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

In the matter of an Application in terms of Article 17 and 126 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

1. Rohini Manel Hettiarachchi
   Parathalakanda,
   Erathne.

2. Walimuni Senaratne Mendis,
   5th Post, Batathota,
   Kuruwita.

PETITIONERS

S.C. (F.R) Application. No. 191/17

Vs.

1. Central Environmental Authority,
   No. 104, ParisaraPiyasa,
   DenzilKobbekaduwa Mawatha,
   Battaramulla.

2. Sri Lanka Sustainable Energy Authority,
   3G-174 A, BMICH,
   Bauddhaloka Mawatha,
   Colombo 07.

3. Mr. Anura Satharasinghe,
   Conservator General of Forest,
   Department of Forest,
   Rajamalwatta Road,
   Battaramulla.

4. A.S.J. Godellawatta,

Former Divisional Secretary of
Kuruwita,
Presently at Provincial
Commissioner of land,
Sabaragamuwa Provincial
Council,
New town,
Ratnapura.

5. Mr. Sunil Kannangara,
(Former District Secretary o
Ratnapura),
Currently,
District Secretary of Colombo,
District Secretariat,
Thimbirigasyaya.

6. Hon. Attorney General,
(To represent His Excellency
Hon. Maithripala Sirisena,
Minister of Environment)
Attorney General's Department,
Colombo 12.

7. Kuruganga Hydro (Pvt) Ltd,
No. 27-02, East Tower,
World Trade Centre,
Echelon Square,
Colombo 01.

8. Mrs. MalaniLokupathagama,
District Secretary,
Ratnapura.

9. Mrs. Dilini Dharmadasa,
Divisional Secretary of
Kuruwita,
Divisional Secretariat,
Kuruwita.

10. Hon. Attorney General,
Attorney General's Department,
Colombo12.

RESPONDENTS

BEFORE: Buwaneka Aluwihare PC, J.

Vijith K. Malalgoda PC, J.

COUNSEL: Mr. Ravindranath Dabare with N. Wickramasinghe and Chathurika Sewwandi for the Petitioners

Mr. Suren Gnanaraj, SSC for the 1st, 2nd, 3rd, 6th, 8th, 9th and 10th Respondents

Saliya Pieris PC with Thanuka Nandasiri for the 7th Respondent

ARGUED ON: 14-11-2017

DECIDED ON: 05.09.2018

Aluwihare PC. J.,

Preliminary objections were raised by the Respondents regarding the maintainability of this application.

The first objection was that, the alleged infringements of the Petitioners' fundamental rights, had been dealt with by this Court in the application bearing No; SCFR 54/2017 and as such the Petitioners are not entitled to urge the same matter for adjudication by this Court for a second time.

In addition, it was also the position of the Respondents that the Petitioners are guilty of suppression of material facts and in any event the instant application had been filed out of time.

It was the contention of both the learned President's Counsel for the 7th Respondent as well as the learned Senior State Counsel for the other Respondents that the SC FR Application No.54/2017 is identical to the instant application, both in substance and the relief sought.

It is common ground that both the instant application as well as the Application No; SCFR 54/2017 were filed in the form of 'public interest litigation' relating to the same environmental concern which the Petitioners in both Applications alleged, had resulted in the infringement of their fundamental rights.

In refusing leave to proceed with SCFR Application No; 54/2017, this Court observed that the Petitioners have even failed to establish a *prima facie* case.

The Court observed that the 1st Petitioner in SC FR Application No; 54/2017 is the Secretary of a non- governmental organisation "Kuruwita Water Resources Conservation Organisation" whereas the two Petitioners to the instant application are members of the said NGO. Both the 1st Petitioner in SC FR Application 54/2017 and the Petitioners in the present case have averred that they are residents "living by the side of 'Kuruganga' and enjoy the riparian rights of the river reservation under the authority of the license issued to them by the Divisional Secretary".

As far as the Respondents are concerned, all eight Respondents cited in SC FR Application No.54/2017 are cited as Respondents in the instant Application as well. It is to be noted that the prayer of the SC FR Application No.54/2017 is identical to the prayer of the instant Application save for the fact that the earlier Application carried an additional prayer seeking interim relief. Save for the additional relief referred to, the prayer in the instant application is a reproduction of the prayer in SC FR Application No.54/2017.

It was the contention on behalf of the Respondents that the Petitioners in the instant Application, admittedly being part of the same aggrieved community and members of the 'Kuruwita Water Resources Conservation Organisation', were bound by the decision of this Court on the very same subject matter, in SCFR Application 54/2017.

The Respondents argued that the Petitioners are prevented by Article 118 of the Constitution from canvassing the very issue again on the premise that the issue had been finally decided by this Court. The Respondents further contended that the subject matter of this application is *"res judicata"* and moved that this application be dismissed *in limine* due to that reason.

The learned counsel for the Petitioners on the other hand, argued that there are remarkable differences in the documents relied on by the Petitioners and remarkable differences 'in some paragraphs of both cases'. Citing the case of ***Sugathapala Mendis and another v. Kumaratunga and Others SCFR 352/ 2007*** SC minutes of 1.10.2008, the learned counsel argued that the **present matter should not be treated as another Fundamental Rights application, but an environment related Application,** where the Supreme Court has given special concern and broadened the provisions of Article 126 of the Constitution in relation to issues concerning environmental matters. (emphasis is mine).

I have carefully considered the judgement referred to by the learned counsel for the Petitioners and in my view, the decision of the case referred to, has no application to the issues that are to be dealt in the present case. No doubt, the jurisprudence, that had evolved over the years since the fundamental rights were made justiciable upon the promulgation of the 1978 Constitution, has enhanced the scope and application of the fundamental rights jurisdiction. I cannot, however, agree with the contention of the learned counsel for the Petitioners that there should be a variance in the standards as to how the alleged violations should be treated, depending on subject matter that is linked to the violation alleged.

In considering the objections raised on behalf of the Respondents, I had the benefit of perusing the petition filed in SCFR Application No.54/21017. In addition to the identical nature of the prayers of the two Applications referred to earlier, I find that the paragraphs 5, 8 to 15 and 19 of the instant application are identical, if not reproductions, of the corresponding paragraphs of the petition filed in SC FR Application 54/2017. Further, paragraphs 21 to 81 of the present petition are a reproduction of paragraphs 23 to 85 of the petition

filed in SCFR Application 54/2017.Thus there is no doubt that what is agitated in these proceedings are the same as what was agitated in SC FR Application 54/2017.

In paragraph 83 of the petition in the present case and paragraph 85 of the petition in SCFR Application 54/2017, the Petitioners have averred that the jurisdiction of this Court is invoked in their own interest as well as **of the interest of the public**.

It was in this backdrop, that the Respondents raised the objection that the present application is *res judicata*.

In explaining the events that followed, the Petitioners have taken up the position that, the Court refused to grant leave to proceed in Application SCFR 54/2017, as the Petitioner Ananda Padmasiri had not attached a copy of the permit or any other document to the petition, to establish that he is a resident adjacent to the banks of Kuruganga, although he claimed in the petition that he holds a permit to do so. It must be said that the manner in which a case is presented before the Court is the prerogative of the counsel, in proceedings which are adversarial in nature and the counsel is free to decide what he wishes to place before the Court. Once an issue is adjudicated, I do not think there is room to re-agitate the same matter on the basis that there were shortcomings in the earlier proceedings as the doctrine of *res judicata* stands in the way against such an exercise.

In the case of ***Hettiarchchi v. Seneviratne, Deputy Commissioner and others 1994 3 SLR 293*** His Lordship Justice Mark Fernando observed:

> *"Proceedings under Article 126 are essentially adversarial in nature. Of course, the Court has ample power to probe a matter for the purpose of ascertaining the truth; to expedite the work of the Court by suggesting the consideration of issues of fact and law which seem to arise; and by indicating how a submission might be clarified or refined; and by guiding an argument in the direction of the matters of fact and law actually in issue. But it will nevertheless leave Counsel entirely free to decide what he wishes to place before*

the Court, and how he proposes to do so. The Court recognizes and respects Counsel's right to do so. It will not encroach on Counsel's rights, especially when he repeatedly insists on following a plan of action he appears to have set himself and disregards suggestions from the bench as to an alternative course that might be followed. We must take the case as Counsel deems it best presented in the interest of his client. Moreover, the Court must take care to guard itself against any appearance of bias which might result from intervention, for justice must not only be-done, but must be seen to be done. As Judges, we are expected to be neutral. Therefore, the Court must refrain from entering into the arena by initiating and presenting legal and factual submissions on behalf of a party."

There is no doubt that in these proceedings the Petitioners have invited this Court to consider the very issue this Court dealt with in the SCFR Application No.54/2017.The Supreme Court being a creature of the statute, its powers are statutory and the Court is not vested with the jurisdiction by the Constitution or by any other law for that matter to review its decisions. In effect, the Court would be doing exactly that, if this Petition is permitted to proceed.

In this respect, I am in agreement with the dicta of this Court in the case of ***Jayraj Fernandopulle v. Premachandra de Silva 1996 1 SLR 70*** at pg. 89 when the Court observed that:

"The Supreme Court is a creature of statute and its powers are statutory. The Court has no statutory jurisdiction conferred by the Constitution or by any other law to re-hear, review, alter or vary its decision. The decisions of the Supreme Court are final…. ..the use of the phrase "shall finally dispose of" in Article 126 (5), in dealing with the exercise of the Court's powers in relation to fundamental rights and language rights petitions, and the phrase "final and conclusive" in Article 127 in dealing with the Court's appellate jurisdiction, signified that once a matter was decided by the Supreme Court, the thing is over. There is nothing more that can be

done. As far as the matters which are the subject of the decision are concerned, it is all over. There is an end to such litigation - as needs must be with all litigation.

In the case of ***Dr. P.B Jayasundera v. The Attorney General 2009 2 SLR 1***, Justice Saleem Marsoof stressing the need for finality of the decisions of the Supreme Court held:

> *"In my view, the jurisdiction conferred on the Supreme Court by Article 126 of the Constitution to redress alleged infringements, or imminent infringements of fundamental and language rights is unique in that it is an original jurisdiction vested in the apex Court of the country without any provision for review through appeal or other proceedings. While our hierarchy of Courts is built on an assumption of fallibility, with one, two or sometimes even three rights of appeal, as well as the oft used remedy of revision, being available to correct errors that may occur in the process of judicial decision making, in the absence of such a review mechanism,*
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> *the remedy provided by Article 126 is fraught with the danger of becoming an "unruly horse", and for this reason has to be exercised with great caution. This Court has generally displayed objectivity, independence and utmost diligence in making its decisions and determinations, conscious that it is fallible though final. The decision of this Court in the Fernandopulle case stressed the need for finality, and very clearly laid down that* ***this Court is not competent to reconsider, revise, review, vary or set aside its own judgement or order (in the context of a fundamental rights application)*** *except under its inherent power to remedy a serious miscarriage of justice, as for instance, where the previous judgement or order was made through manifest error per incuriam".*

In deciding the issues before us, it would also be relevant in my view to consider the decision in ***State of Karnataka v. All India Manufactures Organisation 2006 AIR 1846*** cited by the learned Senior State Counsel, wherein the Indian Supreme Court considered the applicability of the doctrine of res *judicata* in public interest litigation.

In that case, a series of writ petitions were filed challenging the construction of a Bangalore-Mysore Express High way at different stages. The first petition was the public interest litigation filed by one Somashekar Reddy. Thereafter, at regular intervals, different parties came before the Court seeking to achieve the same result by agitating different issues. They sought to argue that res judicata as a principle does not bind on Public Interest Litigation and further sought to argue that even if the previous cases constitute res judicata in respect of the cause of action, it would not constitute res judicata in respect of the 'issues' which vary at every point.

The Supreme Court, however, having dealt exhaustively with the submissions, concluded that *res judicata* as a principle does bind on Public Interest Litigation as long as the previous litigation was not a frivolous, busy body agitation.

"*As a matter of fact, in a Public Interest Litigation, the petitioner is not agitating his individual rights but represents the public at large.* ***As long as the litigation is bona fide, a judgment in a previous Public Interest Litigation would be a judgment in rem. It binds the public at large and bars any member of the public from coming forward before the Court and raising any connected issue or an issue, which had been raised/should have been raised on an earlier occasion by way of a Public Interest Litigation.***" (*emphasis added*)

It was also pronounced that as a principle, *res judicata* is not only confined to the 'issues' agitated, but even extends to every other matter which the parties might and ought to have litigated on and have had decided as incidental to or essentially connected with the subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence.

In view of above, I am of the opinion that the instant application cannot be maintained as the subject matter is "*res judicata"* as the same issue was canvassed in the SC FR Application No.54/2017 and which was adjudicated on by this Court. Hence, I uphold the first preliminary objection raised on behalf of the respondents

Accordingly, this Application is dismissed *in limine* on the ground of *"Res Judicata" and* I see no reason to consider the rest of the preliminary objections raised on behalf of the Respondents.

In the circumstances of the case I do not make any order as to costs.

Application dismissed.

JUDGE OF THE SUPREME COURT

JUSTICE VIJITH.K. MALALGODA P.C

I agree

JUDGE OF THE SUPREME COURT