

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

1. Konthigoda Cankanamage
Yasalal Thilakaratne,
No.67A, Godage Mawatha,
Anuradhapura.
 2. Konthigoda Cankanamage
Renuka Malkanthi,
3309, Third Stage,
Anuradhapura.
 3. Andara Manage Subhadra
Srimathi,
A 247, Second Stage,
Anuradhapura.
- Petitioners

CASE NO: CA/WRIT/102/2015

Vs.

1. Mahaweli Authority,
No.500, T.B. Jayah Mawatha,
Colombo 10.
2. Gamini Rajakaruna,
Director General,
Mahaweli Authority,

No.500, T.B. Jayah Mawatha,
Colombo 10.

2A. Director General,
Mahaweli Authority,
No.500, T.B. Jayah Mawatha,
Colombo 10.

2AA. Sarath Chandrasiri Vithana,
Director General,
Mahaweli Authority,
No.500, T.B. Jayah Mawatha,
Colombo 10.

3. H.M.K. Herath,
Project Manager,
Mahaweli H Division,
Project Management Office,
Thabuththegama.

3A. Project Manager,
Mahaweli H. Division,
Project Management Office,
Thabuththegama.

3AA. I.M. Ubhaya Kalyana Kumara,
Resident Project Manager,
Office of the Resident Project
Manager,
Mahaweli H Division,
Mahaweli Authority of Sri Lanka,
Thabuththegama.

4. K.M.K. Ekanayake,
The Block Manager,
Sri Lanka Mahaweli Authority,
Thalawa.

- 4A. A. Ramya Kumari Thilakarathna,
The Block Manager,
Sri Lanka Mahaweli Authority,
Thalawa.
5. Central Environmental Authority,
Parisara Piyasa,
No.104,
Denzil Kobbekaduwa Mawatha,
Battaramulla.
6. K.H. Muthukudaarachchi,
Director General,
Central Environmental Authority,
Parisara Piyasa,
No.104,
Denzil Kobbekaduwa Mawatha,
Battaramulla.
- 6A. Pathiranage Buddhika Hemantha
Jayasinghe,
Director General,
Central Environmental Authority,
Parisara Piyasa,
No.104,
Denzil Kobbekaduwa Mawatha,
Battaramulla.
7. R.M.D. Anura,
Assistant Director,
Central Environmental Authority,
North Central Provincial Office,
No.388/40,
Harischandra Mawatha,
Anuradhapura.

8. Commissioner General,
Department of Agrarian
Development,
No.42,
Sir Marcus Fernando Mawatha,
P.O. Box 537,
Colombo 07.
 9. Deputy Commissioner of Agrarian
Development,
District Office of Agrarian
Development,
Anuradhapura.
 - 9A. K.P. Rasika Hemajith Silva,
Deputy Commissioner of Agrarian
Development,
District Office of Agrarian
Development,
Anuradhapura.
 10. Officer in Charge,
Police Station,
Nochichiyagama.
 11. Palm Garden Village Ferrase
(Pvt.) Ltd.
Post 42,
Puttalam Road,
Pandulagama,
Anuradhapura.
- Respondents

Before: Mahinda Samayawardhena, J.
Arjuna Obeyesekere, J.

Counsel: Upul Kumarapperuma with Muzar Lye for the
Petitioners.
Palitha Kumarasinghe, P.C., with Asanka
Ranwala for the 1st-3rd Respondents.
Chaya Sri Nammuni, S.S.C., for the 5th-9th
Respondents.
Hemasiri Withanachchi with Shantha
Karunadhara for the 11th Respondent.

Argued on: 07.08.2020

Decided on: 16.11.2020

Mahinda Samayawardhena, J.

The Petitioners, who are farmers, filed this application seeking writs of mandamus compelling the Mahaweli Authority of Sri Lanka, the Central Environmental Authority of Sri Lanka and the Commissioner General of Agrarian Development to enforce the law against the 11th Respondent, to whom Lot 1083 of Final Village Plan No. 663 was handed over on a long-term Lease Agreement marked 11R3A for a Hotel project known as *Forest Rock Garden Hotel* in Nochchiyagama, Anuradhapura. In addition to the said parcel of land, by 1R1 the 11th Respondent was also given Lot 1492 of the same Plan for a forest garden.

The Central Environmental Authority, in its statement of objections, whilst accepting that it issued initial environmental approval marked P19 of 2011 for the implementation of the Hotel project, passes responsibility to the Board of Investment of

Sri Lanka, stating that this is a Board of Investment approved project. However, the Central Environmental Authority, by producing 5R1 and 5R2 of 2016, admits that the 11th Respondent had not complied with condition D.2 of P19, in that the Hotel premises did not have an adequate wastewater/drainage treatment system in place, and therefore the 11th Respondent was informed of the need to comply with that requirement and obtain an Environmental Protection Licence. The Central Environmental Authority then conveniently says in its objections “*The 5th Respondent (i.e. the Central Environmental Authority) has had no further communication (with the 11th Respondent)*”. Is this how the Central Environmental Authority ought to act as a responsible institution? If the Board of Investment should bear the entire responsibility, why did the Central Environmental Authority issue P19, why did it subsequently conduct a field inspection as reflected in 5R2, and why did it issue 5R1 to the 11th Respondent informing the latter to obtain an Environmental Protection Licence upon compliance with the conditions in P19? P19, 5R1 and 5R2 do not seem to have been issued at the behest of the Board of Investment.

The 11th Respondent tenders 11R5A issued by the Chairman, Nochchiyagama Pradeshiya Sabha (on behalf of the Central Environmental Authority) as the Environmental Protection Licence. 11R5A has been issued in 2013 whereas 5R1 and 5R2 have been issued in 2016. The Licence marked 11R5A is in a standard form, issued by filling some basic information peremptorily.

This goes to show that either the position taken up by the Central Environmental Authority that the Board of Investment

should issue the Environmental Protection Licence is false, or 11R5A is false or illegal.

One complaint of the Petitioners is that the 11th Respondent releases wastewater and waste material to the *Pahala Seeramba Wewa*. The Mahaweli Authority says the 11th Respondent has not released wastewater, garbage or waste material to the *Seeramba Wewa* and that there is no drain from the Hotel to the *Seeramba Wewa*. However, the Mahaweli Authority is silent about the Environmental Protection Licence that should have been obtained by the 11th Respondent. The Mahaweli Authority also does not say a proper wastewater/drainage treatment system is in place at the Hotel. On the other hand, the complaint of the Petitioners is that wastewater is released to the *Pahala Seeramba Wewa* and not to the *Ihala Seeramba Wewa*. The Mahaweli Authority seems to be referring to the latter.

The Commissioner General of Agrarian Development says in his statement of objections that as the land is situated in a “Special Area” declared under the Mahaweli Authority of Sri Lanka Act, he has no authority to take action against the 11th Respondent in respect of this dispute. This position is correct in terms of section 3 read with section 22 of the said Act. This is not disputed by the Mahaweli Authority.

The main complaint of the Petitioners, in short, is that their paddy cultivation is gravely affected due to the 11th Respondent’s illegal constructions and encroachments into areas not covered by the Lease Agreement.

The Petitioners engage in paddy cultivation with water from the *Ihala Seeramba Wewa* and *Pahala Seeramba Wewa* in the

blocks of land given to them by the Mahaweli Authority by way of Permits issued under the Land Development Ordinance.

According to the Petitioners, there are two reservoirs in close proximity to the land leased out to the 11th Respondent for the Hotel project. These are the *Ihala Seeramba Wewa* and *Pahala Seeramba Wewa*. The Petitioners' complaint mainly relates to the damage caused to the *Pahala Seeramba Wewa* by the illegal constructions of the 11th Respondent, particularly a well and two-story building unlawfully constructed within the *Pahala Seeramba Wewa* during the dry season of the year 2012, in violation of *inter alia* the Lease Agreement. The complaints P13 and P14 etc. made to the Mahaweli Authority at the time of these unlawful constructions have gone unheeded.

The Mahaweli Authority unequivocally accepts in its objections the illegal constructions and encroachments of the 11th Respondent but says in the same breath that according to the Final Village Plan there is only one reservoir, i.e. *Seeramba Wewa*, and the Petitioner farmers have constructed the *Pahala Seeramba Wewa* using spill water from the (*Ihala*) *Seeramba Wewa* by blocking the water canal using sandbag barriers.

Let me first deal with the second point, i.e. whether the Mahaweli Authority has the right, in this instance, to point the finger at the farmers to say the *Pahala Seeramba Wewa* is an unauthorised reservoir, which, in my view, is done in order to soften if not justify the 11th Respondent's illegal activities. In my judgment, the Mahaweli Authority cannot do so. If the Mahaweli Authority thinks the Petitioners have done something illegal, that shall be dealt with separately.

Although the Mahaweli Authority takes up the position that the *Pahala Seeramba Wewa* is not shown in the Final Village Plan, the Commissioner General of Agrarian Development admits in the supporting affidavit filed along with the objections “*the farmers over the years had expanded and developed a dam that existed near a sluice gate (wana) and had created the smaller reservoir now known as the ‘Kuda Seeramba Wewa’.* This reservoir now irrigates over 6 acres of paddy land.” This means, even if the *Pahala Seeramba Wewa* is not depicted in the Final Village Plan, it has been in existence for a long period of time, irrigating over six acres of paddy land. This is in addition to the paddy cultivation on a larger extent of land with water from the *Ihala Seeramba Wewa*. By looking at photographs such as 11R12, it cannot be said the dam constructed to make the *Pahala Seeramba Wewa* is either temporary or of recent origin.

The Commissioner General of Agrarian Development has attached to his statement of objections an Inspection Report marked 8R1 prepared by an engineer. As seen from 8R1, the said inspection was carried out in view of this case. The observations made therein are revealing. They are reproduced verbatim below:

1. මහ සිරම්බුව වැවෙන් එන පෝෂිත ඇල මාර්ගයේ රක්ෂිතයේ හා කුඩා සිරම්බුව වැව දියගිල්මට වන්නට, අඩි 20 විෂ්කම්භය ඇති ලිඳක් කපා, බැම්ම බැඳ නිම කොට ඇත.
2. එම ස්ථානයටම යාබදව ජල පොම්පාගාරයක් වැනි අඩි 25 හා පළල අඩි 15 පමණ වූ කොන්ක්‍රීට් කුළුණු මත ඉදිකරන ලද ගොඩනැගිල්ලක් ඇත.
3. කුඩා සිරම්බුව වැව වාන පිහිටි වානක් ලෙස නිරීක්ෂණය විය. එහි තිබූ පැරණි ගල් එක් ප්‍රදේශයක ඉවත්කර ඇතිබව දක්නට ලැබුණි.
4. මෙම වැවෙහි දැනට අක්කර 22 1/2 පමණ කුඹුරු ප්‍රමාණයක් ඇත.

5. වැවෙහි පිහිටි වානෙනි ගල් ගලවා ඉවත් කිරීම හේතුවෙන්, කුඩා සිරම්බාව වැවේ ජලය 50% පමණ අඩුවී ඇත.

It appears from these observations that the 11th Respondent removed some parts of the sluice gate/dam of the *Pahala Seeramba Wewa* to reduce the water level by 50% in order to accommodate its (11th Respondent's) unlawful constructions.

The well has been illegally constructed in the *Pahala Seeramba Wewa* to pump water from the well to the illegally constructed two-story building, as seen from the six photographs marked P112.

The Mahaweli Authority categorically admits in its objections that the said two-story building and the well (constructed without prior approvals) are “illegal” but says *inter alia* in 1R2 “ඉහත වැවෙහි වාන මගින් පිටවන ජලය ගමන් කරන ජලමාර්ගය සිරම්බාව වැවේ ජලයෙන් කුඹුරු වගාකරන ගොවීන් (ඉහත නඩුවේ පෙත්සම්කරුවන්) වැලි කොටට යොදා අවහිර කිරීම (රූපය 5) තුළින් හෝටල් සමාගම විසින් ඉදිකර ඇති කාර්යය මණ්ඩල නවාතැන් හා පුස්තකාලය පිහිටි මහල් දෙකක ගොඩනැගිල්ල සහ ලිඳ ජලයෙන් යටවන බව නිරීක්ෂණය විය.”

The 11th Respondent and the Mahaweli Authority seem to be saying that because of the sandbag barriers placed by the farmers, the two-story building (where the Staff Quarters and Library are located) and the well are submerged in water. I reject this line of argument in the strongest terms. The *Pahala Seeramba Wewa* was not built after the unlawful constructions of the 11th Respondent.

As I pointed out earlier, the Commissioner General of Agrarian Services observed that the sluice gate/dam of the *Pahala Seeramba Wewa* has been damaged, causing a reduction in the

water retention capacity of the *wewa* by 50%. Who did it and why it was done are abundantly clear. In this backdrop, the farmers mending the dam by at least fixing sandbags in order to continue their paddy cultivation is, in my view, justifiable. If the farmers had placed sandbag barriers and created a *wewa* for the first time after the aforesaid constructions of the 11th Respondent, I would have thought differently. But the *Pahala Seeramba Wewa* was in existence when the illegal constructions saw the light of day, nay when the Hotel project was conceived by the 11th Respondent. Before the Hotel project commenced, the Mahaweli Authority never alleged that the Petitioner farmers had done something illegal by artificially constructing a *wewa* and thereby posing a serious threat to the ancient *Ihala Seeramba Wewa*.

The Mahaweli Authority says in paragraph 12 of its statement of objections *inter alia*:

- [a] *The 11th Respondent has constructed the well and two storied building outside the land alienated by the long-term Lease, within a part of the said “Seeramba Wewa”;*
- [b] *The 11th Respondent has not obtained any permission from the 1st Respondent for use of the said land area or for such constructions;*
- [c] *The 11th Respondent has illegally cleared another land area outside the land alienated for the hotel using heavy machines in pretext of preparation of “compost”;*
- [d] *The 11th Respondent has not obtained permission from the 1st Respondent for occupation of such land other*

than the land alienated by the long-term Lease marked “11R3A” and such clearing is illegal;

[e] The said usage of any land within the Mahaweli H Zone, other than the land alienated by long-term Lease and annual licence, is illegal and the said constructions of two stories building and the well are illegal;

[f] The 11th Respondent is liable for ejectment under the provisions of the State Land (Recovery of Possession) Act;

In paragraph 13 of the said objections, the Mahaweli Authority says:

[a] The clause 7 of the Regulations framed under sections 54(1) and 54(2) of the Mahaweli Authority of Sri Lanka Act No.23 of 1979 dated 10th December 1976 state

“Clause 7 – Buildings and Structures –

(a) No person shall engage in the construction of a building or structure below the high flood level of a reservoir without prior permission of the Authorised Officer.

(b) No person shall engage in the construction or provision of buildings and structures in and around a reservoir without prior approval of an Authorised Officer and in the construction carried out after approval to conform to such terms and conditions laid out in the approval.”

[b] The word “Reservoir” is defined in the said Regulations in the following manner.

“Reservoir” means an expanse of water resulting from manmade constructions across a river or stream to store or regulate water. Its environs will include that area extending to a distance of 100m from full supply level of the reservoir inclusive of all islands falling within the reservoir.”

[c] The said construction of the building and the well is contrary to the provisions of the said Regulations.

By mutual agreement entered into before Court, the Mahaweli Authority surveyed the land given to the 11th Respondent on long-term Lease through the Government Surveyor at the 11th Respondent’s expense. The said Plan and Report have been marked Y1 and Y2, and the encroached portions and unauthorised constructions are identified therein. The well and two-story building have been identified as H and J in Y2. The other unauthorised structures have been marked K and L. In addition, the unlawful encroachments have been marked B-G.

Learned President’s Counsel for the Mahaweli Authority has informed the Court that there is no provision in the Mahaweli Authority Act to regularise unauthorised constructions in “Special Areas” declared under the Act. Even if it were possible, the time has now passed for such measures to be taken.

Section 13(34) of the Mahaweli Authority of Sri Lanka Act enacts *“Notwithstanding the provisions of any other law and without prejudice to the generality of the powers conferred on the Authority by this Act, the Authority shall in or in relation to any*

Special Area have the power to take all such steps as are necessary for the general welfare of the community in any Special Area.”

No sustainable defence has been presented by the 11th Respondent in its statement of objections.

For the aforesaid reasons, I direct the Mahaweli Authority by a writ of mandamus to take steps to remove all the unlawful structures shown in Y2 marked H, J, K and L, including the well and two-story building mentioned above.

I also direct the Mahaweli Authority by a writ of mandamus to take steps to either include the encroached portions shown in Y2 in the Lease Agreement or eject the 11th Respondent from those portions of land, as the Mahaweli Authority has suggested in its statement of objections, by making use of the provisions of the State Lands (Recovery of Possession) Act.

In addition, I direct the Mahaweli Authority by a writ of mandamus to take steps to ensure the 11th Respondent has a proper Environmental Protection Licence and that the 11th Respondent has complied with the directions given by the Central Environmental Authority by 5R1.

This does not prevent the Mahaweli Authority from taking action against the Petitioners, if, after a proper inquiry with the participation of the Petitioners, the Mahaweli Authority decides that the Petitioners constructed the *Pahala Seeramba Wewa* in violation of the law.

I allow the application of the Petitioners with costs fixed at Rs. 100,000 to be paid by the 11th Respondent to the three Petitioner farmers collectively.

Judge of the Court of Appeal

Arjuna Obeyesekere, J.

I agree.

Judge of the Court of Appeal