarry white silica quartz". This letter referred to an Inter Ministerial Advisory Board Meeting held at the Board of Investment of Sri Lanka on 14.10.2002.

The 6th Respondent also refers to this same document [marked as 6R9a] as an application submitted to the 1st

Respondent on 12.12.2002 for the lease of 10 hectares of land in Pollaththawa, for reforestation of the land with Teak, Halmilla and Khomba etc., after extracting the Silica Quartz. The application for the 10 hectares of land mentioned in 6R9a/1R3 is marked as 6R9b.

It is apparent even on a rudimentary reading of the application marked as 1R2 (for 50 hectares dated 20.12.2000) and the application marked as 6R9b (for 10 hectares dated 12.12.2002), that they both pertain clearly to a scheme of reforestation and cultivation and not to the commercial exploitation of the concerned land through the mining of silica quartz. The concomitant question that arises is as to why the 6th Respondent was not required to comply with the normal procedure of tendering a straightforward application for mining, in the same format as P1. This lends credence to the allegation by the Petitioner that the 6th Respondent was given favorable and privileged treatment by the 1st Respondent in contravention of set and established procedures for the grant of mining permits.

A further point which militates against the *bona fides* of the 1st Respondent is the incontrovertible evidence of the project report marked as 1R4 which relates solely to the reforestation of 10 hectares of land in Pollathawa. A single sentence in paragraph 3 of the Report refers almost surreptitiously to the fact the "it is intended to plant this land in stages after the extraction of quartz in each block". The application was clearly intended to be for reforestation. This same document annexed by the 6th Respondent as 6R9d was referred to by him as an "amended project report for reforestation" of land submitted on 12.12.2002.

Further the 6th Respondent has stated in paragraph 18 of objections dated 04.06.2004, that while several meetings were held regarding the allocation of land for the reforestation program, it was only at a meeting held on 26.05.2003 in discussions with the 1st Respondent that it was "suggested" by the 6th

Respondent that there might be a possibility of "negotiating" with the four parties who had signed the agreement for reforestation, to permit extraction of quartz prior to reforestation. If this suggestion came up only at a meeting held on 26th May 2003, the 1st Respondent could not have conceivably considered either 6R9b dated 12.12.2002 or 1R2 dated 20.12.2000 as applications for a mining permit to extract white Silica quartz.

The 1st Respondent has also tendered 1R2 as the application for the reforestation project 1R4. It is to be noted that the application 1R2 was for 50 hectares and dated 20.12.2000. 1R2 was also produced by the 6th Respondent as 6R7b.The project report 1R4 was filed by the 1st Respondent as the project report relating to the application for reforestation 1R2/6R7b relates however only to 10 hectares which was the project report relating to a subsequent application made by the 6th Respondent dated 12.12.2002 marked as 6R9b. The project report relating to the application for reforestation marked as 1R2, which was for 50 hectares has not been produced by the 1st Respondent, but has been produced by the 6th Respondent as 6R7c.

It is significant that while the application for reforestation produced by the 1st Respondent as 1R2 was for 50 hectares, the project report annexed by him relates only to the amended project for 10 hectares and therefore clearly did not relate to the application 1R2. The 1st Respondent has erroneously tendered a project for 10 hectares 1R4/6R9d. He has not tendered the project report for the 50 hectares, which was however produced by the 6th Respondent and marked as 6R7c.

Accordingly, the 6th Respondent's position contradicts the position taken up by the 1st Respondent. In any event, it is clear that the 6th Respondent has not submitted an application for mining in the form set out in P1. The question then arises as to how a mining license was ever granted to the

6th Respondent without a valid application, in the established format, ever being made; especially as the 6th Respondent himself adverts only to an application for reforestation.

In terms of Section 26 (1) of the National Environmental Act No. 47 of 1980, the Central Environmental Authority could by order delegate any of its powers, duties and functions under this Act to any Government Department or any Local Authority. Therefore, the powers, duties and functions under the Act, which were conferred on the Central Environmental Authority, could be delegated. Accordingly, it appears that the Dambulla Pradeshiya Sabhawa was delegated with powers and functions under this Act. Thereafter Section 26 (1) of the Principle Enactment has been amended by Section 9 of the National Environmental Amendment Act No. 56 of 1988, permitting delegation of the powers and functions of the Central Environmental Authority to any Government Department, corporation, Statutory Board, Local Authority or any public officer.

It is also relevant to refer to Section 23(Y) falling within part IV(c) of the National Environmental (Amendment) Act No. 56 of 1988. This section permits the Minister by an order published in the gazette to specify the state agencies, which shall be the "project approving agency". Section 11 of the Amended Act also repeals the powers of the Minister to make regulations (Section 32 (1) of the Parent Act) in respect of all matters, which are stated or required by the Act for which regulations were required. Though such was repealed, the Minister was now empowered with even wider powers to make regulations in respect of all matters which were required by the Act to be prescribed or for which regulations were required by the said Act.

It is important to note that in accordance with Section 23 (Y) of the National Environmental Act No. 56 of 1988 an order was published in the gazette specifying the Central Environ-

mental Authority and the Geological Surveys Mining Bureau as the Project Approving Agencies [marked as R4]

In terms of Section 9 of the National Environmental Amendment Act No. 56 of 1988, the Chairman of the Predeshiya Sabhawa was vested with the powers to issue an environmental license.

The 8th Respondent has admitted that in terms of section 26 of the National Environmental Act No. 47 of 1980 as amended by Acts No. 56 of 1988 and No. 53 of 2000 he has been delegated with the authority to issue licenses under the National Environmental Act to the industries listed in the Gazette Notification No. 1159/22 dated 22.11.2000 marked as 8R2, and in terms of the letter of authority produced by him and marked as 8R1.

It is also relevant to note at this stage that the 1st Respondent has stated in paragraph 10 of his affidavit that the authority to grant approval to commence excavation of land is vested in the Forest Department and not the Divisional Secretary.

The next matter that comes up for analysis by this Court is the relevance of the Field Inspector's Report tendered by the Central Environmental Authority on 24.11.2005. A clear finding has been made that the quarry is situated within 75 meters of the Digiriya Polaththawa road. It has also been stated that this area is a reserved forest and specific finding have been made that the teak forest that once existed has been destroyed to facilitate the illegal mining activities. A finding has also been made that more than 2 acres of land had been mined.

It is pertinent to note that under the Fauna and Flora Protection Ordinance No. 02 of 1937, a Minister may declare a specified area of land to be a national reserve. It is not in

dispute that the Girithale Minneriya National Reserve has been declared as a national reserve under Section 2 of the Fauna & Flora Protection Ordinance, as it was found in the Gazette marked R7 bearing No. 492/32 dated 12.02.1988. The Field inspectors Report adverted to above states that the mine was located within one mile of the Girithale Minneriya National Reserve. Given the situation of this mine, there should have been an initial environmental examination or environmental impact assessment conducted prior to the granting of the mining license. Even presently, the Field Inspector does not recommend any mining activity without such examinations.

The findings of the Field Inspection Report are significantly corroborated by the actions of the Forest Officer when she sent P11. It appears that the 2nd Respondent rejected the application of the Petitioner based on the grounds laid out in the report P11, which are in conformity with the findings of the Field Inspection Report submitted to court. Under the circumstances it is inexplicable, arbitrary and capricious that this report P11 and the grounds contained therein have been circumvented in order to accommodate and grant mining rights over the same site, to the 6th Respondent. In this context, a comparison of the document 6R11 produced by the 6th Respondent with the document P11, ex-facie shows the capricious and arbitrary manner in which the recommendations of the forest officer, have been granted.

The 4th Respondent is also implicated in this transaction due to the granting of twin licenses covering the same area of land. As the license 6R13 is a license given for the same period as 8R8 it is apparent that the 4th Respondent has issued two licenses for the same period and thereby given permission for an extent of more than one acre to be mined which was in violation of the explicit conditions given by the Forest Department in the document 8R7, which was for an

area of one acre only. This action by the 4th Respondent is both capricious and arbitrary.

It appears that several meetings have been held between the 6th Respondent and the Board of Investment of Sri Lanka. I find it unnecessary and undesirable that the Board of Investment interferes in any manner whatsoever with the functioning of public officers who regulate and implement procedures and mechanisms for environmental protection in Sri Lanka.

The right of all persons to the useful and proper use of the environment and the conservation thereof has been recognized universally and also under the national laws of Sri Lanka. While environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to a clean environment and the principle of inter generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12(1) of the Constitution.

The constitution in Article 27(4) of the directive principles of state policy enjoins the state to protect, preserve and improve the environment. Article 28 refers to the fundamental duty upon every person in Sri Lanka to protect nature and conserve its riches.

Further, although the Directive Principles of State Policy are not specifically enforceable against the state, they provide important guidance and direction to the various organs of state in the enactment of laws and in carrying out the functions of good governance. An important parallel can be drawn with the Indian experience, and the significance granted to Directive Principles within that countries' legal scheme governing environmental protection.

The Indian Supreme Court has increasingly cited the directive principles of state policy in a complimentary

manner to fundamental rights. [Vide, *Som Prakash Rekhi v. Union of India,*[1] *M. C. Mehta v. Union of India,*[2] *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh,*[3] In *Damodar Das v. The Special Officer, Municipal Corporation of Hyderabad,* [4] the High Court of Andra Pradesh has interpreted Article 48A, the provision dealing with environmental protection, as imposing an obligation on the government including courts to protect the environment. In *M. C. Mehta v. Kamal Nath*[5] the Indian Supreme Court has recognized the right of the public to expect certain lands and natural areas to retain their natural characteristic.

Correspondingly, courts in Sri Lanka, have long since recognized that the organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This recognition of the doctrine of 'public trust', accords a great responsibility upon the government to preserve and protect the environment and its resources.

The doctrine of public trust was initially developed in ancient Roman jurisprudence and was founded on the principle that certain common property resources such as rivers, forests and air were held by the government in trusteeship for the free and unimpeded use of the general public. This doctrine emphasizes the obligation of the government to protect and conserve these resources for public use and protect it from exploitation by private individuals for short term monetary or commercial gains. Such resources being an endowment of nature should be available freely to the general public, irrespective of the individual's status or income level in life. This doctrine is an "affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands surrendering the right of protection only in the

rarest of cases, when the abandonment of that trust is consistent with fundamental and larger interest of the purposes of that trust. Contemporary concerns with the state and its role in the protection of the environment have close links with this doctrine of public trust. As part of this responsibility governments make policy decisions related to the environment and its useful utilization, conservation and protection and should always be only in the interest of the general public with a long term view of such being conserved for intergenerational use. For this doctrine is closely linked with the principle of intergenerational equity. Human kind of one generation holds the guardianship and conservation of the natural resources in trust for future generations, a sacred duty to be carried out with the highest level of accountability.

Under the public trust doctrine as adopted in Sri Lanka, the State is enjoined to consider contemporaneously, the demands of sustainable development through the efficient management of resources for the benefit of all and the protection and regeneration of our environment and its resources. Principle 21 of the Stockholm declaration, 1972 and Principle 2 of the Rio De Janeiro Declaration, 1992 recognize the right of each state to exploit its own resources, pursuant, however to its own environmental and development policies. The principle of sustainable development prioritizes human needs and concerns for a healthy and productive life in harmony with nature. Therefore environmental protection as envisaged under the Constitution forms an integral part of such development.

Where government officers act in the manner set out in the facts of the instant case, they act in grave breach of the public trust reposed upon them.

Although the international instruments and constitutional provisions cited above are not legally binding upon

governments, they constitute an important part of our environmental protection regime. As evidenced by the decision of this court in *Bulankulama v. Secretary, Ministry of Industrial Development,*[6] they constitute a form of soft law, the importance and relevance of which must be recognized when reviewing executive action vis-à-vis the environment, In this case the Supreme Court adverted to principle 1 of the Rio declaration that "Human beings are the center of concern for sustainable development. They are entitled to a healthy and productive life in harmony with nature".

The phrase 'sustainable development' encapsulates the meaning that natural resources must be utilized in a sustainable manner, in keeping with the principle of intergenerational equity. This requires that the State as the guardian of our natural resource base does not compromise the needs of future generations whilst attempting to meet and fulfill the present need for development and commercial prosperity or short term gain.

In terms of Article 3 the sovereignty is in the people, and is inalienable and being a representative democracy, the powers of the people are exercised through persons who are for the time being only, entrusted with certain functions, and such must at all times be considered by them as a sacred trust, never to be exploited for short term commercial gain or for personal gain even by those holding political power, or exploited for their own personal and selfish agendas. To do so would be the highest betrayal of the sacred trust reposed in them not only by the present generations but all generations to come.

This has been succinctly put by Judge C.G. Weeramantry, who in his separate opinion in the *Danube case (Hungary v. Slovakia)* [7] referred to the "imperative of balancing the needs of the present generation with those of posterity."

Even national legislation aimed at environmental protection, has developed as a further standard applicable to environmental policy decisions. It involves the anticipation of environmental harm and taking measures to avoid it or to choose the least damaging alternative or activity. The environment must not only be protected in the interest of health, property and economy, but also for its own sake. Precautionary duties are triggered not only by concrete knowledge of danger but also by a justified concern or risk potential. [*Vide, A. P. Pollution Control Board v. Nayudu*].[8]

Application of this principle also suggests that where there is an identifiable risk of serious or irreversible harm, it may be appropriate to place the burden of proof on the person or entity proposing the activity that is potentially harmful to the environment. The burden of proof in such cases is therefore placed firmly on the developer or industrialist who wishes to alter the status quo. [*Vide, Vellore Citizens' Welfare Forum v. Union of India,*[9].

The National Environmental Act, which forms the primary legal basis for environmental protection in Sri Lanka, aims at providing an effective mechanism for the protection and efficient management of the environment. Section 17 of the National Environmental Act makes it a mandatory duty for the Central Environmental Authority to "recommend to the Minister the basic policy on the management and conservation of the country's natural resources in order to obtain the optimum benefits there from and to preserve the same for future generations and the general measures through which such policy may be carried out effectively".

Unfortunately though, neither the enactment of environmental legislation nor the recognition of key principles in this regard have had the desired effect of effectively stemming the tide of environmental degradation. In the face of a conflict between a protective law and personal or commercial interest

it appears sadly that the law ends up the inevitable loser. A strong regulatory framework with requisite checks and balances is therefore an imperative for the effective and meaningful application of any conservation law.

As recognized by the Indian Supreme Court in *ICELA v Union of India*[10] the enactment of a law and tolerating its infringement, is at times worse than not enacting a law at all. The continued infringement of a law, over a period of time is facilitated by a high level of laxity, tolerance and even collusion on the part of the administrative authorities concerned with the implementation of the law. Continued tolerance of such violations not only renders the law nugatory but also encourages a level of lawlessness and adoption of means which must not be tolerated in any civilized society.

A law is not only meant for the law-abiding citizen and it is the function of the enforcement officials to ensure that the spirit of the law is enforced and honored by all. Failure to do so will lead to a level of degradation with disastrous impacts on the present and future health of the nation.

This court is deeply disturbed by the apparent act of collusion and dishonesty committed by high-ranking public officials in order to grant this wrongful license to the 6th Respondent. All these institutions appear to have acted in complete disregard of the several Acts, which exist to protect and preserve the environment.

The power of the state and public servants to grant or refuse licenses and take suitable action for the protection and conservation of both the environment and natural resources is derived from its status as a public trustee. In this capacity state officials have a paramount duty to serve as a safeguard against private and commercial exploitation of common property resources, and the degeneration of the environment due to private acts. The principle of inter-generational equity

and the long-term sustainability of our delicate eco-system and biological diversity vests mainly in the hands of such officials.

In light of the repeated failure of state mechanisms to prevent the degradation of the environment and natural resources at private hands, it is appropriate that we turn our attention to emerging principles of public accountability in the field of environmental law. The accountability principle, establishes that public servants should be held directly accountable to the public for their actions and inactions. While the polluter pays principle internalizes the costs of pollution to corporate or individual polluters, the principle of public accountability extends this liability towards corrupt or incompetent regulators for the most egregious instances of mis-regulation.

The principle is borne from a growing recognition that environmental degradation is by and large the product of government corruption and inertia. Each public official assumes a heightened responsibility upon accepting public office, and every public official is universally empowered with the trust of the people. The official thus owes a corresponding duty of care to the people to exercise their powers in public interest. This is particularly important with respect to environmental laws where dereliction of the officer's duty leads to serious environmental harm. The accountability principle recognized the negligent public official as a cause for environmental degradation and thereby holds them liable.

The concept of good governance requires governments to promote accountability, public participation, transparency, and a sound legal framework for equitable development. Of all these elements in my view, government accountability is the corner stone of good governance. While the principle of accountability as detailed above may not as yet have developed to an extent which warrants its application in the

instant case, it signifies an important step in the direction of full government accountability which cannot be ignored in the future, if the present state of governmental inaction and arbitrariness were to continue into the future.

In light of the circumstances detailed above I conclude that the application of the Petitioner for conducting mining activities has been rightly refused by the relevant authority. I find that the Petitioner's right to equality protected under the Constitution of Sri Lanka has been violated by the arbitrary and capricious acts of the Respondents, which led to the wrongful granting of a mining license to the 6th Respondent under conditions of fraud and collusion. I consequently make the declaration as prayed for by the Petitioner that his rights enshrined in Article 12(1) of the Constitution have been violated.

With respect to the state of the land concerned, there is no doubt that the illegal mining activities conducted on the land have had an appalling impact on the surrounding environment. The primary objective in such a case must be the restoration of the land to its original position. The costs of environmental damage should, in my view, be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation in order to mitigate the environmentally degrading effects of a project. Therefore I order that no further mining activities be conducted on the land and that the 6th Respondent be compelled to bear all costs related to the restoration of the land back to its original position.

With regard to the obvious negligence, collusion and complicity displayed by the relevant state officials in connection with this transaction, I wish to express my profound distress and dissatisfaction regarding the functioning of these

regulatory authorities. I direct that immediate action be taken and inquiries be initiated by the Attorney General and the heads of the public institutions concerned, against those involved whose actions or inaction have facilitated the commencement and continuance of illegal mining activities in a protected forest reserve. I also direct the Attorney General to indict, in terms of the provisions of the Penal Code, the Respondents, including the public officials concerned who have filed false documents in this case.

For the reasons set out in my judgment, I declare that an infringement of the fundamental rights of the petitioner guaranteed by Articles 12(1) of the Constitution has been established. The refusal of the permit to the petitioner was however correct and as it should be in terms of the law. It was salutary that as counsel informed court, the petitioner is not pursuing his application for the permit in view of the facts that were disclosed in the case.

I direct that no further mining activities take place on the said land and that suitable and immediate measures, be taken to restore the concerned land back to its original position by the 6th Respondent, and the program of reforestation that was undertaken by the 6th Respondent be strictly adhered to and complied with.

I further order that the State shall pay the Petitioner a sum of Rs. 20,000 as costs and the 6th Respondent shall pay the Petitioner a sum of Rs. 50,000 as costs.

S. N. SILVA CJ. – I agree

MARSOOF J. - I agree

Relief refused.

Directives issued.