

**ENVIRONMENTAL FOUNDATION LTD.
VS.
CENTRAL ENVIRONMENTAL AUTHORITY AND OTHERS**

COURT OF APPEAL.
SRIPAVAN. J.
SISIRA DE ABREW. J
CA 1556/2004.
OCTOBER 7, 24, 2005.
NOVEMBER 21, 2005.
MAY 11, 2006.
JULY 12, 2006.

Writ of Certiorari and Mandamus National Environmental Act, No. 47 of 1980-section 23 BB (4) - Hydro Power Project- Approval granted on I. E. E. Report - No EIA Report - Validity?-Exercise of power in a certain form - Neglect - Ultra vires?

The petitioner alleges that the Central Environmental Authority (CEA) published a notice indicating its final decision on the Initial Environmental Execution Report (IEER) of the proposed Mini Hydro Project without calling for an Environmental Impact Assessment Report (EIAR).

The decision to grant approval to the 4th Respondent was challenged on the basis of an IEER without calling an EIAR. This was on the basis that the Technical Evaluation Committee (TEC) decided to rely only on the IEER.

- HELD:** (1) The Project Approving Agency has discretion to call for an IEER or an EIAR from the 4th respondent in order to decide whether approval should be given. The law contemplates that such report has to be considered by the Project Approving Agency - CEA.
- (2) When a statute requires the power to be exercised in a certain form the neglect of that form renders the exercise of the power "ultra vires."

TEC has no jurisdiction to decide whether an IEER or EIAR is required for a specified project. The 1st respondent CEA had failed to exercise its discretion reasonably and in good faith in discharging its public duty. The 1st respondent cannot in law surrender the discretion vested in to the TEC.

- (3) where a power is exceeded or abused any act done in such excess or abuse of the power is done without authority. The "ultra vires" doctrine effectively controls those who exceed or abuse the administrative discretion which a statute has given.

Per Sripavan. J.

"This Court cannot issue a Writ of Mandamus directing the CEA to call for an EIAR. The discretion to call for an EIAR or IEER has to be exercised by the CEA (1st respondent) only. Public orders made by public authorities are meant to have public effect and are intended to affect the conduct of those to whom they are addressed and must be construed objectively."

APPLICATION for a Writ of Certiorari/Mandamus.

Ms. Ruana Rajapakse with P. Rajakeeya for petitioner
N. Wijesekare for 1st Respondent -
Ms. Bimba Tilakaratne DSG for 2nd Respondent -
Nalin Laduwahetty for 4th Respondent -

cur. adv. vult.

July 31, 2006.

SRIPAVAN, J.

The petitioner is a non - governmental organization engaged in environmental activities and registered with the first respondent. Authority. The petitioner alleges that the first respondent acting in terms of section 23 BB (4) of the National Environmental Act No.47 of 1980 as amended, published a notice marked P4 indicating its final decision on the Initial Environmental Examination Report (hereinafter referred to as the IEER) of the proposed Bomuruella Mini Hydro Power Project at Perawella, Nuwara Eliya. By the said notice, the first respondent informed the General Public that it has decided to grant approval for the establishment of the said project to the fourth respondent subject to certain specified terms and conditions.

The Petitioner in paragraph 10 of the petition states that upon request, it obtained a copy of the IEER which was in two parts. This fact was not denied or disputed by the first respondent. The said report dated 3rd August 2003 is marked P5a and annexed to the petition. The petitioner's complaint is that the decision of the first respondent Authority to grant approval to the said project on the basis of an IEER

without calling for an Environmental Impact Assessment Report (hereinafter referred to as the EIAR) was arbitrary and unreasonable in view of significant environmental impacts of the project. Therefore, the petitioner seeks a writ of certiorari to quash :-

- a. the approval given for the said project by the first respondent Authority as shown in the notice marked P4 and ;
- b. the annual permit granted to the fourth respondent by the second respondent by letter dated 29th April 2004 marked "X" and referred to in the document marked P8.

On 18th March 2005, the learned DSG appearing for the second respondent informed court that though a decision was taken to issue a permit to the fourth respondent by letter dated 29th April 2004 marked "X", no such permit was issued. In view of the said submissions, learned counsel for the petitioner submitted that she was not seeking relief in terms of paragraph "C" of the prayer to the petition. The written submission filed by the second respondent also shows that since the project area falls within the Kandapaha - Seetha Eliya Forest Reserve which is in higher elevation and is an important catchment area, the second respondent was not inclined to grant the required annual permit in the absence of a proper EIAR. Therefore, the relief claimed by the petitioner to quash the annual permit allegedly granted to the fourth respondent by the letter dated 29th April 2004 marked "X" does not arise.

The first respondent in paragraph 12 of its statement of objections categorically pleads and annexes a copy of the minutes of the meeting held at the Central Environmental Authority prior to granting of the approval. The said document is marked "1R3" and produced along with the statement of objections. The minutes indicate that the said meeting was held on 10th July 2003 by the Technical Evaluation Committee (hereinafter referred to as the TEC). The members of the said Committee finally decided that an IEER was required to be prepared by the petitioner prior to the granting of any approval and that there was no need to call for an EIAR.

In the light of the said averment contained in the statement of objections of the first respondent, it becomes relevant to consider the legal provision, namely, section 23BB (1) of the said Act which reads as follows :-

“It shall be the duty of all project approving agencies to require from any Government department, corporation, statutory board, local authority, company, firm or individual who submit any prescribed project for its approval to submit within a specified time an initial environmental examination report or an environmental impact assessment report as required by the project approving agency relative to such project and containing such information and particulars as may be prescribed by the Minister for the purpose”(emphasis added)

Thus, the project approving agency has a discretion to call for an IEER or an EIAR from the fourth respondent in order to decide whether approval be given to a prescribed project. The law contemplates that such report has to be considered by the project approving agency, namely the first respondent in this application. However, paragraph 12 of the statement of objections of the first respondent shows that the TEC decided that IEER was sufficient to cover all the matters and concluded that such a report was required to be prepared by the project developer prior to considering the approval.

Where a statute requires the power to be exercised in a certain form, the neglect of that form renders the exercise of the power *ultra vires*. It has been the consistent approach of the court in the exercise of its power of judicial review, that it will not interfere with the exercise of a discretionary power vested in the executive or administrative agency except on limited grounds. The court would not substitute its discretion for that of the expert, but would interfere with its exercise, if it is sought to be exercised in an arbitrary manner or in matters outside the limits of the discretionary authority conferred by the legislature or on considerations extraneous to those laid down by the legislature. Thus, this court cannot issue a writ of mandamus directing the first respondent to call for an EIAR in respect of the said project. The discretion to call for an EIAR or IEER has to be exercised by the first respondent and by the first respondent only. Any clear departure from the objects of the statute is objectionable and renders the act invalid in law. Public orders made by public authorities are meant to have public effect and are intended to affect the conduct of those to whom they are addressed and must be construed objectively.

The TEC has no jurisdiction under the Act to decide whether an IEER or EIAR is required in respect of a prescribed project. The first respondent in my view has failed to exercise its discretion reasonably and in good faith in discharging its public duty. The first respondent cannot in law surrender the discretion vested in it to the TEC. I therefore hold that the first respondent has failed to exercise its discretion in granting its approval in the manner provided in section 23BB (1) of the Act.

The first respondent along with its statement of objections produced to court the approval given to the fourth respondent dated 20th October 2003 marked 1R2. The second paragraph of the said letter containing the approval is reproduced below :-

“This is to inform you that the Central Environmental Authority (CEA) after study of your responses to the Environmental Questionnaire dated 3rd June 2003 and the subsequent letter from the Forest Department dated 12th October 2003 has decided to grant environmental clearance for the above project subject to the conditions given below”

It is therefore abundantly clear that the first respondent granted the approval after considering the following two documents :-

- a. The environmental questionnaire dated 3rd June 2003 ; and
- b. The letter from the Department of Forests dated 12th October 2003.

This too demonstrates that the first respondent has failed to exercise its power in terms of section 23 BB (1) considering the purpose for which such power was given. The environmental questionnaire dated 3rd June 2003 could not be equated to an IEER or EIAR referred to in section 23 BB(1). The questionnaire seems to contain the preliminary information on the proposed project. The IEER and /or EIAR must contain information and particulars as prescribed by the Minister for the purpose of ascertaining serious environmental consequences of the project. Review by court of an act or decision of an administrative agency has always been based on an allegation that the agency has exceeded or abused its powers and has acted *Ultra-Vires*. When a power is

exceeded or abused any acts done in such excess or abuse of the power is done without authority. The *ultra vires* doctrine effectively controls those who exceed or abuse the administrative discretion, which a statute has given.

For the reasons stated, a writ of certiorari is issued quashing the approval given for the said project by the first respondent as shown in the public notice marked p4. The petitioner is entitled for costs in a sum of Rs.10,000 payable by the first respondent.

SISIRA DE ABREW, J - I agree.

Application Allowed.
