SOME SIGNIFICANT ENVIRONMENTAL JUDGMENTS IN SRI LANKA

ENVIRONMENTAL FOUNDATION LIMITED
146/34, Havelock Road
Colombo 5

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Consultative Editor

RUANA RAJEPAKSE
LL.B. (London)
Barrister (Inner Temple)
Attorney-at-Law of the Supreme Court
of Sri Lanka

Editor

Wardani Karunaratne
LL.B. (Colombo)
Attorney-at-Law of the Supreme Court
of Sri Lanka

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R. Premasiri Weerasekera & four others
v
Keangnam Enterprises Limited

Court of Appeal Case No:
CA. (PHC) APN. No. 40/2004
HC. Ratnapura No. HCRA 56/2002
MC. Balangoda No. 73896

Before: Sathya Hettige PC, J (P,C/A)
Anil Gooneratne, J

Counsel: Anandalal Nanayakkara with Wardani Karunaratne for the Informant-Respondent-Petitioners.
Saliya Peiris with Asthika Devendra for the Respondent Petitioner-Respondent.
Ms. M.N.B. Fernando DSG for the Added Respondent.

Decided on: May 26, 2009

Code of Criminal Procedure Act No. 15 of 1979 S.s. 98 (1) and 104 (11) – National Environmental Act No.47 of 1980 as amended by Act No. 56 of 1988 and 53 of 2000. S.s. 23 A (2), 23 B and 29. Environmental Protection License (EPL) – Jurisdiction of Magistrate – Inconsistency between the provisions of the Code of Criminal Procedure Act pertaining to public nuisance and the provisions of the National Environmental Act.

The Respondent-Petitioner-Respondent Company had established a metal quarry, a metal crusher and an asphalt plant at a site in Damahana – Balangoda for the purpose of developing and rehabilitating the Kandy – Balangoda road. Informant-Respondent-Petitioners complained of a Public Nuisance caused by the activities of the Respondent-Petitioner-Respondent Company. The learned Magistrate, having considered the submissions of parties and also having given his mind to the

case of Keangnam v Abeysinghe 1994 (2) SLR 271, over-ruled the preliminary objection and ruled that the license does not deny the Magistrate's Court jurisdiction in respect of a public nuisance. The Respondent-Petitioner-Respondent Company thereupon moved the High Court in revision. The High Court issued a stay order staying the operation of the learned Magistrate's Order and subsequently quashed the Order of the learned Magistrate. The Informant-Respondent-Petitioners moved the Court of Appeal in revision against the Order of the High Court.

Held:

1. The only way in which the jurisdiction of the Magistrate could be ousted is to include clear, specific provisions to oust such jurisdiction. One cannot by reading Section 29 of the National Environmental Act conclude that the Magistrate's jurisdiction has been ousted.

2. There is no inconsistency or repugnancy between the provisions of the Code of Criminal Procedure pertaining to nuisance and of the National Environmental Act. The Code is geared to remove or abate nuisances whilst the National Environmental Act seeks to control pollution and noise.

3. The Court of Appeal has wide revisionary powers. The revisionary jurisdiction vested in Court cannot be fettered by the fact that the right of appeal has not been exercised. Whilst the Court could exercise its revisionary jurisdiction to satisfy itself of the legality of the High Court order, it should be used sparingly in exceptional circumstances.

   Revision application allowed setting aside the learned High Court Judge's Order. The Informant-Respondent-Petitioners awarded Rs. 30,000/- in costs against the Respondent-Petitioner-Respondent Company.

Cases referred to:

- Keangnam Enterprises Ltd. v Abeysinghe and others [1994] 2 Sri LR 271
- Nagarjuna Paper Mills Ltd v Sub-Divisional Magistrate and Divisional Officer, Sangareddy.1987 Cri L.J 2071
- Marshall v Gunaratne Unnanse et al- 1 NLR 179
- Arils Appuhamy v Kahavidane –[1983] 2 Sri LR 493
- Abeyratna Ratwatte v Pethan Cangany – Vol. VII, No. 21 SCC 81
- Vaughan v Taff Vale Ry. Co. [1860] 29 L.J. Ex 247
- Colombo Eclectic Tramway Co. Ltd. v The Colombo Gas & Water Co. Ltd (1915) 18 NLR 385
- P.C. Cherian v State of Kerale 1981 Ker.L.T. 113
- Vanghan v Taff Railway Co. (1860) 29 L.J. Ex.247
- A.G. v Nottingham Corporation (1904) 1 CH.673
- London and Brighton Railway Co v Truman (1885) 11 App. Case 45
- Withington Local Board of Health v Corporation of Manchester (1893) 2 CH. 19

Anil Gooneratne, J

This is an application for revision to set aside the Order dated 11.12.2003 made by the learned High Court Judge on Ratnapura in a case of abatement of a public nuisance. Information was filed in the Magistrate's Court of Balangoda that a public nuisance had been caused by the Respondent, Keangnam Enterprises Limited, in terms of Section 98 of the Criminal Procedure Code. Learned Magistrate issued a Conditional Order on 10.01.2002 requesting the Respondent to deposit Rs. 500,000/- and not to proceed with quarrying activities until the said sum was deposited. The Respondent complied with same and thereafter raised a preliminary objection before the Magistrate that the Magistrate Court does not have jurisdiction as an Environmental Protection

License (EPL) had been obtained in terms of the National Environmental Act. Learned Magistrate over-ruled the preliminary objection and ruled that a license obtained as above does not deny the Magistrate's Court jurisdiction in respect of a public nuisance. Thereafter Respondent moved by way of revision in the High Court of Ratnapura, where a Stay Order was issued staying the operation of the learned Magistrate's Order and subsequently High Court quashed the Order of the learned Magistrate, by Order of 11.12.2003.

The Petitioner complains about the above Order of the High Court in para 12 of the Petition as follows.

a) The learned Judge of the High Court has failed to appreciate that the case of Keangnam Enterprises Ltd. v E.A. Abeysinghe and others referred to in his Order in fact recognizes the jurisdiction of the Magistrate's Court in similar instances.

b) The Order of the High Court is bad in law in that it fails to appreciate that it is a well accepted principle in law that in the interpretation of statutes, a statute should not be construed as taking away the jurisdiction of the Courts in the absence of clear and unambiguous language to that effect.

c) In particular the learned Judge of the High Court has failed to appreciate that even if a person has a license for a certain activity, if such person "does not comply with the conditions of a license", then such person "acts as if he had no license" and would therefore be subject to the public nuisance jurisdiction of the Magistrate's Court.

d) The learned Judge of the High Court has failed to appreciate that a license in terms of the National Environmental Act is not a license to commit a public nuisance and that it is well established law that even if

a person has license if his actions cause a public nuisance then the Magistrate's Court has jurisdiction in that regard.

e) The Order of the High Court is bad in law in that it fails to take into account the fact that the Petitioners have also complained of a nuisance being caused by the activities of the crusher situated on the land and that the said crusher is not the subject of the licenses filed by the Respondent before Court.

The learned Magistrate in his brief Order on the above preliminary objection having considered submissions of both parties and also having given his mind to the Case of ***Keangnam v Abeysinghe in 1994(2) SLR pg.271*** held that the Magistrate would not be deprived of jurisdiction vested in him under Section 98 of the Criminal Procedure Code merely because the party concerned has obtained a license under the Environmental Protection Act. On this basis Magistrate fixed the matter for inquiry. However, the High Court revised and quashed the Order of the Magistrate. Before I consider the High Court Order it would be necessary to very briefly consider each parties case before Court.

The Complainant-Respondent-Petitioners are residing at Balangoda, allege that Respondent, Keangnam Enterprises Ltd. is carrying out blasting of rocks with explosives, crushing these rocks and operates an asphalt plant on the land called Mahagala – Balangoda. The above acts according to the Complainant-Respondent-Petitioners cause a public nuisance due to excessive noise and vibration, and emit dust. Several matters are pleaded to demonstrate a public nuisance and information had been filed under Section 98 of the Criminal Procedure Act in the Magistrate's Court. It is pleaded inter alia that provisions of the Code of Criminal Procedure Act cannot be taken away unless by clear and unambiguous words to that effect by statute and that Section 29 of the National Environmental Act does not contain such words to oust the jurisdiction of the Magistrate. In support of

above, Petitioners rely in Keangnam v Abeysinghe Case. Perusing the written submissions of either party, I find that several positions supported with authorities are stated, but all of which cannot be included in this judgment, as it would be prolix.

Respondents submits that the Magistrate's Court has no jurisdiction to grant relief to the Petitioner since the Respondent is acting under a valid license issued by the Central Environmental Authority in terms of the National Environmental Act. Remedy of the Petitioner if any is under the said statue and not the provisions of the Code of Criminal Procedure Act. Respondents refer to Sec.29 of the said Act which reads thus:-

"The provisions of the Act shall have effect notwithstanding anything to the contrary in the provisions of any other written law, and accordingly in the event of the any conflict or inconsistency between the provisions of the Act and provisions of such other written law, the provisions of this act shall prevail over the provisions of such other written law".

Respondents submit that the intention of the legislature is to isolate other laws, in view of Sec. 29 above. There is specific provision in the said Act where persons act in contravention of the Provisions of the Act. In such a situation any aggrieved party will have to seek redress from the CEA and not from the Magistrate under the provision of the Code of Criminal Procedure Act. It is the position of the Respondents that the Magistrate has no jurisdiction to act in terms of Sec. 98 of the Code of Criminal Procedure Act.

The position in the case in hand where a public nuisance is alleged is to consider whether the Magistrate has jurisdiction to proceed to inquiry in terms of the Code of Criminal Procedure Act, (Sec.98) when the party concerned produce a license under the Provisions of the National Environmental Act. In the instant case the learned Magistrate of Balangoda decided that he had jurisdiction to proceed with the inquiry. Learned High Court Judge

however had no hesitation to set aside the Order of the Magistrate.

The provisions relating to public nuisance are embodied in the Penal Code and the Code of Criminal Procedure Act. The law relating to public nuisance like in earlier times is an important legal remedy available to litigants to safe guard their basic rights for a peaceful living. In modern times and in countries taking steps to develop their own country needs to take progressive steps and in the process would have to enter into contracts with both local and foreign organizations to achieve such purpose and projects pursued in this regard would no doubt as alleged by the Petitioner cause noise pollution and various hardships to the public and may be injuries to health. No doubt various statutes are now in operation to minimize such hardship like the National Environmental Act. There is an inbuilt procedure in such statutes to be followed to obtain a license. All this had been enacted by the legislature to minimize possible damages or danger to the public. On the other hand one could argue that there is no absolute protection and as such provision relating to public nuisance in the Penal Code and the Code of Criminal Procedure Act cannot be whittled down, merely because a license had been obtained. As such Court no doubt has to balance public interest and duty to society in the best possible way with legislation introduced to issue a license on environmental aspects. On the other hand as in Sec.29 above I wonder, what the conflict and inconsistency between the said Act and the Code of Criminal Procedure Act? How could the said Act oust the Magistrate's jurisdiction? Can one really draw a parallel between the said laws?

I would also turn to case law (local and abroad) and the Case of Keangnam v Abeysinghe to look at the issue from different perspectives.

(1) ***Nagarjuna Paper Mills Ltd v Sub-Divisional Magistrate and Divisional Officer, Sangareddy.1987 Cri L.J 2071*** – Andhra Pradesh

High Court rejected the argument that the State Pollution Control Board has exclusive power to control air and water pollution. Court held that the water (Prevention & Control of Pollution) Act 1974 had not taken away the rights of Sub-Divisional Magistrate under the Criminal Procedure Code.

(2) ***Marshall v Gunaratne Unnanse – 1 NLR 179 –*** No religious body, whether Buddhist, or Protestant, or Catholic, is entitled to commit a public nuisance, and no license under section 90 of the Police Ordinance, 1865, will be a protection against proceedings under the Penal code, though it may protect them from proceedings under the Police Ordinance.

(3) ***Arlis Appuhamy v Kahavidane – [1983] 2 Sri L.R. 493 –*** This is an action brought in the District Court on the basis of a private nuisance. One defence taken upon by the defendant was that the licenses issued by the Colombo Municipal Council, for the construction of a building and for the bakery, made the said bakery lawful and denied the plaintiff's remedies in nuisance. The Court of Appeal accepted the counter argument that the nuisance action was not intended to challenge the licenses and that the real question was whether the licenses afforded the defendant a valid defence or not. On this question Court held that the issue of a license in respect of the bakery, does not authorize the defendant to interfere with the use and enjoyment of the adjoining land owned and occupied by the plaintiff in such a way as to constitute a nuisance. It was further held that the licenses issued by the local authority to construct the building and to carry on the business of a bakery, do not per se afford a defence to the plaintiff's action.

(4) ***Abeyratna Ratwatte v Pethan Cangany – Vol. VII, No.21 SCC 81 –*** Held that to punish a person for

committing a nuisance because he attempted to defend what he considered his property rights, is certainly a step which the Legislature in the interest of the community could not have had in contemplation when passing the Criminal Procedure Code.

(5) ***Vaughan v Taff Vale Ry. Co. (1860) 29 L.J Ex 247*** states that "it is a good defence to show that the act complained of was expressly authorized by law".

(6) In the ***Colombo Eclectic Tramway Co. Ltd. v The Colombo Gas & Water Co. Ltd (1915) 18 NLR 385 –*** Case statutory authority was inter alia one of the defences that had been taken up. This was an action for damages caused by an explosion of gas which had leaked through a crack in one of the defendant Company's service pipes. It appeared that the crack in question was caused by the passing over of a steamroller belonging to the Municipal Council of Colombo. It is important to note that here the statutory authority, which was pleaded as a defence was on the basis that the statue itself authorized the act in question. It was held here that statutory authority to commit a nuisance must be strictly construed.

(7) ***P.C. Cherian v State of Kerale 1981 Ker.L.T 113*** – it was then argued that when there are statutes like the Panchayat Act, and the Factories Act, prescribing for the issue of licenses on satisfying conditions which include absence of hazard to health, it is not within the province of the Magistrate to see whether those conditions are satisfied. The contention however, is not available in this Case since it is not made out that licenses have been issued to the Petitioners in the two cases for carrying on the work of carbon mixing. (The application for the license for the year 1977-78 presented by the Padinjarekkara Rubber Manufacturers confines the prayer to the running of a

rubber factory.) Even assuming that the license authorizes the factory to carry on the work of carbon mixing, it is open to the Magistrate to invoke the powers under S.133 of the Code if the exigencies warrant such an extreme course.

(8) ***Keangnam Enterprises Ltd. v Abeysinghe And Others [1994] 2 Sri L.R. –*** *Held* – The Magistrate had jurisdiction to make the Orders complained of under Chapter IX of the Code of Criminal Procedure Act, No.15 of 1979 because at the time the quarrying was commenced and the matter was heard the Petitioner-Company had not obtained an Environmental Protection license from the Central Environmental Authority as required by Section 23A of the National Environmental Act No. 47 of 1980 as amended by Act No. 56 of 1988. The Pradeshiya Sabha's permission to have and maintain a metal quarry and a metal crusher is not enough.

By the time the application for revision was taken up the Petitioner-Company had obtained the requisite license but this will not legalize the earlier illegality of quarrying without the license.

If the Petitioner-Company had the Environmental Protection License at the time when the Informant-Respondents complained to the Magistrate's Court, then the Magistrate would have had no jurisdiction to entertain and determine the application (Section 29 of the National Environmental Act). As the Petitioner-Company has the license now it can make the appropriate application to the Magistrate.

Under Rule 46 of the Supreme Court Rules only material documents need be filed along with an application for revision.

At page 281:- Even under P6, the Petitioner-Company had been allowed to have and maintain a quarry and a metal crusher and

to carry out operations, strictly according to the conditions stated therein. If a condition is violated or conditions are violated and such violation becomes a nuisance to the people living in the neighbourhood, would it then not be possible for such people to make an application under the provisions of Chapter IX of the Code to abate such nuisance? This Court is of the view that they can.

At page 282:- The Petitioner-Company is now in possession of the license granted by the Authority as contemplated in Section 23(A) and 23(B) of the Act. It could now go before the learned Magistrate and place it before him, and make submissions based on the provisions of the Act, and would be able to ask him to annual the Orders, made by him, for that, the opportunity is already afforded by the learned Magistrate by fixing the matter for inquiry under Section 101 of the Code of Criminal Procedure Act.

In the aforesaid circumstances, I do not think that this Court should exercise its revisionary powers to revise the Orders made by the learned Magistrate, and therefore the application of the Petitioner-Company for revision is hereby dismissed with costs.

The learned High Court Judge having narrated the facts relevant to this case observes that having considered the information filed in the Magistrate's Court it is evident that the Petitioner complains about the metal quarry and the nuisance caused is due to same and not any other factor. Further a license had been obtained for the purpose of a metal quarry. The judgment makes reference to the above Keangnam Case and refer to Act No. 53 of 2000 (Amendment Act) and Sec. 23 A(2) of same and describes the procedure available and matters dealt with prior to such amendment and subsequent to such amendment are follows:-

> ඒ අනුව 2000 අංක 53 දරණ පාරිසරික (සංශෝධන) පනතින් සංශෝධිත 23 අ (2) යටතේ යම්කිසි තැනැත්තෙකු විසින් අධිකාරිය විසින් නිකුත් කරන ලද බලපත්‍රයක අධිකාරිය යටතේ සහ මේ පනත යටතේ නියම කරනු ලැබිය හැකි යම් ප්‍රමිත හා වෙනත් උපමාන වලට අනුකූලව හැර, යම් නියමිත

> කටයුත්තක් කරනු ලැබූ අවස්ථාවකදී ඒ සම්බන්ධයෙන් එම පනත යටතේ ගත හැකි පියවරවල් පැහැදිලි ලෙස සඳහන් කර ඇතුලත් කරන්නට යෙදී ඇති බව පෙනේ. ඒ අනුව හුදෙක් මෙම සංශෝධනයට ප්‍රථම යමෙක් එම පනත යටතේ යම් වරදක් සිදුකරන්නේ නම් ඒ සම්බන්ධයෙන් මහේස්ත්‍රාත් අධිකරණයේ නඩු පැවරීම සීමා වී තිබුණද සංශෝධන පනතින් එම කාර්යය නිසි පරිදි බලය ලබාගෙන සිදුකරන තෙක් එම කර්මාන්තශාලාව හෝ ඒ නියමිත කටයුත්ත කරගෙන යනු ලබන ස්ථානය වසා දැමීම සඳහා අධිකරණයෙන් ආඥාවක් ලබාගැනීමට ජාතික පාරිසරික අධිකාරියේ අධ්‍යක්ෂ ජනරාල් හට හෝ අධ්‍යක්ෂ ජනරාල් විසින් බලය දෙන ලද යම් නිලධාරියෙකුට ඉල්ලීමක් කර සිටීමට හැකියාව ඇති බව මෙම අධිකරණයට පෙනී යයි. ඒ අනුව දිගින් දිගටම යම් පාර්ශ්වයක් බලපත්‍රයක් නොමැතිව මෙම පනත යටතේ බලපත්‍රයක් ලබාගත යුතු යම් නියමිත කටයුත්තක් කරගෙන යනු ලැබුවා හෝ එම පනත යටතේ නියම කරනු ලැබිය හැකි යම් ප්‍රමිත හා වෙනත් උපමාන වලට අනුකූලව හැර, යම් නියමිත කටයුත්තක් කරගෙන යන අවස්ථාවකදී ගත හැකි පියවරවල් මෙම සංශෝධනයෙන් පසු ගත් පියවරවල් බව මෙම අධිකරණයට පෙනී යයි. ඒ අනුව එම සංශෝධනය මඟින් නිශ්චිත කාලය තුල බලපත්‍රයක් ලබාගෙන කටයුතු නොකරන අවස්ථාවකදී එය වසා දැමීම සඳහා මහේස්ත්‍රාත් අධිකරණයේ ඉල්ලීමක් කර සිටීමේ හැකියාව මෙම සංශෝධනයෙන් ජාතික පාරිසරික අධිකාරිය වෙත ලබාදී ඇත. ඒ අනුව අධිකරණයට ජාතික පාරිසරික අධිකාරිය වෙතින් බලපත්‍රයක් ලබාගන්නා තෙක් ඒ අන්දමට කටයුතු කරන ආයතනයක් වසා දැමීම සම්බන්ධයෙන් ආඥාවක් කිරීමට ඉඩ ප්‍රස්ථා ලැබී ඇති බව මෙම අධිකරණයට පෙනී යයි.

The learned High Court Judge also refer to Gazette No. 1159/22 of 22.11.2000 which deals with the license and the type of license which covers blasting of rocks, crushing and mixing. There is also reference to a license obtained by the Respondent Company and that such license would permit the following

> ගල් පිපිරවීම සම්බන්ධයෙන් ඒ සඳහා පෙත්සම්කාර සමාගම විසින් ලබාගත යුතු බලපත්‍රය ලබාගෙන ඇති බවත්, එම බලපත්‍රය අනුව ඒ සම්බන්ධයෙන් සිදුවන එම ගල් වැඩපොල පවත්වාගෙන යාමේදි එයින් නිකුත් වන ශබ්දය කම්පනය,

> එයින් අපද්‍රව්‍ය පිටමන් කිරීමත්, අපද්‍රව්‍ය තැන්පත් කිරීමත් යනාදී කාර්යයන් පිළිබඳව පෙත්සම්කාර පාර්ශවයට එකී බලපත්‍රයෙන් අවසර ලබාදී ඇති බව පෙනේ.

High Court Judge takes the view that if there is non compliance with the conditions of the license the procedure laid down in the above statute need to be followed and if the relevant Authority does not comply with such provision a proper writ application should be filed in a Court against the authority.

The learned High Court Judge in his judgment proceed to observe that the Conditional Order issued by the Magistrate is not in compliance with sec. 98(1)(e). On the deposit of Rs.500,000/- by the Company would result in a continuation of the nuisance as further carrying on with the work is conditional of the said deposit. I would only agree on this aspect of the judgment of the learned High Court Judge. Conditional Order should require the party concerned to stop the noise or disturbance as the case may be until same is vacated on an application by the opposing party.

Chapter IX of the Code of Criminal Procedure (Sections 98-106) Act contains provisions relating to public nuisance and the Magistrate has power to make Conditional Orders for removal of nuisance, Absolute Orders, consequences for not complying with Orders etc and several other matters to abate a public nuisance. Though the learned High Court Judge gives reasons to oust the jurisdiction of the Magistrate; in accordance with the Environmental Act, I am unable to conclude that the provisions of the National Environmental Act with its amendments has taken away by clear and unambiguous words the above provisions of the Code of Criminal Procedure Act. There are no contrary, inconsistent or conflicting provisions between the Code of Criminal Procedure Act and the National Environmental Act. The only way in which the jurisdiction of the Magistrate could be ousted is to include clear, specific provisions to oust such jurisdiction and one cannot by reading Sec. 29 of the Environmental Act conclude that Magistrate's jurisdiction has

been ousted. Sec. 23Q(1) and Sec. 23 R(1) of the National Environmental Amendment Act No. 56 of 1988 refer to discharge of certain noise and makes excessive noise an offence. The said sections read thus:-

(1) No person shall make or emit or cause or permit to be made or emitted noise greater in volume, intensity or quality than the levels prescribed for tolerable noise except under the authority of a license issued by the Authority under this Act.
(2) The Provisions of sections 23B, 23C, 23D and 23E shall, *mutatis mutandis*, apply to and in relation to the issue of a license under Sub section (1).
(3) Any authority, or institution empowered by any other written law to issue licenses relating to any of the matters referred to in this Act, shall, conform to the standards specified under this Act.

23 (R) – (1) Any person who without a licenses or contrary to any condition, limitation or restriction to which a license under this Act or any other written law is subject, makes or causes or emits to be made or emitted noise that is greater in volume, intensity or quality than the standard as may be prescribed for the emission of noise which is tolerable noise in the circumstances, shall be guilty of an offence under this Act.

(2) Any person who is guilty of an offence under Sub section (1) shall on conviction be liable to a fine not less than rupees ten thousand and not exceeding rupees one hundred thousand and in the case of a continuing offence to a fine of rupees five hundred for every day in which the offence continues after conviction.

It may be possible for one to argue that noise is an integral part of nuisance or public nuisance. But I cannot agree that the above provisions in the Code of Criminal Procedure Act and the above provisions or any other provision in the National Environmental Act are inconsistent or repugnant. There is no incontinency or

repugnancy between above two laws. There is no overlapping between the said laws. Each of these laws is different in its approach. The Code is geared to remove or abatement of nuisance. The Amendment Act No. 56 of 1988 seeks to control pollution and noise and lays down certain prescribed standards which need to be followed in case of noise and an issue of a license which is conditional. A breach of such conditions in a license would amount to an offence.

In the above circumstances Magistrate needs to be satisfied under Section 98 of the Code after receiving a report/information and taking evidence that a Conditional Order need to be issued. Such Order be set aside as in Section 98(2) and 101 of the Code of Criminal Procedure Act after hearing evidence in an all inclusive inquiry. In this process it may be a valid defense to show that the act complained of was expressly authorized by law, Vanghan v Taff Railway Co. (1860) 29 L.J. Ex.247. Mere production of a license would not suffice. Magistrate needs to examine, hear evidence and decide whether there is due compliance with the conditions laid down in the license and whether on this account the party concerned could be exonerated. The procedure stipulated should be followed in the relevant provision in the Code of Criminal Procedure Act, notwithstanding the provisions referred to by learned High Court Judge in his judgment and part of which is referred to in this judgment. Further the Magistrate should decide whether a statute may authorize and legalize acts which would otherwise amount to a nuisance A.G. v Nottingham Corporation (1904) 1 CH.673; London and Brighton Railway Co v Truman (1885) 11 App. Case 45; Withington Local Board of Health v Corporation of Manchester (1893) 2 CH. 19.

This Court has wide revisionary powers. The revisionary jurisdiction vested in this Court cannot be fettered by the fact that right of appeal has not been exercised. In a given situation and in the interest of justice, this Court could exercise its revisionary jurisdiction to satisfy itself of the legality of the High Court Order, though it should be used sparingly in exceptional circumstances.

We are of the view that this is a fit instance to exercise the wide powers vested in this Court in terms of Article 138 of the Constitution, since the issue relates to a jurisdictional matter.

In conclusion we reject the learned High Court Judge's Order of dated 11.12.2003 and allow sub Para (c) of the prayer to the petition and set aside/quash the said Order. However we see no basis at this point of time to grant relief in terms of sub Para 'd' of the prayer to the petition. Revision application allowed as above with costs fixed at Rs. 30,000/-

Anil Gooneratne, J
Judge of the Court of Appeal

I agree.

Sathya Hettige J (P,C/A)
President of the Court of Appeal

Interim Order

Al Haj M.T.M. Ashik and four others, Trustees of Kapuwatta Mohideen Jumma Mosque, Denipitiya, Weligama
v
R.P.S. Bandula, O.I.C. Weligama and nine others

Supreme Court of Sri Lanka
S.C.F.R. Application No. 38/2005

Before: Sarath N. Silva, Chief Justice
Shiranee Tilakawardane, J.
A.M. Somawansa, J.

Counsel: Ikram Mohamed, P.C., for Petitioners
Ms. Indika Demuni de Silva for 2nd, 3rd and, 4th Respondents
Ms. B.J. Tilakaratne, Deputy Solicitor-General for 6th Respondent (Central Environmental Authority)
Uditha Egalahewa for 7th Respondent (Environmental Foundation Ltd)
8th Respondent Senaka Kumar Weeraratne in person[1]

Decided on: 9th November 2007

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[1] Originally there were only 5 respondents to this application, namely four police officers including the Inspector-General of Police, and the Attorney General. Thereafter a number of other respondents were added by order of Court or on their own application to intervene. Although the proceedings in the Case contain some inconsistencies with regard to the numbering of the added respondents, a reading of the proceedings in their proper sequence reveals that the Central Environmental Authority was added as the 6th Respondent while Environmental Foundation Ltd and Senaka Kumar Weeraratne were added as 7th and 8th Respondents respectively. The other Respondents were the Minister of Environment and Natural Resources and the Secretary to the said Ministry.

Application for infringement of fundamental rights made by Trustees of a mosque which had been subject to certain noise restrictions regarding use of loudspeakers, which had not been imposed on two other mosques of the area – whether this infringed their rights under Articles 10 (freedom of thought and religion) and 12(1) (equal protection of the law) – application for intervention on behalf of members of the public adversely affected by the noise – whether failure of the executive to establish restrictions on noise pollution as mandated by Section 23P of National Environmental Act No. 47 of I980 as amended by Act No. 56 of 1988 amounted to a violation of equal protection of the law under Article 12(1) of Constitution in respect of members of public adversely affected by the noise – whether the noise constituted a public nuisance in terms of Section 261 of Penal Code.

This application for infringement of fundamental rights was instituted by the Trustees of the Kapuwatta Mohideen Jumma Mosque in Weligama, southern Sri Lanka, on the basis that the local Police had imposed certain restrictions on the use of loudspeakers by their mosque which had not been imposed on two other mosques in the area that had been granted loudspeaker permits by the Police under Section 80(1) of the Police Ordinance.

Court directed Central Environmental Authority (CEA) to be added as 6th Respondent. Environmental Foundation Ltd moved to intervene as *amicus curiae* on behalf of the public while Senaka Kumar Weeraratne moved to intervene as an affected party and on behalf of other affected parties. These interventions were allowed.

CEA requested time to frame noise pollution regulations under Section 23P of National Environmental Act but failed to do so after several dates and requested that Ministry of Religious Affairs be added as a party. Court declined this request noting that Sri Lanka had always adopted a secular approach to matters of public nuisance. Accordingly the Court acting under Article

126(4) of the fundamental rights provisions of the Constitution which empower the Court to make “such directions as it may deem just and equitable in the circumstances”, issued a series of directions restricting the use of loudspeakers in a manner that impacts adversely on the general public.

Held:

(1) That the People have been denied the equal protection of the law by the failure of the executive to establish by way of regulations an effective legal regime as mandated by Section 23P of the National Environmental Act No. 47 of 1980, as amended by Act No. 56 of 1988, to safeguard the public from the harmful effects of noise pollution.

(2) That emission of noise by the use of amplifiers, loudspeakers or other equipment or appliances which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity be considered a public nuisance in terms of Section 261 of the Penal Code and that the Police should entertain complaints and take appropriate action for the abatement of such public nuisance.

(3) That all permits issued by the Police under Section 80(1) of the Police Ordinance shall cease to be effective forthwith.

(4) That no permits shall be issued in terms of Section 80(1) of the Police Ordinance for the use of loudspeakers and other instruments for the amplification of noise as specified in that section covering the period 10pm (night) to 6 am (morning). Such permits may be issued for special religious functions and other special events only after ascertaining the views of persons who occupy land premises in the vicinity, a record of such matters to be maintained and the grant of any such permit to be reported to the nearest Magistrates Court.

(5) That in respect of the hours from 6.00 am to 10.00 pm permits may be issued for limited periods of time for specific purpose subject to the strict condition that the noise emitted from such amplifier or loudspeaker or equipment does not extend beyond the precincts of the particular premises.

(6) That where a permit is issued in terms of Section 80(1) in terms of these directions, a sufficient number of Police Officers should be designated and posted to the particular place of use to ensure that the conditions imposed are strictly complied with.

(7) That the Police should make special arrangements to entertain complaints from the public against any person guilty of an offence of public nuisance under Section 261 of the Penal Code or of using any loudspeaker, amplifier or other instrument as provided in Section 80 of the Police Ordinance contrary to any of the directions issued by Court, and take immediate steps to investigate the matter and warn such person against a continuance of such conduct and if the conduct is continued after that warning, to seize and detain the equipment as provided in Section 80(4) of the Police Ordinance and report the matter to Court.

Cases referred to:

(1) Marshall v Gunaratne Unnanse, 1 NLR 179
(2) Church of God (full gospel) in India v K.K.R.M.C Welfare Association, A.I.R. 2000 S.C. 2773
(3) Re. Noise Pollution, A.I.R. 2005 S.C. 3136

Sarath N. Silva, C.J.

The proceedings in this Case commenced with an application by the Trustees of the Kapuwatte Mohideen Jumma Mosque of

Weligama impleading the action of the 2nd Respondent, (A.S.P) in not issuing a loudspeaker permit under Section 81 of the Police Ordinance to the extent permitted in previous years and in imposing restrictions on such use, as being in breach of their fundamental rights.

When the matter was supported on 25.2.2005 for leave to proceed the Court noted that the application raises fundamental issues with regard to sound pollution and the standards that should be enforced by the Central Environmental Authority, and the guarantee of the equal protection of the law (Article 12(1)) in this regard.

Accordingly notice was issued on the Central Environmental Authority which was later added as the 6th Respondent.

The Environmental Foundation Limited being a non-governmental organization that has consistently engaged in Public Interest Litigation to preserve and protect the environment was permitted to intervene in the Case in view of the general concern that emerges in this Case requiring adequate legal safeguards to protect the People from exposure to harmful effects of sound pollution.

Mr. Senaka Weeraratne, Attorney at Law, sought to intervene representing the interests of persons affected by noise pollution. He was added as the 8th Respondent.

In his affidavit dated 29.6.2005, he contradicted the claim of the Petitioners for unrestricted of loudspeakers in the call to prayer from the Mosque. He also contended inter alia that such unrestricted use makes:

> *"Captive listeners of people of other religious faiths and violates the fundamental rights of the general public, such as the right to silence and the right to quiet enjoyment of property."*

As a matter of personal experience, he contended in paragraph 4 of is affidavit that he is an aggrieved party as a result of similar conduct of a place of worship situated on the Marine Drive between Jaya Road and Nimal Road in a residential area in Colombo where:

> *"the high pitched sound of a call to prayer is amplified five times a day beginning in the early hours of the morning, that is at 5.00 am and ending at 8.15 pm and repeated daily, and which conduct is causing unnecessary hardship and much disturbance, to residents in the neighbourhood the majority of whom belong to other religious faiths and which locality comprise in addition to residential dwellings, schools e.g. Holy Family Convent, private Accountancy Studies Institutions, Buddhist temples, Kovils, Churches…"*

With the inclusion of the aforesaid parties, and considering the material presented and the submissions that were made the Court proceeded with the matter as being of public interest, to make a determination as to the effective guarantee of the fundamental right enshrined in Article 12(1) of the Constitution for the equal protection of the law in safeguarding the People from harmful effects of noise pollution. The impact of pollution is pervasive and its effect cannot be identified with the right or any particular person. The matter has to be viewed as being of general and public concern affecting the community as a whole.

The 2nd Respondent whose action has been impleaded in this Case filed an affidavit supported with several other affidavits and documents. It appears that the particular dispute with regard to the action of the 2nd Respondent, the A.S.P., being himself a Muslim, arose as a result of loud speaker permits granted to three mosques situated in close proximity in the village of Kapuwatte in Weligama.

The dispute is between the Kapuwatte Mohideen Jumma Mosque and Jiffery Thakkiya Mosque on the one hand and the Jamiul Rahman Jumma Mosque on the other.

In paragraph 5 of the affidavit the 2nd Respondent has stated that to the best of his knowledge from about April 2004 residents in the area where the three Mosques are located have complained of noise pollution due to the excessive use of the loudspeakers by the three Mosques.

Subsequently a dispute had arisen between the persons associated with the Mohideen Jumma Mosque and Jamiul Rahman Mosque with regard to the use of loudspeakers which resulted in the parties lodging complaints against each other at the Weligama Police Station. The Police conducted investigations into the incidents and being apprehensive of an imminent breach of peace filed a "B" Report bearing No. 2154/04 in the Magistrate Court of Matara citing persons associated with the said Mosques as parties. It appears that the proceedings are continuing. The allegation now appears to be that the 2nd Respondent has given more favourable treatment to the Jamiul Rahman Mosque.

The 2nd Respondent has produced marked “2R4A” to “2R4G” photocopies of some of the complaints and affidavits of persons, all of whom are Muslims that specifically state that noise pollution resulting from excessive noise emitted from loudspeakers of the Mosque has caused severe health problems. Two of the deponents have coronary ailments and have produced medical evidence in support. The A.S.P. has stated that it was in these circumstances that he reduced the use of loudspeakers in the call for prayer to 3 minutes since in his view as a Muslim that period is adequate. The Petitioners have not sought to contradict the material adduced by the 2nd Respondent.

It is seen that complaint emerges from Muslims themselves as to the harmful effects of excessive emission of noise from

loudspeakers in Mosques. Thus Mr. Weeraratne does not stand alone as a victim of such excessive noise.

Although there is no contest in the Case as to the harmful effects of noise pollution the Case has gone on for more than 2 years to enable suitable regulations to be made to be implemented by the Central Environmental Authority effectively.

Section 23P to Section 23R of the National Environmental Act No. 47 of 1980 as amended provide for restrictions on noise pollution. The scheme of Section 23P and 23R is that it would be an offence to emit noise in excess of the volume intensity and quality of the standards or limitations that are prescribed which thus becomes a prerequisite for the effectiveness of these provisions. Deputy Solicitor General submitted that the standards and limitations that have now been prescribed in relation to industrial noise cannot be used in respect of community noise (Vide proceedings 28.3.05)

In the circumstances the parties agreed for adjournments to facilitate the formulation of Regulations.

Draft regulations have been tendered from time to time to Court.

The Environmental Foundation Limited made a comprehensive written submission that the initial draft regulations would be unworkable and ineffective, and that in contrast the existing legal regime as contained in Section 80 of the Police Ordinance regarding the grant of permits for the use of loudspeakers, amplifiers and the like; Section 261 of the Penal Code with regard to the offence of public nuisance; the provisions of the Code of Criminal Procedure with regard to the abatement of any nuisance and the National Environmental (Noise Control) Regulations No. 1 of 1996; are adequate and that suitable directions could be issued by this Court in terms of Article 126(4) of the Constitution to assure the people equal protection of the applicable legal regime.

The Court noted that it is desirable to grant further time to formulate suitable Regulations and the added parties were permitted to make representations to the relevant authority to improve the draft. Several postponements have been granted but there appears to be indecision, disputes, vacillation and on the whole a lack of collective will to take positive action. Deputy Solicitor General now submits that she has received instructions to move to add the Ministry of Religious Affairs as a party. This in our view puts the matter back to square one. It has to be firmly borne in mind that Sri Lanka is a secular State. In terms of Article 3 of the Constitution, Sovereignty is in the People at common devoid of any divisions based on perceptions of race religion language and the like. Especially in the area of preserving the environment and the protection of public health, being of immediate concern in this Case, there could be no exceptions to accommodate perceived religious propensities of one group or another. No religion advocates a practice that would cause harm to another or worse still as would cause pollution of the environment, a health hazard or a public nuisance being an annoyance to the public.

We have had in this country probably the oldest jurisprudential tradition of a secular approach in dealing with matters that constitute a public nuisance. I would refer to the Judgment of this Court handed down in the year 1895 in the Case reported in **Marshall v Gunaratne Unnase**, 1 NLR 179. In that Case the principal trustee of a Buddhist vihare in Colombo was charged for creating noise in the night and disturbing the inhabitants of the neighbourhood. The report to Court was under the then applicable Section 90 of the Police Ordinance. Considering the particular circumstances of the Case Bonser C.J., upholding the conviction stated as follows (at page 180):

> *"……the idea must not be entertained that a noise, which is an annoyance to the neighbourhood, is protected if it is made in the course of a religious ceremony.*

> *No religious-body, whether Buddhist, or Protestant, or Catholic, is entitled to commit a public nuisance, and no license under Section 90 of the Police Ordinance, 1865 will be a protection against proceedings under the Penal Code, though it may protect them from proceedings under the Police Ordinance."*

It is to be noted that in terms of Section 261 of the Penal Code a person is guilty of public nuisance who does any act or is guilty of an illegal omission, which causes inter alia any annoyance to the public or to the people in general who dwell or occupy any property in the vicinity. Section further states as follows:

> "*A public nuisance is not excused on the ground that it causes some convenience or advantage."*

The proposition of Bonser C.J., which could be cited as a classic statement of a secular approach in dealing with a public nuisance, is referable to the final sentence of Section 261 cited by me above. A perceived convenience or advantage to some based on a religious practice cannot be the excuse for a "public nuisance which causes annoyance to the public or to the people in general who dwell or occupy property in the vicinity".

Subsequent jurisprudential developments in other countries follow a similar trend of reasoning.

In Case of **Church of God (full gospel) in India v K.K.R.M.C. Welfare Association**, A.I.R. 2000 S.C. 2773, the Supreme Court of India posed the selfsame question as follows:

> *"Whether a particular community or sect of that community can claim rights to add to noise pollution on the ground of religion?"*

Shah J., in his judgment at page 2774 stated as follows in answer to that question:

"Undisputedly no religion prescribes that prayers should be performed by disturbing the peace of others nor does it preach that they should be through voice-amplifiers or beating of drums. In our view, in a civilized society in the name of religion, activities which disturb old or infirm persons, students, or children having their sleep in the early hours or during day-time or other persons carrying on other activities cannot be permitted. It should not be forgotten that young babies in the neighbourhood are also entitled to enjoy their natural right of sleeping in a peaceful atmosphere. A student preparing for his examination is entitled to concentrate on his studies without there being any unnecessary disturbance by the neighbours. Similarly, old and infirm are entitled to enjoy reasonable quietness during their leisure hours without there being any nuisance of noise pollution. Aged, sick people afflicted with psychic disturbances as well as children up to 6 years of age are considered to be very sensitive to noise. Their rights are also required to be honoured"

It transpired in the course of the submissions that at time there is rivalry between respective religious groups. In this Case the rivalry appears to be between different places of worship of one religious group. It is commonly known that when there is call to prayer in the early hours of the morning at about 5.00am, on the other hand amplifiers and loudspeakers blare forth recorded chantings of "pirith". The proceedings in this Case evoked much response of persons who are buffeted by the countervailing forces of such amplified noise.

It may be appropriate here to state albeit briefly some matters with regard to the chanting of "pirith" which dates back to the time of the Buddha. The chanting of "pirith" takes place only upon an invitation addressed three times to the Maha Sangha. Chanting follows with compassion to the devotees who address the three fold invitation.

Much respected Piyadassi Thero in his work titled "The Buddhas Ancient Path" has stated as follows (at page 17). That benefit could be derived only, "*by listening intelligently and confidently to paritta sayings because of the power of concentration that comes into being through attending whole-heartedly to the truth of the sayings."*

Thus there must necessarily be a close proximity between the person chanting and the person who is listening. Blaring forth the sacred suttas and disturbing the stillness of the environment, forcing it on ears of persons who do not invite such chant is the antithesis of the Buddha's teaching.

I would finally refer to the important Case in India **In Re. Noise Pollution AIR 2005 S.C. 3136** especially because in that Case the Supreme Court of India issued several directions in order to safeguard the people from the harmful effects of noise pollution. The motion of the intervenient 6th Respondent is that similar directions be issued pertinent to our legal context in terms of Article 126(4) of the Constitution.[2]

The Chief Justice of India commences his judgment delving into the etymology of the term "Noise" itself and has noted that it is derived from the latin "Nausea" defined as unwanted sound. He has cited a leading authority which describes unwanted sound as "a potential hazard to the health and communication dumped into the environment without regard to the adverse effect it may have on unwilling ears and has continued to state that

> *"noise is more than just a nuisance. It constitutes a real and present danger to people's health. Day and night, at*

[2] It would appear from the context that this is in fact a reference to Environmental Foundation Ltd, which moved to intervene and was added as 7th Respondent. The said organization has been referred to as 6th Respondent in some versions of the caption, but the third paragraph of the judgment as well as other journal entries in the Case make clear that the 6th Respondent was the Central Environmental Authority.

> *home, at work, and at play, noise can produce serious physical and psychological stress. No one is immune to this stress. Though we seem to adjust to noise by ignoring it, the ear, in fact, never closes and the body still responds – sometimes with extreme tension, as to a strange sound in the night."*
>
> Further, "*that noise is a type of atmospheric pollution. It is shadowy public enemy whose growing menace has increased in the modern age of industrialization and technological advancement*." (pages 3141 and 3142).

The Supreme Court of India has firmly rejected the contention that there is a fundamental right to make noise associated with the freedom of speech and expression. The Chief Justice observed –

> *"Nobody can claim the fundamental right to create noise by amplifying sound of his speech with the help of loudspeakers. While one has a right to speech, and others have a right to listen or decline to listen. Nobody can be compelled to listen and nobody can claim that he has a right to make his voice trespass into the ears or mind of others. Nobody can indulge in aural aggression."* (page 3141)

In an exhaustive survey, the Supreme Court of India has dealt with the developments in many other jurisdictions where comprehensive provisions have been made to safeguard people from the harmful effect of the public nuisance of noise pollution and finally the Court issued several directions (pages 3164 - 3165) including a direction that "no one shall beat a drum or tom tom or blow trumpet or beat or sound any instrument or use any sound amplifier at night (between 10.00 and 6 am) except in public emergencies."

There is no dispute in this Case that People have been denied the equal protection of the law by the failure of the executive to

establish by way of regulations an effective legal regime as mandated by Section 23P of the National Environmental Act No. 47 of 1980, as amended by Act No. 56 of 1988 to safeguard the public from the harmful effects of noise pollution. The facts also reveal that there are no guidelines for the effective implementation of the applicable provisions of law so as to provide to the people equal protection of the law guaranteed by Article 12(1) of the Constitution.

Accordingly, we consider it to be just and equitable in the circumstances of the Case to make the following directions in terms of Article 126(4) of the Constitution:

i) That the emission of noise by the use of amplifiers, loudspeakers or other equipment or appliances which causes annoyance to the public or to the people n general who dwell or occupy property in the vicinity be considered a public nuisance in terms of Section 261 of the Penal Code and that the Police should entertain complaints and take appropriate action for the abatement of such public nuisance;

ii) That all permits issued by the Police under Section 80(1) of the Police Ordinance shall cease to be effective forthwith;

iii) That no permits shall be issued in terms of Section 80(1) of the Police Ordinance for the use of loudspeakers and other instruments for the amplification of noise as specified in that section covering the period 10pm (night) to 6 am (morning). Such permits may be issued for special religious functions and other special events only after ascertaining the views of persons who occupy land premises in the vicinity, a record of such matters to be maintained and the grant of any such permit shall be forthwith reported to the nearest Magistrates Court;

iv) That in respect of the hours from 6.00 am. to 10.00 pm. permits may be issued for limited periods of time for specific purpose subject to the strict condition that the noise emitted from such amplifier or loudspeaker or equipment does not extend beyond the precincts of the particular premises;

v) Where a permit is issued in terms of Section 80(1) as provided in direction (iii) and (iv) sufficient number of Police Officers should be designated and posted to the particular place of use to ensure that the conditions imposed are strictly complied with;

vi) That the Police will make special arrangements to entertain any complaint of a member of the public against any person guilty of an offence of public nuisance as provided in Section 261 of the Penal Code or of using any loudspeaker, amplifier or other instrument as provided in Section 80 of the Police Ordinance contrary to any of these directions and take immediate steps to investigate the matter and warn such person against a continuance of such conduct. If the conduct is continued after that warning to seize and detain the equipment as provided in Section 80(4) of the Police Ordinance and to report the matter to the Registrar of this Court.

Copies of this Judgment to be sent to the Secretary, Ministry of Defence and the Inspector General of Police for immediate action to be taken in regard to Directions stated above.

The Inspector General of Police to submit a report to Court as to the action taken on the Judgment.

Sarath N. Silva
Chief Justice

I agree.

Tilakawardane J.
Judge of the Supreme Court

I agree.

Somawansa J.
Judge of the Supreme Court

Watte Gedara Wijebanda
v
Conservator General of Forest and eight others[3]

Supreme Court of Sri Lanka
SC Application No. 118/2004

Before: S.N. Silva, C.J.
Shiranee Tilakawardane, J.
S. Marsoof, J.

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

Decided on: 05 April 2007

Fundamental rights application under Article 12(1) of Constitution – respondent refused to grant a permit to carry out quarry mining activities in an environmentally sensitive area – 6th Respondent given permit to quarry mine in same area – whether the acts of

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[3] Originally there were only 7 Respondents to this Application namely Conservator General of Forests, Deputy Conservator of Forests, District Forest Officer of Matale, Geological Survey and Mines Bureau, Divisional Secretary of Dambulla, Ceyquartz MBI (Pvt) Ltd and Hon. Attorney General. Subsequently, by order of the Supreme Court dated 07.09.2005, the Chairman of Dambulla Pradeshiya Sabha and the Chairman of the Central Environmental Authority were added as 8th and 9th Respondents respectively.

one, several or all of the 1st to 5th Respondents in refusing to grant permit to Petitioner and granting permit to the 6th Respondent infringed Petitioner's fundamental rights whether Petitioner had legitimate expectation that same criteria would be applied to his application and that of 6th Respondent – whether the relevant State authorities had duly adhered to the requirements of the National Environmental Act No. 47 of 1980 and other applicable rules and regulations in granting the mining permit to the 6th Respondent – whether a proper Environmental Protection License had been issued with reference to the mining permit of 6th Respondent – whether the public officers concerned were in breach of the public trust and accountability reposed in them – whether right to a clean environment and principle of inter-generational equity formed part of fundamental rights under Article 12(1) – relevance of Directive Principles of State Policy in legal scheme governing environmental protection – public trust doctrine and inter-generational justice – public trust and the conduct of State officials – burden of proof where there is identifiable risk of serious or irreversible harm.

The Petitioner instituted this application for infringement of fundamental rights when, after being refused a permit for quarry mining in an environmentally sensitive area, he became award that the 6th Respondent had been issued such a license to carry out quarry mining in the same area.

Court found that the 6th Respondent had not obtained a valid Environmental Protection License under the National Environmental Act No. 47 of 1980, which was a mandatory requirement for the granting of a mining license.

It was found that this particular site was located less than a mile from the Girithale-Minneriya National Reserve close to the Sigiriya archaeological area and that the Environmental Committee of Matale District has decided not to grant permits for any quarries in state lands around Sigiriya, considering the possible damages to wildlife and water recourses of the surrounding area.

The Chairman of the Dambulla Pradeshiya Sabha and the Chairman of the Central Environmental Authority were added as Respondents in the course of proceedings.

Held:

1) That the application of the Petitioner for conducting mining activities has been rightly refused by the relevant authority.

2) 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 in respect of operations at the same location.

3) That the 6th Respondent's permit was in any event invalid, as he did not have a valid Environment Protection License under the National Environmental Act.

4) In as much as the illegal mining activities of the 6th Respondent 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. Accordingly, no further mining activities were to be conducted at the said location and the 6th Respondent should bear all the costs related to the restoration of the land back to its original position.

5) That issuance of an environmental license with a validity period, extending beyond that of the mining permit was a clear violation of established procedure and raised suspicions of *mala fides* against the relevant authorities who sanctioned such a license.

6) That immediate action to be taken and inquiries to be initiated by the Attorney General and the heads of the

public institutions concerned, against those involved whose actions or inactions have facilitated the commencement and continuance of illegal mining activities in a Protected Forest Reserve.

7) That 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.

8) That the State and the 6th Respondent should pay the Petitioner a sum of Rs. 20,000 and a sum of Rs. 50,000 as costs respectively.

Cases referred to:

1) Som Prakash Rekhi v Union of India, AIR 1981 SC 212;
2) M.C. Mehta v Union of India, AIR 1988 SC 1037;
3) Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh, AIR 1988 SC 2187
4) Damodar Das v The Special Officer, Municipal Corporation of Hyderabad, AIR 1987 AP 171.
5) M.C. Mehta v Kamal Nath, (1997)1 SCC 388
6) Bulankulama v Secretary, Ministry of Industrial Development, (2000) 3 SLR 243
7) Danube Case (Hungary v Slovakia) (1997) ICJ Reports 78
8) A.P. Pollution Control Board v Nayudu, (1992)2 SCC 718
9) Vellore Citizens' Welfare Forum v Union of India, (1995)5 SCC 647
10) ICELA v Union of India, AIR 1997 SC 3519

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 Article 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 archaeological area; that mining activities at the site may cause damage to wild life and water resources; that watercourses to the ancient Sigiriya 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 Pradeshiya 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 this 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 02.03.2004 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 - 20.02.2006. 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 has 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 it 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 his 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 IML/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 has 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 Pollaththawa 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 that "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. IR4 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 Environmental Authority and the Geological Surveys Mining Bureau as the Project Approving Agencies [marked as R4].

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In terms of Section 9 of the National Environmental Amendment Act No. 56 of 1988, the Chairman of the Pradeshiya 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 tended 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 Sigiriya Polaththawa road. It has also been stated that this area is a reserved forest and specific findings 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 recommendation 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, AIR 1981 SC 212; M.C. Mehta v Union of India, AIR 1988 SC 1037; Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh, AIR 1988 SC 2187]*** In ***Damodar Das v The Special Officer, Municipal Corporation of Hyderabad***, 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. ***[AIR 1987 AP 171]***. In ***M.C. Mehta v Kamal Nath [(1997)1 SCC 388]*** 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, [(2000) 3 SLR 243]*** 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)*** 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, (1992)2 SCC 718].***

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,* (1995)5 SCC 647].**

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 looser. 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 [AIR 1997 SC 3519]*** 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 acts 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 ecosystem 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 recognizes 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.

Shiranee Tilakawardane, J.
Judge of the Supreme Court

I agree.

Sarath N. Silva
Chief Justice

I agree.

S. Marsoof, J.
Judge of the Supreme Court

Environmental Foundation Limited
v
Central Environmental Authority and others

Court of Appeal
Application No. 1556/2004.

Before: K. Sripavan, J.
Sisira De Abrew, J.

Counsel: Ms. I.R. Rajapakse with Ms. P. Rajakeeya for the Petitioner.
N. Wijeyasekera for the 1st Respondent.
Mrs. B. Tillakaratne, D.S.G. for the 2nd Respondent.
Nalin Ladduwahetti for the 4th Respondent.

Decided on: 31 July 2006.

Mini hydropower project at high altitude – approval required under National Environmental Act – Duty of Project Approving Agency under Section 23BB to require submission of Initial Environmental Examination Report (IEER) or Environmental Impact Assessment Report (EIAR) in respect of prescribed projects- whether decision to call for IEER only was arbitrary and unreasonable in view of significant impacts of project – whether approval of Technical Evaluation Committee was a valid approval in terms of the Act – whether approval granted in terms of the answers provided by the project proponent to an 'Environmental Questionnaire' sent by the Central Environmental Authority could be equated to approval after an IEER – whether 1st Respondent had exceeded or abused its powers.

The Petitioner was a non-profit making organization, registered with the Central Environmental Authority and instituted this action in the public interest. The Petitioner challenged the validity of the approval given by the 1st Respondent (Central Environmental Authority) to a private company (4th Respondent) to construct a mini hydro project on the upper reaches of a river, at an altitude of about 1750 meters above sea level, in an area with steep mountain slopes.

Due to approval being granted on the basis of an IEER, without an EIAR, the public was not entitled to any notice of the project until approval had been granted and notice of the same published in newspapers.

The Petitioner argued that the impacts of the project as set out in the documents before Court made it arbitrary and unreasonable for the 1st Respondent to grant approval without an EIAR. It also transpired from the documents placed before Court that the decision to call only for an IEER had been made by a Technical Evaluation Committee and was not the decision of the project approving agency (1st Respondent) and also that approval had been granted for the project on the basis of the project proponent's answers to an 'Environmental Questionnaire' and not on the basis of the IEER.

The Petitioner prayed for a writ of certiorari to quash the approval granted by the 1st Respondent and a writ of mandamus to require the 1st Respondent to conduct an Environmental Impact Assessment of the project. The Petitioner was granted an interim order restraining the 4th Respondent from carrying out the project until the final hearing and determination of the application.

Held:

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

(2) The Court would not substitute its direction for that of the expert and thus cannot issue a writ of mandamus directing the 1st Respondent to call for an EIAR in respect of the said project. The discretion to call for an EIAR or IEER has to be exercised by the 1st Respondent and by the 1st Respondent only.

(3) The 1st Respondent had failed to exercise its discretion reasonably and in good faith in discharging its public duty. The 1st Respondent could not in law surrender the discretion vested in it to the TEC. Therefore the 1st Respondent had failed to exercise its discretion in granting its approval in the manner provided in Sec. 23BB (1) of the Act and writ of certiorari would issue to quash the approval given for the project.

(4) It was also clear that the 1st Respondent had granted approval for the project based on its environmental questionnaire and a letter from the Department of Forests, and this too demonstrated that the 1st Respondent had failed to exercise its power in terms of Section 23BB(1) considering the purpose for which such power was given.

K. Sripavan, J.

The Petitioner is a non-governmental organization engaged in environmental activities and registered with the 1st Respondent Authority. The Petitioner alleges that the 1st Respondent acting in terms of Sec. 23BB(4) of the National Environmental Act No. 47 of 1980 as amended, published a notice marked P4 indicating its final decision on the Initial Environmental Examination Report (hereinafter referred to as the IEER) of the proposed Bomuruella Mini Hydro Power Project at Perawella, Nuwara Eliya. By the said notice, the 1st Respondent informed the General Public that it has decided to grant approval for the establishment of the said

project to the 4th Respondent subject to certain specified terms and conditions.

The Petitioner in paragraph 10 of the petition states that upon request, it obtained a copy of the IEER which was in two parts. This fact was not denied or disputed by the 1st Respondent. The said report dated 3rd August 2003 is marked P5a and annexed to the petition. The Petitioner's complaint is that the decision of the 1st Respondent Authority to grant approval to the said project on the basis of an IEER without calling for an Environmental Impact Assessment Report (hereinafter referred to as the EIAR) was arbitrary and unreasonable in view of significant environmental impacts of the project. Therefore, the Petitioner seeks a writ of certiorari to quash:-

a. The approval given for the said project by the 1st Respondent Authority as shows in the notice marked P4 and;
b. The annual permit granted to the 4th Respondent by the 2nd Respondent by letter dated 29th April 2004 marked "X" and referred to in the document marked P8.

On 18th March 2005, the learned DSG appearing for the 2nd Respondent informed court that though a decision was taken to issue a permit to the 4th Respondent by letter dated 29th April 2004 marked "X", no such permit was issued. In view of the said submissions, learned counsel for the Petitioner submitted that she was not seeking relief in terms of paragraph “c” of the prayer to the petition. The written submissions filed by the 2nd Respondent also shows that since the project area falls within the Kandapola-Seetha Eliya Forest Reserve which is in higher elevation and is an important catchment area, the 2nd Respondent was not inclined to grant the required annual permit in the absence of a proper EIAR. Therefore, the relief as claimed by the Petitioner to quash the annual permit allegedly granted to the 4th Respondent by the letter dated 29th April 2004 marked "X" does not arise.

The 1st Respondent in paragraph 12 of its statement of objections categorically pleads and annexes a copy of the minutes of the meeting held at the Central Environmental Authority prior to granting of the approval. The said document is marked "1R3" and produced along with the statement of objections. The minutes indicate that the said meeting was held on 10th July 2003 by the Technical Evaluation Committee (hereinafter referred to as the TEC). The members of the said committee finally decided that an IEER was required to be prepared by the 4th Respondent prior to the granting of any approval and that there was no need to call for an EIAR.

In the light of the said averment contained in the statement of objections of the 1st Respondent, it becomes relevant to consider the legal provision, namely Sec. 23 BB(l) of the said Act which reads as follows:-

> "It shall be the duty of all **project approving agencies to require** from any Government Department, corporation, statutory board, local authority, company, firm or individual who submit any prescribed project for its approval to submit within a specified time an Initial Environmental Examination Report or an Environmental Impact Assessment Report as required by the project approving agency relative to such a project and containing such information and particulars as may be prescribed by the Minister for the purpose." [Emphasis added]

Thus, the project approving agency has a discretion to call for an IEER or an EIAR from the 4th Respondent in order to decide whether approval be given to a prescribed project. The law contemplates that such report has to be considered by the project approving agency, namely the 1st Respondent in this application. However, paragraph 12 of the statement of objections of the 1st Respondent shows that the TEC decided that IEER was sufficient to cover all the matters and concluded

that such a report was required to be prepared by the project developer prior to considering the approval.

Where a statute requires the power to be exercised in a certain form, the neglect of that form renders the exercise of the power *ultra vires.* It has been the consistent approach of the court in the exercise of its power of judicial review, that it will not interfere with the exercise of a discretionary power vested in the executive or administrative agency except on limited grounds. 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 matters outside the limits of the discretionary authority conferred by the legislature or on consideration extraneous to those laid down by the legislature. Thus, this Court cannot issue a writ of mandamus directing the 1st Respondent to call for an EIAR in respect of the said project. The discretion to call for an EIAR or IEER has to be exercised by the 1st Respondent and by the 1st Respondent only. Any clear departure from the objects of the statute is objectionable and renders the act invalid in law. Public orders made by public authorities are meant to have public effect and are intended to affect the conduct of those to whom they are addressed and must be construed objectively.

The TEC has no jurisdiction under the Act to decide whether an IEER or EIAR is required in respect of a prescribed project. The 1st Respondent in my view has failed to exercise its discretion reasonably and in good faith in discharging its public duty. The 1st Respondent cannot in law surrender the discretion vested in it to the TEC. I therefore hold that the 1st Respondent has failed to exercise its discretion in granting its approval in the manner provided in Sec. 23BB(1) of the Act.

The 1st Respondent along with its statement of objections produced to Court the approval given to the 4th Respondent dated 20 October 2003 marked 1R2. The 2nd paragraph of the said letter containing the approval is reproduced below:-

> "This is to inform you that the Central Environmental Authority (CEA) after study of your responses to the Environmental Questionnaire dated 3rd June 2003 and the subsequent letter from the Forest Department dated 12th October 2003 has decided to grant environmental clearance for the above project subject to the conditions given below"

It is therefore abundantly clear that the 1st Respondent granted the approval after considering the following two documents.

a. The Environmental Questionnaire dated 3rd June 2003, and
b. The letter from the Department of Forest dated 12th October 2003.

This too demonstrates that the 1st Respondent has failed to exercise its power in terms of Sec. 23 BB (1) considering the purpose for which such power was given. The Environmental Questionnaire dated 3rd June 2003 could not be equated to an IEER or EIAR referred to in Sec. 23 BB(1). The questionnaire seems to contain the preliminary information on the proposed project. The IEER and/or EIAR must contain information and particulars as prescribed by the Minister for the purpose of ascertaining serious environmental consequences of the project. Review by Court of an act or decision of an administrative agency has always been based on an allegation that the agency has exceeded or abused its powers and has acted *ultra-vires.* When a power is exceeded or abused any acts done in such excess or abuse of the power is done without authority. The *ultra-vires* doctrine effectively controls those who exceed or abuse the administrative discretion, which a Statute has given.

For the reasons stated, a writ of certiorari is issued quashing the approval given for the said project by the 1st Respondent as shown in the public notice marked P4. The Petitioner is entitled for costs in a sum of Rs. 10,000 payable by the 1st Respondent.

K. Sripavan, J.
Judge of the Court of Appeal

I agree.

Sisira de Abrew, J.
Judge of the Court of Appeal

Environmental Foundation Limited
v
Urban Development Authority of Sri Lanka and others

Supreme Court of Sri Lanka
S.C.F.R. Application No. 47/2004

Before: Sarath N. Silva, Chief Justice
N.K. Udalagama, J.
N.E. Dissanayake, J.

Counsel: Ms. I. R. Rajapakse with Ms. Pamoda Rajakeeya for Petitioner
Romesh De Silva, P.C. with Sugath Caldera for 1st Respondent
S. Parathalingam, P.C. with N.R. Sivendran and S. Cooray for 2nd Respondent.

Decided on: 23rd November 2005

Attempt by Urban Development Authority (UDA) to lease out traditional open public recreation area known as 'Galle Face Green', to a commercial entertainment company – advertised as being a public friendly venture – request for further information by Petitioner who was a registered national level environmental NGO – refusal by UDA to disclose requested information – whether an infringement of Petitioners fundamental rights under Articles 12(1) (equality before the law) and 14(1)(a) (freedom of speech and expression) of the Constitution by UDA – whether UDA had legal authority to lease out Galle Face Green – whether Petitioner being an incorporated company had legal standing to invoke fundamental rights jurisdiction under Articles 12(1) and 14(1)(a).

The Petitioner, Environmental Foundation Limited, which is a non - profit making organization, filed this application in the public interest seeking disclosure of the vesting order issued under the Urban Development Authority Law vesting Galle Face Green in the UDA, and the agreement entered into by the UDA with a private company to lease out the Green. The Respondents were the UDA and the private company. At the outset Court issued an interim stay order restraining UDA from putting into operation any lease or other kind of arrangement or agreement affecting the use, occupation and/or management of Galle Face Green pending the hearing and determination of this application.

At the main hearing the Court noted that the UDA itself had described Galle Face Green (originally called “Galle Face Walk”) as a "landmark in the history of our nation", and that it had been constructed during the time of the 19th century British Colonial Governor Sir Henry Ward, who had recommended to his successors that it be dedicated to “the Ladies and Children of Colombo”. This was declared on an engraved rock tablet and plaque that is still in existence today. The Court was of the view that the Government of Sri Lanka as the legal successor to the British Governor had a duty to maintain Galle Face Green in this manner.

With regard to the Petitioner’s request for information, the Court noted that Sri Lanka’s Constitution contains no specific guarantee of a right to information, but that the right to freedom of speech and expression contained in Article 14(1)(a) may include the right to information that would enable a person effectively to exercise these rights in respect of a matter that should be in the public domain. The Court also considered that the arbitrary refusal of the UDA to release information about a matter which it had earlier put into the public domain by way of a newspaper advertisement, was arbitrary and an infringement of the Petitioner’s right to equality before the law and equal protection of the law guaranteed by Article 12(1) of the Constitution.

The Court also found that the purported lease agreement between the UDA and the private developer (2nd Respondent) which was produced by the latter, was *ultra vires* the powers of the UDA and accordingly declared the same to be of no force or avail in law. The Petitioner was awarded Rs. 50,000/- in costs against the UDA.

Held:

(1) Although the right to information is not specifically guaranteed under our Constitution as a fundamental right, the 'freedom of speech and expression including publication' guaranteed by Article 14(1)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain.

(2) The UDA being an organ of the Government, has an obligation under the Constitution to ensure that a person could effectively exercise the fundamental right of freedom of speech, expression and publication in respect of a matter that should be in the public domain, and its bare denial of access to official information amounted to an infringement of the Petitioner's fundamental rights as guaranteed by Article 14(l)(a) of the Constitution.

(3) The arbitrary refusal of information required by the Petitioner, by the UDA was an infringement of the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution.

(4) The purported agreement entered into between the UDA and the private developer was *ultra vires* and of no force or avail in law. The Galle Face Green should be maintained as a public utility in continuance of the dedication made by Sir Henry Ward and necessary resources for this purpose should be made available by

the Government of Sri Lanka, being the successor to the colonial Governor who made the dedication referred to above.

(5) The fundamental rights guaranteed by Articles 12(1) and 14(1)(a) should not be restricted to natural persons but extended to all entities having legal personality.

Sarath N. Silva, C.J.

This Case relates to a purported Management Agreement or Lease entered into on 15.12.2003 by the 1st Respondent (Urban Development Authority - UDA) with the 2nd Respondent (E.A.P. Networks (Pvt) Ltd - EAP Ltd), whereby it was sought to hand over the management and control of the 14 acre seaside promenade of Colombo - the Galle Face Green, to E.A.P. Ltd. When the application was supported on 13.2.2004, the Court granted leave to proceed and made an interim order directing the UDA to refrain from putting into operation any lease or any other kind of arrangement or agreement affecting the use, occupation and/or management of the area described as the Galle Face Green. The order states as follows:

> "We make this order on the basis that Galle Face Green has been open to the public, established and maintained as a public utility for the past 150 years."

The interim order did not make specific reference to the impugned Agreement since it was not in the public domain at that time and the Petitioner had been denied access to it, being the alleged infringement of Article 14(1)(a) of the Constitution.

The Agreement has been subsequently produced by E.A.P. Ltd., marked 2R2. Although the Agreement purports to be a Management Agreement, as correctly submitted by Counsel for

the Petitioner, since it provides for payment to be made to the UDA it is more in the nature of a lease. It is plain that a manager does not pay the owner. But, in the case of a Lease the lessee pays the owner. I do not have to dwell on this matter further, since even after the extended time allowed for the purpose, the Respondents have failed to produce any grant, lease or order by which Galle Face Green was vested in the UDA. Therefore, the UDA had no power whatsoever to enter into the Agreement 2R2 and the interim order of this Court fortuitously prevented, "the landmark in the history of our nation", “the nations pride and heritage” (to use the words, in the prominent newspaper notification P5, published by the UDA, which would be referred to later) from passing into private hands.

This is an application filed in the public interest and considering the purported exercise of power by the UDA alleged to be an infringement of Article 12(1) of the Constitution – and the refusal to disclose information alleged to be an infringement of Article 14(1)(a), it is necessary to examine the legal status and character of the Galle Face Green.

As stated in the description, in the newspaper notification P5, published by UDA, the Galle Face Green is in certain respects a "landmark in the history of our nation", in reference to the British period of colonial rule of our history and the later period after gaining independence. Whilst the national, social, cultural and political events that have taken place at the Galle Face Green, including Independence Day Parades, Swearing in of the President, visit of His Holiness the Pope and foreign dignitaries including Her Majesty the Queen, May Day Rallies, and the like form part of our contemporary history, the establishment and development of Galle Face Green are firmly engraved on a rock tablet and a plaque, found at the seaward edge and at the Galle Road end, respectively of the Green. The rock tablet (referred to in P4d) at the sea-ward edge of the 'walk' marks the commencement of the Galle Face Green and has a legal significance that we have to take note of. The rock tablet, well preserved upto date, has the following inscription:

GALLE FACE WALK
Commenced by
Sir Henry Ward
1856
completed 1859
and recommended to his successors in the interest
of the Ladies and Children of Colombo

Sir Henry Ward was the Governor and wielded the power of the British Monarch. The inscription reflects the immense toil that would have gone into the construction of the elevated walk and green with the panoramic view of the Indian Ocean stretching to the arch of the horizon. The idyllic setting of tranquility and leisure was dedicated to the "ladies and children of Colombo". The "recommendation to his successors" by the Governor, which would include the Government of the Republic of Sri Lanka, ascribes to it the character of a dedication in perpetuity and it is the duty of the Government of Sri Lanka to maintain the Galle Face Green in the manner as laid down by Sir Henry Ward. The location of the Galle Face Hotel constructed in 1864, effectively prevents the construction of any road, highway or rail track across the Green and removed it from the pale of commercial exploitation. The cherished dedication of Sir Henry Ward has held sway for nearly 150 years until the arrangement being the subject of this application was made, in the manner that will be stated hereafter.

As noted in the publication P4, over the years due to bad maintenance, the Green turned into a dust bowl and in the years 2000-2001 the then administration undertook a comprehensive rehabilitation programme spending over Rs. 30 Million, which was completed 23.9.2001 as recorded in the plaque referred to above, as a part of a comprehensive Galle Face Development Programme.

After the change of administration towards the end of December 2003, the' Petitioner pleads that there were several newspaper publications, some of which have been produced marked P4(a) to P4(d) reporting a "deal" entered into between the UDA and EAP Ltd., whereby the control of the Green would pass to the latter to set up a "Mega Leisure Complex". The computer print out of the Gulf News "GN online" dated 23.12.2003 (P5d) contains an account of the history of the Green including the dedication by the Governor and the extensive development carried out by the previous administration. A portion of this publication reads as follows:

> *"Now, the Urban Development Authority has leased out the sacred site to a private entertainment company, E.A.P. Edirisinghe, to turn the Green to a mega entertainment and leisure park with food stalls with a hawker-street style theme. Small-time traders fear they will be wiped out of business as the big-names come into eat into their business. And free access will surely be a thing of the past. The 'hands-off' Galle Face Green policy since the latter part of the 19th century might not be yielded without a fight."*

The UDA lost no time responding to these publications which implied a "secret deal" and published a half page notification on 4.1.2004 (P5) with a bold headline.

'MORE TRANSPARENT THAN GLASS'

The notification is in reference to the transaction the UDA has entered into with E.A.P. Ltd., and extols the many attributes of the Green some of which have been referred to above with an assurance that the public would have free and uninterrupted access to the Green.

Within 2 days of the publication P5, the Petitioner wrote letter P6 (dated 6.1.2004) to the UDA describing its status as a "non-profit making organization – which has for over 22 years dedicated

itself to the protection of the environment in the public interest" and called for copies of the following documents –

(a) The Order vesting the Galle Face Green in the UDA

(b) The Lease Agreement entered into with EAP Group of companies or related entity

(b) The approved plan, if any, for the development of Galle Face Green in terms of the said lease

The Petitioner copied the letter to the Chairperson E.A.P. Group of Companies. There was no response to this request of the Petitioner by the UDA and E.A.P. Ltd. The Petitioner then sent a further request by letter dated 14.1.2004, addressed to the UDA and E.A.P. Ltd (P7 and P8). The UDA replied by letter dated 20.1.2004 (P10), stating that the Authority is not in a position to forward official documents as requested.

The Petitioner alleges that the refusal on the part of the UDA to disclose the information, as requested in the letters marked P6 and P8 constitute an infringement of the fundamental right guaranteed by Articles 14(1)(a) of the Constitution. It is seen that this Article guarantees "the freedom of speech and expression including publication".

There is no specific guarantee of a fundamental right to information contained in our Constitution.

Counsel for the Petitioner contended that the right to information, in the circumstances of this Case, is implicit in the freedom of expression, that is guaranteed by Article 14(1)(a) of the Constitution. It is submitted that the UDA by the publication of P5 containing the bold headline "more transparent than glass" brought the matter of the agreement entered into with E.A.P. Ltd., into the public domain. Therefore the Petitioner is entitled to check on the information given by the UDA as regards the transaction entered into with E.A.P. Ltd., by securing the relevant

documents including the vesting order, agreement and the approved plan for development. It is only on the basis of this information the Petitioner would be in a position to effectively exercise the freedom of expression. It is contended that the Petitioner, being a well recognized entity working for the preservation of the environment is entitled to act in the public interest and secure relevant information as to the transaction that had been entered into since the matter should be in the public domain.

The contention of the Petitioner and the objections raised thereto, have to be considered in the light of the fact the right to information is not specifically guaranteed under our Constitution as a fundamental right. Although there is no such safeguard I am of the view that the 'freedom of speech and expression including publication' guaranteed by Article 14(1)(a), to be meaningful and effective should carry within its scope an implicit right of a person to secure relevant information from a public authority in respect of a matter that should be in the public domain. It should necessarily be so where the public interest in the matter outweighs the confidentiality that attaches to affairs of State and official communications.

Article 4(d) of the Constitution states the manner in which the sovereignty of the People shall be exercised in relation to the fundamental rights, as follows:

> "the fundamental rights which are by the Constitution declared and recognized shall be respected, secured and advanced by all the organs of government, and shall not be abridged, restricted or denied, save in the manner and to the extent hereinafter provided."

The UDA is an organ of the Government and is required by the provisions of Article 4(d) to secure and advance the fundamental rights that are guaranteed by the Constitution. It has an obligation under the Constitution to ensure that a person could effectively exercise the freedom of speech, expression and publication in

respect of a matter that should be in the public domain. Therefore a bare denial of access to official information as contained in P10, sent by the UDA, in my view amounts to an infringement of the Petitioner's fundamental rights as guaranteed by Article 14(l)(a) of the Constitution.

The Petitioner also alleges that the refusal as contained in document P10 on the part of the UDA amounts to an arbitrary exercise of power in the absence of specific reasons that support such refusal. The UDA is here purporting to exercise statutory power. It has held out in publication P5 that a very transparent transaction has been entered into in respect of Galle Face Green with E.A.P. Ltd., with all necessary safeguards to preserve and protect the public interest. Since the transaction entered into and the publication constitute a purported exercise of power, the arbitrary refusal of information required by the Petitioner is an infringement of the Petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution. In this instance I have to note that the conduct of the UDA is worse than being arbitrary in the light of the publications that alleged a "secret deal" in respect of the Galle Face Green and UDA's bold notification that the agreement entered into was a very transparent transaction. The purpose of the publication was to mislead the public that everything has been done reasonably and according to law. But, when requested for information the UDA took a different turn and refused any disclosure of whatever information. The UDA has persisted in this refusal even before the Court. This is administrative action that has to be unreservedly condemned. Therefore the irresistible inference to be drawn is that the publication P5 was an act of deceit on the part of the UDA to prevent any further inquiry into the matter and the agreement entered into, until it was implemented.

The timely intervention of the Petitioner prevented the matter becoming a fait accompli. In the circumstances the action of the UDA constitutes to an infringement fundamental rights guaranteed by Article 12(1) of the Constitution.

An objection has been raised that the Petitioner cannot have and maintain this application, since it is an incorporated company and that the fundamental rights guaranteed by Articles 12(1) and 14(1)(a) can be invoked only by persons and in the Case of Article 14(l)(a) by a citizen. In my view the word "persons" as appearing in Article 12(1) should not be restricted to "natural" persons but extended to all entities having legal personality. In several cases this Court has given relief to incorporated bodies that have a legal personality recognized by law (1983 2 SLR p.111; 1997 SLR p.20 and 2000 1 SLR p.265). Although Counsel contended that Article 14(1) should be read differently in view of the reference to a “citizen”, I am of the view that this distinction does not carry with it a difference which would enable a company incorporated in Sri Lanka, to vindicate an infringement under Article 12(1) and disqualify it from doing so in respect of an infringement under Article 14(1).

The Petitioner has pleaded, without contradiction that it is a non profit making organization with the object of *inter alia* the monitoring of State Departments and Regulatory Agencies to ensure that the public interest is protected in the matter of preserving the environment.

In December 1981 Central Environmental Authority registered the Petitioner as a National Level Non-Governmental Organization engaged in activities in the field of environment (P3).

In several cases the Petitioner has assisted this Court in important matters with regard to the preservation of environment. In this instance too the Petitioner has acted in the public interest and exposed acts on the part of the UDA that are clearly *ultra vires*. As noted above although much time has been granted, the UDA has failed to produce any order or authority by which the Galle Face Green has been vested in it.

It appears that the then Minister in charge of Urban Development whose efforts are referred to in the publications P4(c) and P4(d),

used the agency of the UDA in order to carry out the ambitious Galle Face Development Project. It had been done in the fulfilment of the dedication made by Sri Henry Ward to preserve this seaside promenade as a place of quiet leisure for the people of Sri Lanka" After the change of administration the UDA has endeavoured to commercialize this property dedicated to the public benefit without realizing the significance of the sensitivity with which the colonial Governor expended enormous amount of money and effort to create a panoramic setting.

For the reasons stated above I would grant to the Petitioner a declaration that the fundamental rights guaranteed by Articles 12(1) and 14(1)(a) have been infringed by the acts of the UDA.

I would make a further order declaring that the purported agreement entered into between the UDA and EAP Limited and produced marked 2R2 is *ultra vires* and of no force or avail in law. The Galle Face Green should be maintained as a public utility in continuance of the dedication made by Sir Henry Ward and necessary resources for this purpose should be made available by the Government of Sri Lanka, being the successor to the Colonial Governor who made the dedication referred to above.

The application is allowed and the 1st Respondent is directed to pay the Petitioner a sum of Rs. 50,000/- as costs.

Sarath N. Silva
Chief Justice

I agree.

Udalagama J.
Judge of the Supreme Court

I agree.

Dissanayake J.
Judge of the Supreme Court

Environmental Foundation Limited

The Environmental Foundation Limited (EFL) established in 1981, is one of Sri Lanka's oldest public interest organisations working in environmental conservation and protection. It is a non profit making institution that has gained a reputation for a balanced approach, transparency and neutrality and is well known for its legal actions over the years. Successful judicial interventions by EFL include the Eppawela phosphate mining case and the Galle Face Green privatisation case, both which were resolved in the Supreme Court. EFL carries out scientific investigations of issues, provides technical support including scientific reports, expert evidence and periodically updates court on matters of environmental degradation. EFL publications include, Sri Lanka's only handbook on the environment, '*Your Environmental Rights and Responsibilities: A Handbook for Sri Lanka*' and number of issue based policy papers and briefing papers aimed at knowledge sharing and influencing policy. The activities of the organisation are supported by a number of donors, who currently include WWF, IUCN and UNEP.

For more details contact:

Environmental Foundation Limited
No. 146/ 34, Havelock Road
Colombo 5
Sri Lanka

Tel: (+94 11) 4528482, Fax: (+94 11) 4528483
E-mail: efl@sltnet.lk, Website: www.efl.lk