

S.C. judgment vindicates Eppawala objectors

In a judgment that vindicated the long running objections by residents of Eppawala as well as Sri Lanka's scientific community, the Supreme Court has ordered the Government to desist from going ahead with its controversial phosphate mining project.

This BOI approved project, which was to be carried out by "Sarabhami Resources (Pvt) Limited", a company with a ninety per cent foreign shareholding, envisaged the exploitation of the known rock phosphate reserves at Eppawala over a mere thirty-year period, in a high intensity mining operation that its detractors claimed would devastate the local environment.

The fundamental rights case was filed by six owners of agricultural land and the Viharadhipathi of the Galkanda Purana Viharaya, all within the exploration area of the project. They claimed that they were in danger of losing their lands and livelihood as a result of this government-sanctioned project which, they said, was not for a public purpose but for the enrichment of a private company.

They also claimed that the project was being entered into in a manner that circumvented the environmental laws of this country, and that clauses in the agreement binding the Government to assist the company to obtain all necessary approvals meant that any environmental impact assessment conducted thereafter (in which they as citizens were entitled to participate) was likely to be biased and not conducted in good faith.

The petitioners accordingly claimed an imminent infringement of their rights under Article 12(1) of the Constitution - right to equality before the law and equal protection of the law - and Articles 14(1)(g) and (h) - right to choose their place of residence and carry on their livelihood.

One of the handicaps faced by the petitioners was that they were only in possession of unsigned copies of the documents relevant to prove their case and were not even aware whether those documents had subsequently been signed and/or amended. As part of their prayer the petitioners asked for disclosure of the documents pending hearing, and, in a significant ruling at the leave to proceed stage, the Supreme Court issued an order that the Mineral Investment Agreement, if signed, should be produced to Court within one week.

As it turned out, the agreements had not yet been signed but the respondents admitted that the copies filed by the petitioners represented the final drafts which had been initialled by the Government.

In its final judgment, arrived at after lengthy arguments and written submissions by the contesting parties, the Supreme Court Bench headed by Justice A. R. B. Amerasinghe, with Justices Wadugodapitiya and D. P. S. Gunasekera in agreement, held that the petitioners had established an imminent infringement of their fundamental rights.

The State was directed to desist from entering into any contract until a comprehensive exploration and study had been carried out with regard to the locations, quantity and quality of the rock phosphate deposits in consultation with the National Academy of Sciences and the National Science Foundation. Both these organizations had issued reports highly critical of the Sarabhami

project.

In terms of both environmental jurisprudence and public law in general, this judgment broke new ground in Sri Lanka. It is comparable to landmark decisions such as the Kamal Nath case in India and the Oposa case in the Philippines where the Supreme Court showed itself willing, in the public interest, to review decisions of the Executive regarding the management of natural resources, if the mismanagement of such resources was likely to interfere with the rights of present and future generations.

In the course of its judgement, however, the Court found not only an imminent infringement of the rights of the petitioners, but a deliberate attempt on the part of the parties to the Agreement (which included the Government of Sri Lanka) to circumvent the laws of this country.

In place of the detailed environmental impact assessment (EIA) procedure laid down in the National Environmental Act and the Regulations made thereunder, the proposed Mineral Investment Agreement provided for the project company to conduct its own "feasibility study" with the aid of a qualified foreign consultant selected by the company.

It was the Secretary to the Ministry of Industries and not the Central Environmental Authority who would decide whether to give the go ahead to the project following such study and there was no provision for public participation as was mandatory under the EIA process. In the event of the Secretary's refusal to give approval, the company could take the Government to international arbitration in London, a costly process which the Government would probably wish to avoid.

The Court had this to say: "What was being attempted by the proposed agreement was to substitute a procedure for that laid down by law. It was assumed that by a contractual arrangement between the executive branch of government and the company, the laws of the country could be avoided. That is an obviously erroneous assumption for no organ of government, no person whomsoever, is above the law."

The Court was critical of confidentiality clauses in the proposed agreement that would serve to keep information on the project out of reach of the people. Such clauses were, in its view, an "attempt to quell, appease, abate or even, under the guise of a binding contract, to legally put down or extinguish public protests".

Accepting the legal standing of the petitioners to bring this action, the Court pointed out that Constitution places a shared responsibility on the State and its citizens to safeguard the natural environment. The question of infringement of the rights of the seven petitioners, the Court said, needed to be viewed in the context of the rights guaranteed: to them not only within the category of "all persons" as referred to, for instance, in Article 12(1), but "in particular as members of the citizenry of Sri Lanka".

The indefinitely extendable project area in terms of the Agreement, and the profound impact

that the mining activities could have on the inter-linked irrigation system of the North Central Province were matters that caused the Court serious concern.

Quoting extensively from writers such as D. L. O. Mendis and R. L. Brohier on the importance of the historic Jaya Ganga and its environs as part of our national heritage, the Court rejected the respondents' arguments that the impact of the project should be looked at stage by stage, with the initial exploration causing little damage. The petitioners were entitled, it said, to base their case on the harm that may be caused "at all stages of the project and by the total effect of the project as described in the proposed agreement".

A clause in the proposed Agreement that drew particular adverse comment from the Court was the provision for relocation of occupants of land affected by the project. Under that clause it was the company that would determine when relocation was necessary. Although the company was nominally committed to bear the cost of such relocation, the Government was committed to "use its best efforts to facilitate the relocation of any inhabitants of such land as requested by the company in a manner which does

not create an undue financial burden on the company or delay the company's development and operation of the mining area."

As the Court put it, this clause showed "not only that the petitioners and others may be affected but that if they are, the paramount consideration will be the interests of the company rather than those of the occupants of the affected areas".

The petitioners had made it clear, and the Court accepted, that they had no objection to the sustainable development of the Eppawala mineral deposits, and that they were not asking the Government to "sit back and do nothing" as alleged by the respondents.

After analyzing the concept of sustainable development as contained in the international Stockholm and Rio de Janeiro Declarations on the environment, the Court said this:

"The human development paradigm needs to be placed within the context of our finite environment, so as to ensure the future sustainability of the mineral resources and of the water and soil conservation ecosystems of the Eppawala region, and of the North Central Province and Sri Lanka in general. Due account must also be taken of our unrenowned cultural heritage. Decisions with regard to the nature and scale of activity require the most anxious consideration from the point of view of safeguarding the health and safety of the people, naturally including the petitioners, ensuring the viability of their occupations, and protecting the rights of future generations of Sri Lankans."

Several scientists had pointed out the economic folly of entering into a project of this scale without further studies into the extent of the reserves of rock phosphate actually available, and hence the Court's direction for a comprehensive exploration and study in consultation with local scientists. The Court remarked that such a study ought have been done before the negotiating

committee appointed by the President to conduct the final round of negotiations in 1997 recommended the signing of the proposed agreement.

As part of its order, the Court also issued a direction that after such studies were completed and the results published, any project proponent must obtain approval from the Central Environmental Authority "according to law including the decisions of the superior courts of record of Sri Lanka".

The judgment set out several guidelines to be followed by the CEA. Most notable is the requirement that the CEA in its decision making should take note of the principles set out in the Stockholm and Rio Declarations. In particular the Court stressed the importance of the "precautionary principle" recognized in the latter, namely that where there is a threat of serious or irreversible damage to the environment, lack of full scientific certainty should not be used as an excuse for postponing preventive measures.

Polluter pays

The Court also drew attention to the "polluter pays" principle, namely, that the cost of environmental damage should be borne by the party that causes the harm and not be 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".

Stressing the need for strict compliance with the EIA procedure including the provisions for public participation before project approval is granted, the Court said:

"I should like to remind the persons concerned, and especially the Central Environmental Authority, that an environmental impact assessment exercise can identify the potential threats of a proposed activity or project, and that this information can then be used to modify the proposed activity in order to take these threats into account."

The Court noted that in this instance, the "salutary provisions" of the environmental laws had not been complied with. The alternative project approval procedure provided in the Mineral Investment Agreement was an "attempt to contract out of the obligation to comply with the law".

This finding, namely, the attempt to circumvent the law, was commented on adversely at a number of places in the judgment and was no doubt a factor that influenced the heavy award of costs against the State and the private companies involved.

This judgment ought to be read carefully by the BOI which threw its full weight behind this flawed project and the apparent attempts to bypass the relevant laws. It must, in terms of the Court's directions, be studied with equal care by the CEA which was content to remain passive while its statutory powers were bypassed or disregarded in setting up a project of enormous environmental consequences.

What is certain is that the Eppawala judgment is even now being read and digested by environmentalists and citizens' groups here and abroad and will enhance Sri Lanka's reputation as a significant regional source of public law jurisprudence.

LEGAL WATCH

by Nayana