

**IN THE SUPREME COURT OF THE DEMOCRATIC  
SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Application under  
and in terms of Articles 17, 126 and  
Chapter VI of the Constitution of the  
Democratic Socialist Republic of Sri  
Lanka.

**SC (FR) APPLICATION  
NO. 335/2021**

1. Sebastian Benadic
2. Aiiyasamy Sellanayagi
  
3. Eugenia Nova
4. Eron Cleture Nova
5. Evan Galena Nova

All are of;  
“Kanthi” Niwasa,  
Nagaraya,  
Lunugala.

**Petitioners**

**Vs.**

1. Kodithuwakku Arachchilage  
Nihal Chandrakantha,  
No. 170/04,  
Rukmalgama Road,  
Kottawa,  
Pannipitiya.  
*and*  
Ambalangoda Kotasa,  
Hopton,  
Lunugala.
  
2. Dissanayakalage Chandra  
Kumara,

No.26/01,  
Siri Nithikarama Road,  
Dalupitiya,  
Kadawatha.

3. Mahambadu Ibrahim Ahmad Sajeer,  
Executive Engineer (Uva Province),  
Road Development Authority.
4. Gamasinghe Arachchilage Dilip Indunil Wimaladharama,  
(Badulla-Chenkaladi Road  
Development Project Engineer),  
Road Development Authority.
5. L. V. S. Weerakoon,  
The Director-General,  
Road Development Authority.
6. T. K. M. Galappaththi,  
Provincial Director (Uva),  
Road Development Authority.
7. Chandana Athuluwage,  
The Chairman,  
Road Development Authority.
8. Road Development Authority,  
All 3<sup>rd</sup> to 8<sup>th</sup> Respondents are of;  
No.216,  
Denzil Kobbekaduwa Mawatha,  
Koswatta,  
Battaramulla.
9. R. W. R. Premasiri,  
The Secretary,  
Ministry of Highways,  
“Maganeguma Mahamedura”,  
No. 216,  
9<sup>th</sup> Floor,  
Denzil Kobbekaduwa Mawatha,  
Koswatta,  
Battaramulla.

10. Johnstan Fernando,  
The Minister,  
Ministry of Highways,  
“Maganeguma Mahamedura”,  
No. 216,  
9<sup>th</sup> Floor,  
Denzil Kobbekaduwa Mawatha,  
Koswatta,  
Battaramulla.

10(A). The Minister,  
Ministry of Highways,  
“Maganeguma Mahamedura”,  
No.216,  
9<sup>th</sup> Floor,  
Denzil Kobbekaduwa Mawatha,  
Koswatta,  
Battaramulla.

11. AMSK Constructions (Pvt) Ltd,  
No. 1/29,  
New Town Madampe,  
PX 61230.

12. Ajith Rohana,  
Senior Deputy Inspector General  
(Crimes and Traffic Range),  
Police Department of Sri Lanka,  
Colombo 01.

13. Indika Hapugoda,  
(Senior Superintendent of Police),  
Director of Traffic Management  
and Road Safety,  
Traffic Headquarters,  
Traffic Management and Road  
Safety Division,  
No. 03,  
Mihindu Mawatha,  
Colombo 12.

14. R. M. Palitha Senevirathne,  
Officer in Charge,  
Passara Police Station,  
Passara.

15. C. D. Wickremarathne,  
Inspector General of Police,  
The Department of Police of  
Sri Lanka,  
Colombo 01.

16. Hon. Attorney General,  
Attorney General's Department,  
Colombo 12.

**Respondents**

**Before** : **P. Padman Surasena, J**  
**Janak De Silva, J**  
**K. Priyantha Fernando, J**

**Counsel** : Thusitha Wijekoon for the  
Petitioners.

Lakmali Karunanayake, DSG for the  
3<sup>rd</sup> to 9<sup>th</sup> and 16<sup>th</sup> Respondents.

Harsha Fernando with Chamith  
Senanayake and Yohan Cooray  
instructed by;  
Dimuthu Kuruppuarachchi for the  
11<sup>th</sup> Respondent.

**Argued on** : 11.09.2023

**Decided on** : 22.11.2023

**K. PRIYANTHA FERNANDO, J**

1. This application stems from the bus accident, also known as the, “Passara Bus Accident”, which claimed the lives of 14 passengers, while leaving 35 individuals injured. The petitioners’ claim that at the time the bus accident occurred, *Benadict Medona* and *Anthoni Saminoda*, the mother and father of the 3<sup>rd</sup> to 5<sup>th</sup> petitioners, had also been travelling in the same bus and were unfortunately found among the dead. The 3<sup>rd</sup> to 5<sup>th</sup> petitioners are the children of *Benedict Medona* and *Anthoni Saminoda*. The 1<sup>st</sup> and 2<sup>nd</sup> petitioners are the grandparents of the 3<sup>rd</sup> to 5<sup>th</sup> petitioners. The petitioners claim that the most prominent cause for the death of *Benadict Medona* and *Anthoni Saminoda* (hereinafter referred to as the “Deceased”) were the “actions and/or inactions and/or omissions” on the part of the 03<sup>rd</sup> to 10<sup>th</sup> respondents (hereinafter referred to as the “Respondents”) and therefore alleged that the fundamental rights of the parents of the petitioners guaranteed under Articles 11, 12(1), 12(2), 14(1)(c), 14(1)(f) and 14(1)(h) of the Constitution has been infringed by the 03<sup>rd</sup> to 10<sup>th</sup> respondents.
2. This Court granted leave to proceed under the alleged infringement of Article 12(1) of the Constitution against the 3<sup>rd</sup> to 9<sup>th</sup> respondents.

**Facts in Brief:**

3. On 20.03.2021, at about 6.45 a.m., the private bus bearing No. **UP-ND 6448** plying from *Lunugala* to *Colombo* with around 60 passengers has gone off the road and fallen into a precipice of about 250 feet near the 13<sup>th</sup> mile post on the *Lunugala-Passara* road (**A 005**).
4. The petitioners state that the road had been partially obstructed due to a boulder which had fallen onto the road due to a landslide which had occurred on

20.11.2020, which was about four months prior to the accident and as a result of which the two-lane road had been narrowed down to a single-lane, thereby no two vehicles could pass on the road at the same time.

5. According to the petitioners, a tipper truck bearing No. **LH-9388** had been approaching from the opposite direction towards *Lunugala* at the double bend which had caused the bus driver to swerve to the edge of the road to make room for the tipper truck. However as a result of this, the front wheel of the bus had slipped off the road causing the bus to fall down the cliff, causing the death of the parents of 3<sup>rd</sup> to 5<sup>th</sup> petitioners. The petitioners claim that the edge of the road had been eroded and was landslide prone.
6. The petitioners while admitting that it is the negligence of the bus driver which resulted in the deaths of *Benadict Medona* and *Anthoni Saminoda*, likewise submitted that if not for the inactions or omissions of the respondents, this accident would not have happened. Therefore, the petitioners claim that the respondents, who has a prime duty and/or responsibility for the maintenance of the roads and who has a duty to ensure the ultimate safety of the general public of the country are in violation of the rights guaranteed to the petitioner under Article 12(1) of the Constitution.
7. In the further written submissions tendered to this Court by the petitioners, the learned Counsel asserts section 9 of the **Road Development Authority Act No.73 of 1981**, which provides the powers, duties and functions of the RDA to show how the RDA has a duty to ensure the safety of the public.
8. Additionally, the learned Counsel submitted the preamble to the **National Thoroughfares Act No. 40 of 2008** to further illustrate the responsibility owed by the RDA and submitted that in light of the preamble, it is clear that the intention of the legislature is to provide a

legal framework to facilitate the maintenance and administration of the road network of the country.

9. The learned Counsel for the petitioners further submitted that according to section 3 of the **National Thoroughfares Act**, the RDA has exclusive power of implementation and administration of the provisions of the Act. Moreover, the learned Counsel for the petitioners submitted that according to section 5 of the said Act, the 3<sup>rd</sup>, 5<sup>th</sup> and 6<sup>th</sup> respondents are to be responsible for the implementation and administration of the provisions of the said Act.
10. Furthermore, the petitioners also claim that despite having known that the boulder was obstructing the road, the respondents had failed to take steps to clear the road for a duration of four months and therefore they are thoroughly responsible for the death of the deceased.
11. The petitioners claim that the respondents have neither erected a safety fence along the eroded edge of the road, nor have placed any warning signs and/or barriers to warn the road users of the boulder and to alert passengers of the road to be more vigilant.
12. In the further written submissions tendered to this Court, the learned Counsel for the petitioners draws attention of the Court to the cases of **Jayanetti v The Land Reform Commission and Others [1984] 2 SLR 172**, **Azath Salley v Colombo Municipal Council and Others [2009] 1 SLR 365**, **Everad Anthony Payoe and Others v Hatton Dickoya Urban Council & Others SC FR 654/09 S.C Minute 23.06.2017**, and the case of **Gamlakshage Sunil Seneviratne v Shelton Gunasekara & Others SC FR Application No. 476/2012 S.C. Minute 13.07.2015** to explain as to how the facts of this case could satisfy to invoke a fundamental rights action.

13. In response to these submissions by the petitioner, the 7<sup>th</sup> respondent (Chairman of the Road Development Authority) in his affidavit claims that the section of the road where the accident occurred had been handed over to the contractor named AMSK Constructions (Pvt) Ltd (the 11<sup>th</sup> respondent) which is evident from the letter marked [**R1**], for widening and development under the OFID Funded Project on 31.01.2017 and submits that according to their contractual obligations, the construction company was obligated to look after the overall safety and maintenance of the road.

14. The 7<sup>th</sup> respondent claims that from September 2020 up until February 2021, there had been severe monsoons in that area, which had resulted in landslides around 45 locations along the same road and admits that on 20.11.2020 a large volume of rocks had fallen onto the site of the accident causing a boulder, soil and debris to block the road. The 7<sup>th</sup> respondent further claims that, once the Road Development Authority (hereinafter referred to as the "RDA") had been informed about the land slips by the contractor, they had advised the contractor to take immediate action to clear the location. The contractor had started clearing the road once they were advised by the RDA. Although they had been able to clear the debris and the soil to make the road passable, they had been unable to remove the boulder.

15. In furtherance to that, the 7<sup>th</sup> respondent explains that although advised to remove the boulder immediately, the contractors were not able to remove it as it had been precariously balanced on vulnerable rock surface and due to the rainy weather conditions prevailing in that area. He further states that if removed at that instance, it would have resulted in further more landslides, and would have endangered the houses atop the rock surface. It was submitted on behalf of the 7<sup>th</sup> respondent

that, it was dangerous to remove the boulder by using normal explosives. Therefore, they had several meetings with the experts and finally decided to do a chemical blasting where the risk is minimal.

16. In addition to that, the 7<sup>th</sup> respondent claims that some of the other slips that had occurred during that time as mentioned above were worse in terms of volume and damage caused to the road when compared to the landslide which had occurred at the site of the accident and therefore, they had to first attend into clearing those areas of the road that were largely affected.

17. In furtherance to that, the 7<sup>th</sup> respondent claims that the RDA consultant and the officers of RDA have had conducted regular site inspections and several meetings had also been held with the contractors regarding the site and the safety measures which could be taken by the contractors.

18. In answering to the petitioner's claim, the 7<sup>th</sup> respondent deposed that the contractors have taken the necessary precautions to warn the public. In his affidavit he claims that the contractors have placed yellow tape and poles had also been fixed with illuminating stickers. The 7<sup>th</sup> respondent further deposed that apart from that, the contractors have also placed "drive slow" road signs at the double bend area. The 7<sup>th</sup> respondent further submits that iron poles have been erected along the right side of the road, however, the poles were removed by unknown people several times and the contractor had to continuously replace the same. Complaints had been made by the contractors regarding the same to the *Passara Police Station*.

19. The petitioners have submitted that just two to three days after the accident, the RDA has removed the boulder which had fallen on the road and erected a safety fence along the right edge of the road and pleads the

question as to why the respondents could not have done this earlier.

20. In response, the 7<sup>th</sup> respondent submits that, as mentioned before, they were unable to remove the rock due to safety reasons and due to the prevailing weather conditions in the area. On 19.03.2021, the day before the accident the contractor had commenced drilling the rock for the purpose of chemical blasting which was to happen on the next date (i.e. 20.03.2021). Therefore, the 7<sup>th</sup> respondent deposed that since the process had already started, the 11<sup>th</sup> respondent has completed it by a controlled blasting method as instructed by the National Building Research Organization (NBRO).

21. The 7<sup>th</sup> respondent further submitted that, the driver of the bus, as a person who would be taking the same route daily ought to have been familiar with the terrain and about the fallen rock. The 7<sup>th</sup> respondent deposed that the RDA had acted according to the law and discharged their duties and has not done anything to erode the public trust as was claimed by the petitioner.

22. In this instance, the learned Counsel for the respondents further contends that the facts of this case does not create a basis for the invocation of the fundamental rights jurisdiction and that this is a matter that should be determined in a trial in the District Court.

**Alleged Violation of Article 12(1):**

23. Having heard all parties at the hearing, and at the perusal of the petition, objections, and written submissions of parties, I shall now examine as to whether the 3<sup>rd</sup> to 9<sup>th</sup> respondents are in violation of Article 12(1) of the Constitution.

24. At the hearing of the case, this Court had the opportunity to watch the video recording submitted by the learned Counsel for the petitioner marked as **['X13(A) to X22(A)']** in open Court. It was seen that the driver of the ill-fated bus, drove the bus at a very high speed on the slope and went out of control upon seeing the tipper truck and swerved towards the precipice. In the event the driver had been more cautious, careful and driving at a controllable speed, he would have been able to stop the bus upon seeing the tipper truck and would have safely passed the boulder without any accident. The bus driver being a person who drives daily on the same route would have been familiar about the road and the boulder.

25. In addition to that, the tipper truck driver also had a responsibility to have stopped his vehicle before the boulder and make way for the oncoming bus as he could have reasonably foreseen that it would be dangerous for both vehicles to pass alongside the boulder at the same time as there was only one operative lane in the road due to the boulder.

26. Nevertheless, in this instance, as mentioned above, it needs to be considered whether there was any action, inaction or omission on the part of the 03<sup>rd</sup> to 09<sup>th</sup> respondents as alleged by the petitioners.

27. **Article 12(1)** of the **Constitution** provides;

*“All persons are equal before the law and are entitled to the equal protection of the law.”*

28. Article 12(1) incorporates two distinct principles; the negative concept and the positive concept. His Lordship, Justice Janak De Silva in the case of **D. S. Fernando v**

**Hon. Laxman Kiriella and Others SC/FR/360/2016 S.C. Minute 10.08.2023** stated that;

*“...The negative concept is that all individuals are equal before the law and that no one should be treated differently. The positive concept is that all individuals are entitled to equal protection of the law, which requires them to be treated equally in similar circumstances. The negative concept requires the application of the law to everyone. No one is entitled to be treated differently, except where the law recognizes a specific exemption to its application...Any act which contravenes the law will violate the rule of law embedded in Article 12(1)”.*

29. The RDA being a public authority who carries out administrative actions, is deemed to provide equal protection to individuals and in the event that they are found to have infringed a fundamental right of an individual by way of an administrative action, the individual is able to invoke jurisdiction against the RDA under Article 17 of the Constitution. This is also evident from the case authorities provided by the learned Counsel for the petitioners as mentioned in paragraph 12 above.

30. **Section 101 of the Evidence Ordinance No.15 of 1895** provides;

*“Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.*

*When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.”*

It is for the petitioners to prove that the actions and/or inactions of the respondents violated their rights enshrined under Article 12(1) of the Constitution.

31. As submitted by the learned counsel for the petitioners the publication present on the RDA website, where it provided;

*“...it is the responsibility of the RDA to maintain the road network to a reasonable standard so that there would be uninterrupted public transport available to them”.*

The RDA owes a duty to maintain the roads and to remove any hazards that would obstruct or cause harm to the public who uses the road. This is also evident through the preamble to the National Thoroughfares Act No. 40 of 2008 and the Road Development Authority Act No. 73 of 1981 as provided by the learned Counsel for the petitioners.

32. As was stated in the Supreme Court of Canada in the case of **Housen v Nikolaisen [2002] 2 S.C.R. 235**, a municipality has a duty to keep a roadway in a reasonable state of repair so that the users of the roadway, exercising ordinary care may travel upon it safely. The municipality owes a duty of care to the ordinary driver, not the negligent driver.

33. In this situation, the petitioners allege that the respondents had done nothing to remove the boulder for a period of four months, but had been able to remove it just few days after the accident. Prima facie, this would show that the RDA had breached their duty owed to the public and has not acted with due care and diligence and therefore could be made liable for having knowledge of the possible hazards that could arise due to the fallen rock, and yet not clearing the road.

34. However, when considering the facts and circumstances of this case, it could be seen that the RDA has since the

day of the landslides, taken steps to clear the roads with more than 40 landslides. This is evident from the fact that they have initially cleared the soil and debris that had covered the road and also from the fact that they have had several meetings with the 11<sup>th</sup> respondent contractors and have conducted several inspections as to how they could remove the boulder which was large in volume and which had been lying in a vulnerable position.

35. The explanation provided by the RDA as to why they were unable to remove the boulder at the very instance of the landslide; the fact that a normal blasting of the boulder would have been very risky and if they have removed it during the monsoon season it would have caused a potential threat to the houses that were atop the hill, shows that they have looked into this matter with caution, taking into consideration all the other situations which could arise.

36. It could be seen that although the RDA had not been able to remove the boulder earlier, they had initiated measures to do chemical blasting. Moreover, they had taken necessary precautions to warn the public as submitted by the respondents. This is evident from the fact that they have placed 'drive slow' warning signs at the double-bend, they have also erected poles with illuminating stickers and yellow tape, which can be seen in the photographs marked as **['R9 to R12']** and the video recordings marked as **['X13(A) to X22(A)']**.

37. In addition to that, as submitted by the learned Counsel for the respondents, despite warning signs being present or not, the bus driver as someone using the same route daily, ought to have been aware of the boulder which had been present there for the past four months.

**Declaration:**

38. Therefore, for the foregoing reasons and pertaining to the circumstances of the present case, I hold that the respondents are not in violation of Article 12(1) of the Constitution.

*Application dismissed without costs.*

**JUDGE OF THE SUPREME COURT**

**JUSTICE P. PADMAN SURASENA.**

I agree

**JUDGE OF THE SUPREME COURT**

**JUSTICE JANAK DE SILVA.**

I agree

**JUDGE OF THE SUPREME COURT**