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

PUBLISHED BY THE MINISTRY OF JUSTICE
Printed at M. D. Gunasena & Company Printers (Private) Ltd.

Price: Rs. 25.00

DIGEST

(Continued in Part 14)

In *Kottabadu Durage Sriyani Silva v. Chanaka Iddamalgoda* standing was given under Article 126 to the wife of the deceased. In its first order dealing with two preliminary 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 Constitution must be avoided if it were to produce such an 'absurd result'. Accordingly, in its final 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 finds that so long as the applicant of a fundamental 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 principle to the present case, this Court finds that the substantive

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 himself or in association with others in any lawful occupation, profession, 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 aspirations of young persons, this Court holds that the Petitioners 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 guaranteed 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 violation 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

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 fixed for support.

IMAM, J – I agree

SURESH CHANDRA, J – I agree

Preliminary objections overruled.

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 fide 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.

(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 (affirmed)

(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 affirmed 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 (hereinafter referred to as the plaintiff-respondent). The appellant

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 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 section 4(1) and 98 of the Trusts Ordinance?

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 appellant. 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 submitted that the plaintiff-respondent had purchased the said land for the benefit 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

contended that he had no intention to grant the beneficial 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-respondent had requested the appellant through his nominee to transfer the said land, which had been refused by the appellant 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 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.

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

account he had with his wife and to show her that it was a different transaction he had obtained the appellant's signature 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

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 benefit of another. Describing the concept of trust, Dr. L.J.M. Cooray refers to the definition given by Keeton, (Trust, 1971, Pg. 13), which is as follows:

"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 equitable title for the benefit 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 benefit of the property accrues not to the trustee but to the beneficiaries or other objects of the trust."

Learned Counsel for the appellant contended that, considering 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 decision 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 Chapter 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 purpose 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

(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 fide 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 being 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 respondent cannot seek relief under the Trusts Ordinance. As stated earlier, section 4(1) of the Trusts Ordinance is specific with regard to the creation of Trusts, which could be for any lawful purpose. The said section has clearly defined the instances, where a trust could be regarded as unlawful. In such circumstances, what is necessary is to examine as to the steps taken 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

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 purposes, Dr. Cooray refers to Prof. Weeramantry's Treatise on the Law of Contracts (The Law of Contracts, Vol. 1). Prof. Weeramantry, 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 imposed (The Law of Contract, Vol.1, Pg. 340). It could also be argued that what the plaintiff-respondent intended by purchasing 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

on the ground of illegality because it is contrary to what may be termed the policy of an Ordinance. Considering the implied 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 contract void. The imposition by the legislature of a penalty on any specific act or omission is *prima facie* equivalent according to Pollock to an express prohibition. Such provision 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 transaction 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.

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 specifically 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 unlawful intentions, Prof. G. L. Peiris (Some Aspects of the Law of Unjust Enrichment in South Africa and Ceylon, pp. 72-73) states that,

> "A significant development in the modern law is that an unlawful intention, bilaterally entertained, is no longer an obsolute bar to restitution. This principle was recognized 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 policy, 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

had been for an unlawful purpose in terms of section 4(1) of the Trusts Ordinance.

Learned Counsel for the appellant strenuously contended 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 Fragmentation Board. They were both persons whose application for citizenship in Sri Lanka were being finalized by the Registering Authorities of the State. The plaintiffs-respondents were therefore non-citizens at the time of the sale. Under the Finance Act. No. 11 of 1963, they were required to pay 100% tax of they purchased the property as non-citizens. In order 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 matter 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; considering 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

pay the relevant dues to the authorities. As correctly pointed out in *Muniyandy's case (supra)* section 58(1) read with section 59 of the Finance Act had imposed a tax and empowered 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 notification 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:

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 affirmed.

I make no order as to costs.

SRIPAVAN, J. – I agree.

IMAM, J. – I agree.

Appeal dismissed.

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].

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 specified 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 filed this application seeking for a writ of mandamus to compel the 7th respondent to gazette the Environmental Impact Assessment Report under section

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 briefly 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 specified 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 exploration 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 benefit of the project and such other relevant 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

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 affidavit of the Central Environmental Authority (Authority) who is the 8th respondent in this application in paragraph 13 and paragraph 14. The reasons for not approving the project by the 7th respondent, who is the Conservator of Forests in the Forest Department (Project Approving Agency), are contained in paragraphs 14 and 15 of his affidavit. 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 first four years (but this

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 determined 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 benefits 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.

(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 competition 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 export 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 Central 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 submitted 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 application. 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

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 irrespective of any right of ownership of all soil under which the minerals nay be found. And no person can explore for minerals 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 application 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 project to which the industrial Mining License had been issued. Section 37 states that a licence could be cancelled if it contravenes 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

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 provisions 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 concerning 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 considering 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 Environmental 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 classified 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

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 Environmental 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 proponent (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 preliminary information of the project submitted by the project proponent is adequate to be an Initial Environmental Examination Report, the PAA under the law is permitted to proceed with that report as specified 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 General (Environmental Pollution Control Division) the following;

(i) The proposed project should undergo an EIAR under section 23BB of the NEA.

(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 department (P25). The Forest Department consists of Conservator of Forests, Deputy Conservator of forest officers.

In terms of the law the PAA (FD) could grant approval to the EIAR only with the concurrence of the CEA. (NEA regulation 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 proponent, seeking environmental clearance for implementation of the said project. The 7th respondent appointed the following officers to the TEC.

1. C.H.E.R. Siriwardena – Deputy Director Geology of the Geological Survey and Mines Bureau.
2. A. M. Wimalasiri Environmental Officer attached to the Butthala Pradeshiya Sabha – an officer attached to the Ministry of the Environmental Affairs.
3. Nilimini Attanayake – Environmental Officer attached to the CEA. (Authority)

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 officers appointed to the TEC were from the CEA, (Authority) Forest Department, (PAA) and the 1st Respondent Officer, 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 officers. 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 methodology 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)