IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

In the matter of an application for orders in the nature of a writ of Certiorari and Mandamus under and in terms of the provisions of Article 140 of the Constitution.

Centre for Environmental Justice (Guarantee) Ltd.,

20A, Kuruppu Road,

Colombo 08.

Petitioner

Case No. C.A. (Writ) 291/2015

Vs.

1. Anura Satharasinghe,
   Conservator General,
   Department of Forest Conservation,
   No. 82, "Sampathpaya",
   Rajamalwatta Road,
   Battaramulla.

2. Central Environment Authority,
   104, "Parisara Piyasa",
   Robert Gunawardena Mawatha,
   Battaramulla.

3. H.D. Rathnayaka,
   Director General,
   Department of Wild Life,
   382, Jayanthipura Road,
   Battaramulla.

4. R.P.R. Rajapaksha,
   Commissioner of Lands,
   Department of Commissioner General of Lands,
   Gregory's Road,
   Colombo 07.

5. Dr. Senarath Dissanayaka,
   Commissioner General,
   Archaeological Department,
   Sir Marcus Fernando Mawatha,
   Colombo 07.

6. District Secretary,
   District Secretariat,
   Mannar.

7. Rishad Badiuddeen,
   Minister of Industry and Commerce,
   No. 73/1, Galle Road,
   Colombo 03.

8. N. Rupesinghe,
   Secretary,
   Minister of Environment and Mahaweli Development,
   Ministry of Environment,
   "Sampathpaya", Rajamalwatta Road,
   Battaramulla.

9. Attorney General,
   Attorney General's Department,
   Colombo 12.

RESPONDENT

Before: Janak De Silva J.

N. Bandula Karunarathna J.

Counsel:

Ravindranath Dabare with S. Ponnamperuma for the Petitioner

Manohara Jayasinghe SSC for the 1st to 6th and 8th and 9th Respondents

Faiz Musthapha P.C. with Basheer Ahamed and N.M. Riyaz for the 7th Respondent

Argued On: 31.07.2019, 12.02.2020 and 19.02.2020

Written Submissions:

Petitioner on 26.09.2018 and 12.06.2020

1st to 6th and 8th and 9th Respondents on 10.09.2018 and 12.05.2020

7th Respondent on 04.09.2018

Decided On: 16.11.2020

Janak De Silva J.

The Petitioner is a company limited by guarantee and a non-profit organization having as its objectives, inter alia, the protection, preservation and conservation of nature and environment and the promotion and advancement of the concepts of environmental justice and good governance in the interests of the general public.

In this public interest litigation it seeks to impugn several acts of the Respondents in the forest complex adjoining Wilpattu National Park, i.e. Northern Sanctuary of Wilpattu National Park, Maraichukkaddi/Karadikkuli Reserve Forest standing westward of Wilpattu blocks II and IV and the forest area in Madu, Periyamadu and Mannar area which is part of the Madu Road Sanctuary and Madu Road Reserved Forest.

The principal submission of the Petitioner is that these areas have been declared as reserved forests (P4) in terms of section 3 of the Forest Conservation Ordinance as amended (Forest Conservation Ordinance) and that around 1500 families have been illegally settled in this area contrary to law. This declaration was significantly made on 21st September 2012 and published in Gazette Extraordinary dated 10th October 2012. As provided by section 3 of the Forest Conservation Ordinance, it specifies that the area covered will be a reserved forest with effect from 20th October 2012. I shall refer to the significance later on.

According to the journal entries when the argument began on 31.07.2019, the learned Counsel for the Petitioner referred to this Gazette notification (P4) and the Court enquired from the learned Senior State Counsel appearing on behalf of the 1st to 6th and 8th and 9th Respondents (Respondents) whether the land forming the subject matter of this application falls within the area covered by P4. The learned Senior State Counsel acting in the highest traditions of the Attorney-General's department obtained instructions and informed Court that the land forming the subject matter of this application is covered by P4. The Court wishes to place on record our commendation to the learned Senior State Counsel.

Section 7 of the Forest Conservation Ordinance (as amended by Act No. 65 of 2009) prohibits several types of activity in a reserved forest including fresh clearing, clearing or breaking up any land for cultivation or any other purpose, erection of any building whether permanent or temporary or occupation of such building and constructing any road.

According to the statement of objections filed on behalf of the Respondents, the land forming the subject matter of this application was cleared and several houses and roads have been constructed in order to settle the internally displaced persons (IDP) who were ordered to leave the Northern Province in October 1990 by the Liberation Tigers of Tamil Eelam. On this evidence the provisions of section 7 of the Forest Conservation Ordinance has been breached in the settlement of the IDPs.

The Respondents state that the Lessons Learnt and Reconciliation Commission (LLRC) had recommended in its Report that the Government take steps to resettle IDPs and that the Government should access all possible sources of assistance from institutions and individuals both national and international. The Respondents state that in taking the initiative of resettling IDPs in the Northern Province the Respondents were fulfilling their obligations both under domestic and international law.

No doubt there is a need to settle down all IDPs who were displaced due to the war in Sri Lanka as far as possible in the areas where they were residing. However, this is subject to other overriding concerns and above all the respect for the rule of law which is the basis of our Constitution [*Visvalingam v. Liyanage* (1983) 1 Sri.L.R. 236; *Premachandra v. Jayawickrema* (1994) 2 Sri.L.R. 90]. The rule of law in its fundamental meaning requires that all acts must be according to law. Where land has been declared as reserved forest in terms of the Forest Conservation Ordinance, no person is entitled to act contrary to law and carry out activities such as clearing of forest, construction of houses and roads within this area.

Chapter VI of the Constitution enumerates the Directive Principles of State Policy which are to guide the Parliament, the President and the Cabinet of Ministers in the enactment of laws and the governance of the country for the establishment of a just and free society. Article 27 (14) of the Constitution, mandates that the State shall protect, preserve and improve the environment for the benefit of the community.

The order P4 declaring several areas as reserved forest in terms of the Forest Conservation Ordinance are a practical application of this constitutional directive. It makes the provisions of section 7 of the Forest Conservation Ordinance applicable to the land in dispute and seeks to conserve the reserved forest.

The evidence before Court establishes that vast extent of reserved forest land has been cleared and used for the resettlement of IDPs in breach of the provisions of the Forest Conservation Ordinance.

The contention of the Respondents is that the land forming the subject matter of this application has been used for re-settlement in terms of decisions made by the Presidential Task Force for Resettlement, Development and Security (Northern Province) (1R2) and the Committee appointed by the Task Force to make recommendations to resolve land related issues in Muslim Villages Displaced in 1990 (1R2 and 1R3).

However there is no documentary evidence before Court to substantiate this assertion. Accordingly on 31.07.2019 the Court enquired from the learned Senior State Counsel whether the land forming the subject matter of this application was used for the re-settlement based on any recommendation made by this Committee or the Task Force. Having moved for time to obtain instructions, he was unable to provide the clarification sought by Court. Instead Court was informed, by motion dated 22.11.2019 that, inter alia, steps will be taken to rescind the order P4 and a new order made excluding the land used for the settlement of the IDPs and that if further re-settlements are necessary every effort will be made to relocate IDPs outside reserved forest.

In any event the "Report of the Inter Agency Committee on Land Related Issues among the Muslim Families Internally Displaced in the Year 1990 (Mannar District)" is dated 15.10.2012 (1R3) whereas the land forming the subject matter of this application became reserved forest with effect from 20.10.2012.

Hence on the evidence before Court neither the Task Force nor the Committee appointed by the Task Force played any role in identifying and releasing the land forming the subject matter of this application for re-settlement of IDPs after it was declared as a reserved forest.

However there is evidence that it was the 7th Respondent Mr. Rishad Badiudeen, Minister of Industry and Commerce who was instrumental in getting this land released for the re-settlement of IDPs. On 15.01.2013 a meeting was held under the chairmanship of the 7th Respondent with the participation of the Secretary, Ministry of Environment and Sustainable Energy, Director General of Forest Conservation and his officers and a decision was made to release several lands for the re-settlement of IDPs (P7). Deplorably the then Conservator General of Forest K.G. Ariyadasa compliantly took part in the meeting and signed P7 containing the decision to release the reserved forest land.

Such a release of reserved forest land for re-settlement of IDPs could have been done only if there had been an order made by the Minister in terms of section 4(2) of the Forest Conservation Ordinance declaring that the land in dispute is no longer reserved forest. No such order has been made.

Therefore, the Court concludes that the re-settlement of the IDPs was made in violation of the provisions of the Forest Conservation Ordinance. The question then is the relief that Court will grant in this application.

The Petitioner has sought the following relief:

(a) A writ of certiorari quashing orders made by the 1st and 6th Respondents in respect of the alleged clearing of Maraichukkaddi/Karadikkuli Northern Sanctuary of Wilpattu National Park Forest complex of Madu Road Sanctuary and Madu Road Forest Reserve and construction of housing project more fully described above without compliance to the prevailing law and to remove said illegal constructions.

(b) A writ of mandamus to order the 1st, 2nd, 3rd, 4th and 8th Respondents to perform the statutory duties more fully described in the petition in respect of the illegal clearing and illegal re-settling of encroachers in Maraichukkaddi/Karadikkuli Northern Sanctuary of Wilpattu National Park Forest complex of Madu Road Sanctuary and Madu Road Reserved Forest and construction of housing project more fully described above without obtaining approval for the same from a project approving agency in the performance of the statutory duty in compliance with the provisions of the National Environmental Act, Forest Ordinance and Fauna and Flora protection Ordinance and Antiquities Ordinance as amended.

(c) An order in the nature of mandamus ordering the 1st Respondent to take action against the illegal removal of forest cover, and illegal re-settlement done by the encroachers and re-instate the forest lands to the forest reserve and organize forest replanting programme under and in terms of the provisions of the Forest Ordinance No. 16 of 1907 as amended.

The relief sought in terms of the writ of *certiorari* cannot be granted as necessary parties have not been made Respondents to this application. It is trite law that all those who would be affected by the outcome of the application for writ of certiorari should be made respondents [*Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and Four Others* (2011) 2 Sri.L.R. 258 at 267]. The Respondents have pleaded that re-settlement has

taken place in areas forming the subject matter of this application and have tendered the lists of names of the persons re-settled [1R6(a) to 1R6(e)]. However, the Petitioner failed to add these parties as Respondents even after their names were disclosed.

The relief sought in terms of a writ of mandamus must also fail for the same reasons as the rule of necessary parties applies to this remedy as well.

In this application the Court is exercising the jurisdiction conferred upon it by Article 140 of the Constitution and the Supreme Court has held that this jurisdiction is not limited to the issuing of prerogative writs such as writs of certiorari, *prohibition* and *mandamus* etc.

The jurisdiction conferred by Article 140, however, is not confined to "prerogative" writs, or extraordinary remedies", but extends '"subject to the provisions of the Constitution" – to "orders in the nature of" writs of *Certiorari* etc. Taken in the context of our Constitutional principles and provisions, these "orders" constitute one of the principal safeguards against excess and abuse of executive power; mandating the judiciary to defend the sovereignty of the People enshrined in Article 3 against infringement or encroachment by the Executive, with no trace of any deference due to the Crown and its agents. Further this Court itself has long recognized and applied the "public trust" doctrine: that powers vested in public authorities are not absolute or unfettered but are held in trust for the public, to be exercised for the purposes for which they have been conferred, and that their exercise is subject to judicial review by reference to those purposes [*Heather Therese Mundy v. Central Environmental Authority and Others* (S.C. Appeal No. 58/2003, S.C.M. 20.01.2004)].

Therefore the remaining relief for an order in the nature of mandamus ordering the 1st Respondent to take action against the illegal removal of forest cover, and illegal re-settlement done by the encroachers and re-instate the forest lands to the forest reserve and organize forest replanting programme under and in terms of the provisions of the Forest Ordinance No. 16 of 1907 as amended is one that this Court is permitted to issue. The question of necessary parties does not arise here as long as the order made by Court does not affect any person who is not a party to this application.

The learned Senior State Counsel raised an objection that a writ of *mandamus* cannot be issued since the 1st Respondent has been named by office. He cited the decision of this Court in *Indrakumara v. Land Reform Commission* [C.A. (Writ) 271/2013, C.A.M. 15.10.2019]. It is true that when this application was filed the 1st Respondent was cited by reference to his official designation. However, on 10.11.2017 the Petitioner filed an amended caption and brought in Anura Satharasinghe, Conservator General as the 1st Respondent. Therefore this objection is overruled.

A further objection was raised by the learned Senior State Counsel that this Court is denuded of any power to grant relief as the identical matter was urged before the Supreme Court in S.C.F.R. No. 130/2017 where leave to proceed was refused.

This Court has had the benefit of perusing the pleadings filed in S.C.F.R. 130/2017 since they have been filed of record in this application. I observe that the Petitioner in this case was not a party to that application. Hence the doctrines of *res judicata* or *issue estoppel* do not apply as in both instances it is necessary that the parties to the two cases and the cause of action (or issue estoppel as in this case) must be the same for the two doctrines to apply. [*Ran Menika v. Gunasena and Another* [C.A. 471/2000(F), C.A.M. 23.09.2019].

In any event, it is trite law that the rights of the parties must be decided as at the date of the institution of the proceedings or action [*Ponnammah v. Arumugam* (8 N.L.R. 223), *Sithy Makeena and Others v. Kuraisha and Others* (2006) 2 Sri.L.R. 341]. This application was filed and notice issued in 2015 whereas the fundamental rights application S.C.F.R. 130/2017 was filed in 2017. Hence the outcome of the fundamental rights application cannot be held against the Petitioner in this application.

It was further contended by the learned Senior State Counsel that this application is futile in that the re-settlement has been completed and that no meaningful purpose can be achieved by this application. I have no hesitation in overruling this objection.

Although the re-settlement has been completed, that does and should not in any way restrain the Court from making orders in the interest of justice and upholding of the rule of law. The re-settlement has been done in breach of the law and the Court must do all what can be done within the law to address the unlawful acts.

This can be done by considering the type of relief that can be granted in terms of the prayer for an order in the nature of mandamus ordering the 1st Respondent to take action against the illegal removal of forest cover, and illegal re-settlement done by the encroachers and re-instate the forest lands to the forest reserve and organize forest replanting programme under and in terms of the provisions of the Forest Ordinance No. 16 of 1907 as amended.

Court is mindful of the decisions in *Dayananda v. Thalwatte* [(2001) 2 Sri.L.R. 73] and *Environmental Foundation v. Commissioner of Buddhist Affairs* [(C.A. (Writ) 243/2017, C.A.M. 07.11.2017] which lays down that the prayer in a writ application must be set out with precision and clarity. However, in the instant application, the Petitioner has prayed for an order in the nature of mandamus which this Court is empowered to issue [See *Heather Therese Mundy v. Central Environmental Authority and Others* (supra)].

In any event, the judiciary is part of the State [*Centre for Policy Alternatives v. Dayananda Dissanayake* (2003) 1 Sri.L.R. 277 at 292] and is bound to protect, preserve and *improve* the environment for the benefit of the community as directed by Article 27(14) of the Constitution. In my view procedural requirements should not be an obstacle to the Court giving effect to this Directive Principle of State Policy in public interest litigation such as this application as it is one made on behalf of the community and the lapse of the pleader, if any, should not be allowed to compromise the rights of the community at large.

In India, the Supreme Court has recognized the power vested in the High Court in moulding remedies in the exercise of the writ jurisdiction vested in it by Article 226 of the Indian Constitution to do substantial justice between the parties [*C.M. Singh v. H.P. Krishi Vishva Vidyalaya and Ors.* (1999) 9 SCC 40] and, that an application should not be thrown out simply on the ground that the proper writ or direction has not been prayed for [*Chiranjit Lal v. The Union of India* A.I.R. 1951 S.C. 41]. *It is open to the Court to mould the relief and to grant the*

consequential or ancillary relief so as to restore the position to what it was before the impugned action was taken by the concerned authority [*Consumer Education and Research Centre v. State LNIND* 1981 Guj 51, AIR 1981 Guj 233].

Polluter Pays Principle

The polluter pays principle enshrined in Principle 16 of the Rio De Janeiro Declaration has been recognized and applied by the Supreme Court of India on numerous occasions [*Indian Council for Enviro-Legal Action v. Union of India* (2011) 8 SCC 161; *Vellore Citizens Welfare Forum v. Union of India* AIR 1996 SC 2715; *M.C. Mehta v. Kamal Nath* (1997) 1 SCC 388; *M.C. Mehta v. Union of India* AIR 1987 SC 965, *S. Jagannath v. Union of India* (1997) 2 SCC 87; *M.C. Mehta v. Union of India* (1997) 2 SCC 411].

The Polluter Pays principle as interpreted by the Indian Supreme Court means that the absolute liability for harm to the environment extends not only to compensate the victims of pollution *but also the cost of restoring the environmental degradation. Remediation of the damaged environment is part of the process of sustainable development and as such*, *the polluter is liable to pay the cost* to the individual sufferers as well as the cost *of reversing the damaged ecology*.

The Supreme Court of Sri Lanka has also recognized and applied the Polluter Pays principle [*Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others* (2000) 2 Sri.L.R. 243; *Wijebanda v. Conservator General of Forests* (2009) 1 Sri.L.R. 337; *Kariyawasam v. Central Environment Authority and Others* [S.C.F.R. 141/2015, S.C.M. 04.04.2019]. In *Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others* (Supra. at 305)] Amerasinghe J. held that the costs of environmental damage should 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.

Having taken into consideration all the circumstances of the case, Court issues an order in the nature of mandamus ordering the 1st Respondent (Conservator General, Department of Forest Conservation) to take action to implement a tree planting programme under and in terms of the provisions of the Forest Ordinance No. 16 of 1907 as amended in any area equivalent to the reserve forest area used for re-settlement of IDPs.

Article 28(f) of the Constitution dictates that it is a fundamental duty of every person in Sri Lanka to protect nature and conserve its riches. This includes public officials and representatives of the people like the 7th Respondent.

In view of this constitutional duty it would be a travesty of justice to require the State and consequentially the tax payer to bear the costs of this programme when the 7th Respondent was instrumental in getting the reserved forest released for the re-settlement of the IDPs.

Although it is true that no relief has been sought by the Petitioner against the 7th Respondent, this in my view does not prevent the Court from applying the polluter pays principle against the 7th Respondent and granting ancillary or consequential relief against him. He is a party to this application and has filed objections and written submissions through his pleader. In any event, the prayer to the petition seeks "such and further relief as Your Lordships Court shall seem meet" which in my view is sufficient to cover consequential or ancillary relief against the 7th Respondent.

Therefore, Court issues an ancillary or consequential order directing the 7th Respondent Rishad Badiuddeen to bear the full the cost of such tree planting programme applying the polluter pays principle since according to the evidence before Court he was instrumental in using the reserved forest land for the re-settlement of the IDPs. The Conservator General, Department of Forest Conservation (1st Respondent) is directed to calculate the costs of the tree planting programme directed by Court and inform the 7th Respondent of this cost and the details of the account to which the said sum should be paid by him within two-months of the date of this judgment. The 7th Respondent shall pay the said sum within one month of such notification.

The judgment of this Court is based on a clear violation of the law as explained above. However, before I part, let me emphasis that the protection of the environment is a matter that has been recognized in international law as well as in many religions.

In *Gabcikovo-Nagimaros project (Hungary/Slovakia)* case [1997 General list N 92 25th September 1997], Vice President of the ICJ Judge C.G. Weeramantry in his separate opinion held that the protection of the environment is a vital part of the contemporary human rights doctrine and that it is a sine qua non for numerous rights such as the right to health and the right to life itself and that damage to the environment can impair and undermine all human rights spoken in the Universal Declaration and other human right instruments.

In *Bulankulama and Others v. Secretary, Mininstry of Industrial Development and Others (Eppawela Case)* [(2000) 3 Sri.L.R. 243 at 253] Amerasinghe J. stated:

> "The organs of State are guardians to whom the people have committed the care and preservation of the resources of the people. This accords not only with the scheme of government set out in the Constitution but also with the high and enlightened conceptions of the duties of our rulers, in the efficient management of resources in the process of development…"

In Buddhism, the *Kutadanta Sutta* states that it is the responsibility of the government to protect trees and other organic life and that government should take active measures to provide protection to flora and fauna. According to Hinduism, when a person is engaged in killing creatures, polluting wells, and ponds and tanks, and destroying gardens he goes to hell (*Padmapurana*, *Bhoomikhanda* 96.7-8).

C.G. Weeramantry in "*Tread Lightly on the Earth, Religion, The Environment and the Human Future*" [Stamford Publication, 2014] cites various religious texts to emphasis that several religions speak of the need to protect the environment and follow sustainable development. He states (at page 228) "trusteeship of the universe is recognized in Islam and any violation of it by man is accountable and subject to punishment as the Qur'an states "It is He who made you trustees of the earth…Indeed your Lord's retribution is swift, yet He is forgiving and kind (6:165)."

As Rousseau wrote in *Emile,* "forgetfulness of all religions leads to the forgetfulness of the duties of man." [Rousseau, Jean Jacques, *Emile:* or On Education, 1762, Book 4, p. 929]

Before parting with the judgment, I reiterate that without any doubt there is a need to settle down all IDPs who were displaced due to the war in Sri Lanka as far as possible in the areas where they were residing. However this is subject to other overriding concerns and above all the respect for the rule of law which is the foundation of our Constitution. The conclusions I have made and the relief granted is based on the finding that the re-settlement of the IDPs in this case has been made contrary to law.

Application partly allowed.

Judge of the Court of Appeal

N. Bandula Karunarathna J.

I agree.

Judge of the Court of Appeal