

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

In the matter of an Application for
Writs of Certiorari and Prohibition in
terms of Article 140 of the
Constitution.

C.A.(Writ)Application No. 287/2015

01. C.E. Liyanage,
No.39, "Suwa Piyasa",
Medical Centre, Pituwala Road,
Elpitiya.
02. G.C.P. Thrimavithana,
No.45, Colour Lab,
Pituwala Road,
Elpitiya.
03. P.A.Dayananda,
No.45/1A,
Pituwala Road,
Elpitiya.
04. K. Disanayake,
Disanayake Motors,
No. 01, Nagarasabha Mawatha,
Pituwala Road,
Elpitiya.

05. A.K.Pemarathna
Rathna Traders,
No.46,
Pituwala Road,
Elpitiya.
06. Samantha Withana,
Saam Mart, No.47,
Pituwala Road,
Elpitiya.
07. G. Pathmalatha,
Wewa Side, Elpitiya
08. G. Karunaratna
No.48, Pituwala Road,
Elpitiya.
09. Inoka Darshani Ihalawithana
"Saman",
No.49, Urban Council Road,
Elpitiya.
10. Mahagodage Nimal Kumarasiri,
"Gunasewana"
No.52, Pituwala Road,
Elpitiya.
11. R.W. Mettananda,
No.55 Diport Mawatha,
Pituwala Road,
Elpitiya.
12. A.G.G. Somarathna

Science Centre,
Pituwala Road,
Elpitiya.

13. J.K. Disanayake,
Sumith Hotel,
No.57, Pituwala Road,
Elpitiya.
14. B.G.D.C.L. Kariyawasam,
"Manahara",
Pituwala Road,
Elpitiya.
15. B.G.S.P.K. Kariyawasam,
"Manahara",
Pituwala Road,
Elpitiya.
16. B.G.R.R. Kariyawasam,
No.61, Pituwala Road,
Elpitiya.
17. V.S. Weerasinghe,
Pituwala Road,
Elpitiya.

Petitioners

Vs.

01. N.A.K.L Wijenayake
Divisional Secretary,
Divisional Secretariat,
Elpitiya.

02. Chief Engineer (Constructions)
Ceylon Electricity Board,
No.167,
Matara Road,
Galle.
03. Provincial Engineer (Southern
Province)
Ceylon Electricity Board,
Provincial Engineers Office,
Galle.
04. The Secretary,
Ministry of Power and Energy,
No.72, Ananda Coomaraswamy
Mawatha,
Colombo 07.
05. Mahinda Kariyawasam
The Manager,
Merry Kids International School,
Pituwala Road,
Elpitiya.
06. Hon. Attorney General,
Attorney General's Department,
Colombo.
07. Kariyawasam Haputhanthri Gamage
Mahinda Padmasiri,
"Pathmasiri",
Niyagama, Thalgaswala
(7th Added Respondent)

Respondents

BEFORE : HON. ACHALA WENGAPPULI, J.

COUNSEL : A.D.H. Gunawardena with K.P.S.M.
Karunanayaka for the Petitioner.
Avanthi Weerakoon S.C. for the 1st to 4th
and 6th Respondents
Sanjeewa Ranaweera for the 7th Added-
Respondent

ARGUED ON : 19th, November, 2019

DECIDED ON : 24th January, 2020

HON. JUSTICE ACHALA WENGAPPULI,

The seventeen Petitioners, who are either owners of properties that are located along *Pituwala Road, Elpitiya* or residents of those buildings, have invoked the jurisdiction conferred by Article 140 of the Constitution on this Court, seeking issuance of Writs of Certiorari and Prohibition. The Petitioners thereby seek to quash the approval granted by the 1st Respondent by letters dated 06.04.2015 and 04.06.2015 (marked as "P6" and P11" respectively) to erect a high tension electricity line of 160 kVA along the left side of the said *Pituwala Road* in close proximity to their properties, in order to supply electricity to *Merry Kids International School*, managed by the 5th Respondent, and the decision of the 4th Respondent to draw the said electricity line. The Petitioners also seek the issuance of Writ of Prohibition, prohibiting the 1st to 4th Respondent from erecting the said electricity line.

After an inquiry on 20.07.2015, as to issue of granting interim relief as sought by the Petitioners, this Court made order granting interim relief as prayed for in paragraph "e" of the prayer to the Petition. Subsequently an amended caption has been tendered by the Petitioners citing 7th added Respondent in lieu of the 5th Respondent, who was only an employee of the *Merry Kids International School* who was subsequently discharged from these proceedings.

The Petitioners claim, in support of the factual basis of their application, that the proposed electricity supply line would expose them to a very dangerous situation as it would expose them to the threats of lightning, electrocution, serious health risk including cancers. In addition, it would hinder further development of the area as the power line would act as ceiling to the number of stories to any building could have, which are located along left side of the *Pituwala Road*.

The factual background to the legal basis on which the Petitioners have sought to challenge on the validity of the approval granted by the 1st Respondent is described in the Petition. The Petitioners claim that upon their objection and request to opt for an alternative route to the proposed power line, the 1st Respondent held an inquiry by arbitrarily selecting only some of those who objected to the proposal. The 1st Respondent had thereafter conveyed his approval to the 2nd Respondent for the erection of an electricity line subject to the conditions set out in his letter of approval dated 06.04.2015 ("P6").

It is also claimed by the Petitioners that " the 1st Respondent had failed to consider the alternatives available for the proposed project and

had decided arbitrarily to lay electricity cables over and/or closer to Petitioners' buildings" and thereby causing a serious threat and danger to their lives and properties. After the said approval, the Petitioners have proposed another alternative route through which the electricity supply to the *Merry Kids International School* could be provided but the 1st Respondent had failed to hold an inquiry but had "made a determination to draw the electricity line as per his decision dated 04.06.2015 by placing the disputed electricity poles inside the lands."

The Petitioners claim that the 1st Respondent had arrived at the aforesaid arbitrary decision without considering the alternatives that are available and thereby causing serious hardships on them. Therefore, the Petitioners state that the said decisions of the 1st Respondent ("P6" and "P11") are "contrary to law, arbitrary, irrational and contrary to the rules of natural justice." They also contend that the said decision to grant approval for the proposed power line had violated their personal rights as well as rights over their properties.

The matter was taken up for hearing on 19.11.2019 and the learned Counsel for the Petitioners submitted that the impugned approvals should be quashed as the Petitioners were not called for the inquiry under Section 3 of the Sri Lanka Electricity Act No. 20 of 2009. Learned Counsel also submitted that the Section 1(2) of the said Act, made it mandatory for a licensee in order to place an electric line on or over a street, to obtain consent of the local authority. It was also submitted that Section 17 of the Act No. 31 of 2013, had amended the Schedule I and made it mandatory for the 1st Respondent, being the Divisional Secretary of the relevant area, to conclude the inquiry within a period of six weeks, if the licensee is

unsuccessful in its efforts to secure the grant of a way leave. The Petitioner's claim that these mandatory requirements were not complied with the 1st Respondent in granting the impugned approvals as per "P6" and "P11" and had failed to hear them in holding that inquiry.

It was also contended by the Petitioners that the scientific research conducted on the adverse health effects on humans who live in close proximity to high tension power lines clearly indicate the existence of a substantial risk of causing cancer and similar illnesses such as leukaemia and thus the proposed power line poses a serious health hazard.

In the light of these submissions by the Petitioners, this Court must examine the question whether the impugned approvals are tainted with any defect recognised by public law principles, which warrants the issuance of a prerogative writ in exercising discretion vested in this Court.

In *Mendis v. Seema Sahitha Panadura Janatha Santhaka Pravahana Sevaya and Others* (1995) 2 Sri L.R. 284 Silva J. stated:

"It is thus seen that prerogative remedies such as Certiorari and Prohibition lie in situations where statutory authorities wielding power vested by Parliament exercise these powers to the detriment of a member of the Public. The essential ingredient is that a member of the public who is affected by such a decision has to submit to the jurisdiction of the authority whose action is subject to review. In other words, there is an unequal relationship between the authority wielding power and the individual who has to submit to the jurisdiction of that authority. The principles of

Administrative Law that have evolved such as the doctrine of ultra vires, error on the face of the record, rules of natural justice, requirement of procedural fairness and the reasonableness of decisions , coupled with the remedies by way of prerogative Writs, lie to correct any illegality or injustice that may emanate from this unequal relationship."

On the question of denial of an opportunity for the Petitioners to voice their grievance over the proposed power line, the 1st and 4th Respondents have annexed two sketches of the path along which the proposed power line would be drawn. The two sketches shown in the document marked as "1R6 – 10(k)" shows the two options that are available along the *Pituwala* Road for the proposed power line. The said document was addressed to the 1st Respondent apparently by the 2nd Respondent, informing him of the change of the path of the proposed power line as shown in 2nd sketch after considering the objections raised by the affected persons. Having noted that the initial proposal would have affected the building of the 2nd Petitioner, the 2nd Respondent suggested to draw the power line on the opposite side of the road and thereby preventing any damage to the building of the 2nd Petitioner.

It is noted by this Court that, of the 17 Petitioners, only the 2nd, 4th, 10th and 11th Petitioners are affected with the proposed power line as their properties are located along the original path of the said power line. None of the other Petitioners were identified in the two sketches. The Petitioners, in their counter affidavit, although referred to the document 1R6, opted

not to challenge non identification of the other 13 Petitioners from these two sketches. Therefore, it is undisputed that only the 2nd, 4th, 10th and 11th Petitioners are directly affected by the proposed power line.

In all the correspondence in relation to the inquiry, these four Petitioners were named and their participation is sought in the inquiry into the objection to the proposed power line. Document marked "1R5C - 10(c)" annexed to the objections of the 1st and 4th Respondents, indicate that from the initial 17 persons who objected, the proposed path of the power line would have any effect only on four of these Petitioners. However, only two of them had participated in the inquiry that was conducted.

The 1st Respondent directed the four Petitioners be called to his office to have their views expressed. The 1st Respondent informed the 17 persons who initially objected to the proposed power line, to be present for an inquiry by his letter dated 12.11.2014 marked as "1R4C -10(j)" and then had limited the number of the persons who participated at the subsequent inquiry date to the four Petitioners, who were clearly affected as per his letter dated 24.02.2015, marked as "1R4D -10(j)". In the impugned approval marked as "P6" or "1R7 - 10(l)", the 1st Respondent refers to the date of inquiry held on 04.03.2015, and his decision had been conveyed to these four Petitioners.

Therefore, the claim of the Petitioners that the said inquiry was conducted with the participation of a selected few and thereby the 1st Respondent had violated rules of natural justice by depriving of an

opportunity of being heard, is clearly based upon a distorted version of the attendant circumstances.

In countering the submissions of the Petitioners that the mandatory provisions of consent of the local authority is not obtained by the Respondents, it was submitted by learned Counsel for the 7th Respondent that Section 3 of the Act No. 31 of 2013 had amended the principal enactment with the insertion of Section 2A after the existing provision of Section 2. Section 2A(1)(b) empowered the Public Utilities Commission to delegate its powers under items 3,4,5 and 6 of the Schedule I of the Sri Lanka Electricity Act to “any Divisional Secretary” and in this instance, the 1st Respondent had been delegated to exercise those powers. The consent to place a line on or over a street could be obtained either from the local authority or “other relevant authority” as per Section 1(2) and the Petitioner’s complaint of non-compliance of certain mandatory provisions therefore has no valid basis.

The 1st Respondent had considered the alternative routes through which the proposed power lines could be drawn. As these alternatives are not economically viable, and having minimized the effect on the concerned parties, the 1st Respondent had then decided the path, along which the power line could be drawn now challenged by the Petitioners.

The reference to the Public Utilities Commission in the preceding paragraph remind this Court to the position taken up by the Respondents that the Petitioners have failed to name the said Commission as a party and upon their failure to name necessary party to the application the Petition is clearly defective. This was not taken up by the Respondents as a

preliminary issue at the hearing of this application and only referred to during their submissions on the relative merits and demerits of the application. However, since the 7th Respondent made submissions that the powers of the said Commission had already been delegated to the 1st Respondent. The Respondents have then taken the position that it is the 1st Respondent and not the Public Utilities Commission that is the naming party to this Application. Therefore the issue does not arise for consideration.

Approval for the proposed power line granted by the 1st Respondent is subjected to the condition that the proposed power line should be drawn upon the existing electricity poles which are already installed to supply electricity to the area. Thus, the proposed power line would not result in any change in the environment or causing any damage to property.

In this situation the only concern would be the possible exposure to a health hazard of the Petitioners by the proposed power line as claimed by them.

In order to strengthen the challenge mounted on the approvals granted by the 1st Respondent to erect a power line adjacent to their properties on health hazard, the Petitioners have annexed two documents to their petition marked "P5" and "P5A". The document "P5" is an extract from the British Journal of Cancer (2013) 108, from where the report of a study conducted under the title " Childhood leukaemia close to high voltage power lines – the Geocap study, 2002- 2007".

The study (P5 and P5A) concerns the issue whether living in close proximity to High Voltage overhead power lines and exposure to the extremely low magnetic field such power lines generate could be "considered a possible risk factor for childhood leukaemia". The study was based on the findings made by International Agency for Research on Cancer and its conclusion was such exposure had resulted in "... an increase in childhood acute leukaemia". However, this conclusion is in relation to living in close proximity to 225 to 400 kV range power lines.

Thus, this study is not directly helpful to the Petitioners who sought to challenge the erection of proposed power line on two aspects. Firstly, there is no statement of any children living in the "affected" properties and secondly, the proposed power line is for a supply of only 160 kVA and power not 225 to 400 kV range of power lines as the study had focused on. This study had no findings on the power lines in the range the 7th Respondent needed. To counter the claim that the proposed power line posed a serious health risk, the 7th Respondent relied on article annexed to his objections as "7R3-a", "7R3-b", where the accuracy of such study findings are challenged but admit that it is a widely held fallacious view.

It appears from this limited reference to few articles, that the opinion of the scientific community over this issue is inconclusive.

Thus, it is clear that from the above considerations, the approvals granted by the 1st Respondent with the issuance of letters "P6" and "P11" is not tainted with any defect warranting it to be quashed by this Court with the issuance of Writ of Certiorari.

Application of the Petitioners is therefore refused. The Petition of the Petitioners is accordingly dismissed.

Parties will bear their costs.

A handwritten signature in black ink, appearing to be 'L. S. N.', written over a horizontal line.

JUDGE OF THE COURT OF APPEAL