

**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 mandamus
under and in terms of the provisions of
Article 140 of the Constitution*

C. A. Ap. No. 497/ 2007

Centre for Environmental Justice
(Guarantee) Limited,
20 A, Kuruppu Road,
Colombo 08.

PETITIONER

v.

1. Central Environmental Authority,
104, 'Parisara Piyasa',
Robert Gunewardene Mawatha,
Battaramulla.
2. Director of Wildlife Conservation,
Department of Wildlife Conservation,
382, Aluthnuwara Mawatha,
Malambe.
3. Minister of Environment and Natural
Resources,
Ministry of Environment and Natural
Resources,
'Sampathapaya', Rajamalwatta Road,
Battaramulla.
4. Attorney General,
Attorney General's Department,
Hulftsdorp Street,
Colombo 12.

RESPONDENTS

**TO HIS LORDSHIP THE PRESIDENT AND THE OTHER HONOURABLE JUSTICES
OF THE COURT OF APPEAL**

On this 30 day of May 2007

The Petition of the Petitioner above named appearing by Ms. Nilmal Wikremasinghe its Attorney at Law states as follows:

01. The Petitioner is a public company, limited by guarantee and a body corporate duly incorporated under and in terms of the provisions of the **Companies Act No. 17 of 1982**, as amended and may sue or be sued in its corporate name. True copies of the Memorandum and Articles of Association and Certificate of Incorporation of the Petitioner are annexed hereto marked **P1 (a), (b) and (c)** respectively.

02. The Petitioner is a non-profit making national non-governmental organization having *inter alia* as its objectives the protection, preservation and conservation of nature and environment and the promotion and advancement of the concepts of environmental justice and environmental good governance in the interests of the general public.

03. The Petitioner is genuinely concerned with the implementation and enforcement of the laws relating to the protection of nature and environment and responding to the constitutional dictates enshrined in the **Chapter on Directive Principles of State Policy and Fundamental Duties** in the **Constitution of the Democratic Socialist Republic of Sri Lanka** is interested in performing the fundamental duty imposed on every person by **Article 28 (f)** of the said **Constitution** to protect nature and conserve its riches. Since its inception, the Petitioner in the said capacity has initiated and/or engaged in and/or contributed to a number of activities in such regard, in proof of which is annexed hereto the affidavit marked **P2**.

04. The 1st Respondent is a body corporate established under and in terms of the provisions of **section 2** of the **National Environmental Act No. 47 of 1980**, as amended and may sue or be sued in its corporate name. It is responsible for the due exercise, performance and discharge of powers, duties and functions vested in, imposed on and assigned to under and in terms of the provisions, particularly of **sections 10, 20 and 23** of the said **Act**.

05. The 2nd Respondent is a public officer appointed under and in terms of **section 68 (1) (a)** of the **Fauna and Flora Protection Ordinance No. 02 of 1937**, as amended and is the officer in charge of the Department of Wildlife Conservation, the main governmental agency tasked with wildlife and habitat protection in and management of national reserves. He is charged with the implementation and enforcement of the provisions of the said **Ordinance** and supervision thereof.

06. The 3rd Respondent is the Minister in charge of the subjects of environment and natural resources and is a member of the Cabinet of Ministers (which is charged with the direction and control of the Government of the Republic under and in terms of the provisions of **Article 43 (1)** of the **Constitution**) and as such is an agent and/or a component of the executive arm of the Government.

07. The 4th Respondent is the Chief Legal Officer of the State and is made a Respondent for the purpose of giving notice of this application.

08. The Petitioner states that the Asian elephant (*Elephas maximus*), presently confined to about 13 countries in the Asian region of which Sri Lanka is one, is one of the most seriously endangered species of large mammals in the world. Given its enormous size and body mass, it is also one of the few species of terrestrial megaherbivores still extant; in fact it is the largest surviving terrestrial herbivore.

09. The population of Asian elephants is approximately about 35,000 - 40,000 and population of wild elephants in Sri Lanka is about 3000 (about 10% of total population) at present, in contrast

to more than 10,000 elephants found distributed all over the island about a century ago. It is estimated that about 70% of elephants range outside the protected area system; (*vide.* 2-5 p.p. of the document annexed hereto marked **P 3**).

10. This limited number of wild elephants lives in one of the most densely populated countries in the South Asian region having a population of about 20 million people sustained essentially by an agriculture-based economy. Given the small geographical size of the country (65,610 km²) and the high population density (300 people per km²) increased interactions between the humans and elephants have become inevitable.

11. Deforestation, and destruction and fragmentation of natural habitats owing to rapid growth in the agricultural sector and unplanned expansion of human settlements have lead to a continuous contraction of habitats available to elephants. The resultant Human-Elephant Conflict (HEC) has escalated to an alarmingly high proportion at present contributing to a very high mortality of elephants *i.e.* of about 3 elephant deaths per week, a 5% decline annually; (*vide.* v, ix p.p. of the document annexed hereto marked **P 4**).

12. The Petitioner states that such a high rate of elephant mortality is unsustainable owing to their small population and slow rate of reproduction. Ensuring the future survival of elephants that range inside and outside protected areas is both central and crucial to the conservation of elephants in Sri Lanka.

13. On account of the rapid depletion of the number of Sri Lankan elephants, it is threatened with imminent extinction and hence listed as an endangered species in the Red Data Book published by the International Union for Conservation of Nature and Natural Resources (IUCN); *vide.* 42 p. of the document annexed hereto marked **P 5**.

14. It is due to their rarity, high bio-diversity value and threatened nature that elephants have been given special protection under and in terms of the provisions of the said **Fauna and Flora Protection Ordinance** (*vide.* Part II) and declared as the national animal of Sri Lanka.

15. Sri Lanka's separation from the subcontinent has helped the elephants to evolve into a sub species (*Elephas maximus maximus*) different from their relatives elsewhere in the world. If the elephants become extinct in Sri Lanka it would result in the loss of another animal unique to our land.

16. The Petitioner states that the continued intensity of the human elephant conflict would pose a serious threat to the survival of the wild elephant in Sri Lanka and the resultant decline in elephant population will have an adverse impact on the viability of other wildlife as the elephant is a 'keystone species' and is critical to the management of its habitat: Since the elephant is a 'flagship species' its conservation will result in the maintenance of biological diversity and ecological integrity across a vast area of Sri Lanka.

17. The Petitioner states further that these huge giants need to roam freely over larger areas of natural ranges than other animals or otherwise they will suffer from thermo regulatory imbalance or heat stress since large animals are slower at thermo regulation *i.e.* the process of releasing metabolic heat and regularizing their body temperature; this is evident by the fact that the Asian elephants prefer to rest during the mid-day, roaming to find food only during early mornings, late evenings and nights. Thus, the elephant migration between protected areas needs to be facilitated through either maintenance or renewed establishment of human-habitation free corridors.

Also, elephants are very social animals and shall not be kept in solitary confinement; removal of an elephant from its natural habitat, viewed from the ecological and biological perspectives, is similar to killing it because it cannot fulfill its biological and ecological roles.

18. In Sri Lanka no other animal has been associated for so long with the people in their traditional and religious activities as the elephant. This majestic and magnificent creature is the only animal permitted to carry the sacred Tooth Relic of the Buddha.

19. Poaching on wildlife, together with degradation and depletion of natural habitats has had an adverse impact on the preservation of wildlife which is on the verge of extinction. The destruction and depletion of other forms of life would create ecological imbalances endangering human life; it is extremely essential for the survival of man to co-exist with nature and to preserve and protect wildlife.

20. On account of rich and diverse eco-systems, extensive gene pools, high species diversity and high level of endemism, Sri Lanka has been named as one of the 18 bio-diversity hot spots in the world. Conservation of Sri Lanka's bio-diversity therefore transcends national boundaries; it is of global relevance.

Wildlife forms part of our cultural heritage, in the same manner as other archeological monuments, to be preserved for future generations. The overall goal of bio-diversity conservation shall therefore be to conserve the biological diversity while fostering its sustainable use to meet the needs of the present generation without compromising the ability of the future generations to meet their own needs.

The present generation, therefore, has a duty to those yet unborn to preserve the rhythm and harmony of nature and bequeath it to the next generation for the full enjoyment of a balanced and healthful ecology. Where there are threats of serious or irreversible damage, effective precautionary measures shall be taken to prevent environmental degradation.

21. The preservation of fauna and flora has been a great and urgent necessity for the survival of humanity and thus the policy and object of the domestic legislation on wildlife and environment reflect an increasing awareness of the compelling need to take emergent action to restore the serious ecological imbalances created by depredations inflicted on nature by man. This is the essence and spirit that permeate the substratum of the country's prime bio-diversity legislation, the said **Fauna and Flora Protection Ordinance** and the umbrella environmental statute, the said **National Environmental Act**.

22. It was not only the perception of the national legislature but also of the world community, of the importance of biological diversity for evolution and for maintaining life sustaining systems of the biosphere so that they adopted the Paris Convention for the Protection of World Cultural and Natural Heritage (1972) and Rio Convention on Biological Diversity (1992) and proclaimed the Stockholm Declaration on Human Environment (1972), Paris Declaration on the Responsibilities of Present Generation Towards Future Generations (1997) and Johannesburg Declaration on Sustainable Development (2002), considering that deterioration and disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the common heritage of mankind, affirming that the conservation of biological diversity is common concern of humankind and recognizing the responsibility of the present generation to protect, preserve and improve the environment and bequeath to the future generations an Earth not irreversibly damaged by human activity.

Further, as reflected in the Washington Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), the elephant must be protected from being wiped out from the face of the Earth by excesses of man. As the Asian elephant was a highly endangered species it was placed in Appendix I of the said Convention which includes all species threatened with extinction or which are/or may be affected by trade.

The Petitioner annexes hereto true copies of the said international instruments marked **P 6 (a) - (f)**.

23. Hence, the primary responsibility for the protection, preservation and conservation of the country's biological diversity and ecological heritage and for the exploitation and utilization of such resources in a rational manner for the well-being, development and advancement of the people lies with the Government of which the said Respondents are components and/or agents and/or instrumentalities, as the guardian of the natural resources of Sri Lanka on behalf of the present and future generations of the people. The recognition of such responsibility by the Government of Sri Lanka is manifest by it becoming a contracting party and subsequently ratifying, or acceding to or becoming a signatory to the international instruments mentioned in the above paragraph.

24. On account of the aforesaid facts and circumstances, the Petitioner states that the adoption of emergent preventive, remedial and curative measures by the authorities concerned are required to mitigate the Human-Elephant Conflict and to conserve wild elephants in Sri Lanka. Unless the problem is resolved or mitigated, it would ultimately lead to the extinction of Sri Lankan elephant.

25. The Petitioner states that the current status of the draft 'National Policy for the Conservation and Management of Wild Elephants in Sri Lanka' prepared by the Department of Wildlife Conservation is uncertain and in any event the said Department is not vested with statutory power to make such Policy.

26. Thus, for the aforesaid reasons, the Petitioner, in the public interest and responding to the constitutional dictates enshrined in the said **Chapter on Directive Principles of State Policy and Fundamental Duties** in the **Constitution**, requested through its Attorney at Law, the Chairman and the Director General of the said 1st Respondent, to take cognizance of the aforesaid facts and circumstances and to take action forthwith to conduct research and/or studies as to the nature, extent and causes of the decline in elephant population in Sri Lanka, with particular reference to the Human - Elephant Conflict, and to device and to recommend to the said 3rd Respondent for implementation a comprehensive National Policy for Elephant Conservation, in the performance of the statutory duty in compliance with the provisions, particularly of **sections 10 (b) and (d), 20 and 23** of the said **National Environmental Act** and the said 3rd Respondent to implement the same by formulating Regulations in that regard in the performance of his statutory duty in compliance with the provisions, particularly of **section 32 (2) (b)** of the said **National Environmental Act** read with **section 71** of the said **Fauna and Flora Protection Ordinance** or otherwise as required by law as being consonant also with the provisions contained in **Articles 27 (14) and (15) and 28 (f)** of the said **Constitution**. True copies of the said letters dated 11. 05. 2007 are annexed hereto marked **P 7 (a), (b) and (c)** respectively. However, they have failed to respond and to take necessary actions satisfactorily in that regard up to date.

27. Being aggrieved by the said inaction and/or failure to act and/or neglect to perform duty of/by the said 1st and 3rd Respondents, the Petitioner respectfully seeks to invoke the jurisdiction

of Your Lordships' Court under and in terms of the provisions of **Article 140** of the **Constitution** for orders in the nature of a *writ of mandamus* and for other incidental relief, on the following among other grounds that may be urged by Counsel at the hearing of this application.

i. The said inaction and/or failure to act and/or neglect to perform duty of/by the said Respondents is/are wrong, illegal and contrary to law.

ii. It is submitted with respect that the said Respondents by the said unlawful and/or illegal and/or wrongful inaction and/or failure to act and/or neglect to perform duty have failed to perform the public statutory duty imposed on the said Respondents respectively by the provisions of **sections 10 (b) and (d), 20 and 23** of the said **National Environmental Act** and **section 32 (2) (b)** of the said **National Environmental Act** read with **section 71 (1)** of the said **Fauna and Flora Protection Ordinance**.

iii. It is submitted further with respect that the said inaction and/or failure to act and/or neglect to perform duty of/by the said Respondents are obnoxious to the declared objectives of the aforesaid enactments as stated in their Long Titles.

iv. It is respectfully submitted that the said inaction and/or failure to act and/or neglect to perform duty of/ by the said Respondents is/are in violation of the legitimate expectations of the citizens of Sri Lanka, as the said concept is judicially understood and/or interpreted.

v. It is respectfully submitted further that the said inaction and/or failure to act and/or neglect to perform duty of/by the said Respondents are detrimental to and/or in violation of the fundamental rights of the citizens of Sri Lanka ,declared, recognized and guaranteed, particularly by **Articles 12 (1) and 14 (1) (f)** of the **Constitution** and thereby the said Respondents have failed in the constitutional duty imposed on all organs of government by **Article 4 (d)** to respect, secure and advance the fundamental rights declared and recognized by the **Constitution**.

vi. It is submitted with respect that the said inaction and/or failure to act and/or neglect to perform duty of/by the said Respondents is/are inconsistent with and/or repugnant to the **Directive Principles of State Policy and Fundamental Duties**, particularly those enunciated in **Articles 27 (2) (a) and (c), 27 (14), 27 (15) and 28 (a) and (f)** of the **Constitution**. According to **Article 27(1)**, the **Directive Principles of State Policy** are the guiding principles for the legislature and executive in the enactment of laws and the governance of the country. They are in the nature of an instrument of instructions, which both the legislature and executive must respect and follow.

vii. It is submitted further with respect that the organs of the government in which the said Respondents are components and/or agents and/or instrumentalities, are the guardians to whom the people have committed the care and preservation of natural resources, including the bio-diversity of the country and thus, by the said inaction and/or failure to act and/or neglect to perform duty the said Respondents have failed and/or neglected to perform their duty in the said capacity of the 'Public Guardian' as the said concept is judicially formulated.

viii. It is respectfully submitted that the said inaction and/or failure to act and or neglect to perform duty of/by the said Respondents are in violation and/or derogation of the **Concepts and Principles of Environmental Law** enshrined in the international conventions and declarations indicated in para. 22 above, particularly the **Concepts of Sustainable Development** and **Inter-**

generational Equity, Principle of Precautionary Action and Doctrine of Public Trust which as has been judicially determined have become part of the domestic law of Sri Lanka.

28. The Petitioner humbly pleads that it has encountered difficulty in obtaining certain documents in further proof the matters set out herein and respectfully moves that Your Lordships' Court be pleased to permit the Petitioner in the said circumstances, to furnish them to Your Lordships' Court, as and when they are obtained.

29. The Petitioner has not invoked the jurisdiction of Your Lordships' Court in respect of this matter prior to this application.

WHEREFORE the Petitioner prays that Your Lordships' Court be pleased to:-

- a. Issue notice of this application on the Respondents in the first instance;
- b. Grant and issue an order in the nature of a *writ of mandamus* directing the 1st Respondent to conduct research and/or studies as to the nature, extent and causes of the decline in elephant population in Sri Lanka, with particular reference to the Human-Elephant Conflict, and to devise and to recommend to the said 3rd Respondent for implementation a comprehensive **National Policy for Elephant Conservation**, in the performance of the statutory duty in compliance with the provisions, particularly of **sections 10 (b) and (d), 20 and 23** of the said **National Environmental Act**;
- c. Grant and issue an order in the nature of a *writ of mandamus* directing the 3rd Respondent to formulate Regulations to implement the said **National Policy for Elephant Conservation** in the performance of his statutory duty in compliance with the provisions, particularly of **section 32 (2) (b)** of the **National Environment Act** read with **section 71 (1)** of the **Fauna and Flora Protection Ordinance**;
- d. Grant costs of this application;
- e. Grant such other and further relief as to Your Lordships' Court shall seem meet.

Attorney at Law for the Petitioner