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

In the matter of an Appeal to the Supreme Court under and in terms of Article 128 of the Constitution against a Judgment of the Court of Appeal.

1. **P.B.S. Dissanayake**
   No. 241, Sri Sangaraja Mawatha,
   Colombo 10.

2. **S.K. Senarathna**
   No. C9, University Park,
   Mahakanda,
   Hidagala.

3. **Y.M.A.K. Yapabandara**
   No. 241, Sri Sangaraja Mawatha,
   Colombo 10.

Conducting business in the nature of a partnership under the name and style of "Uva Magnetite" at No. 241, Sri Sangaraja Mawahta, Colombo 10.

Petitioners

SC Appeal No. 137/2017
SC (Spl.) LA No. 221/2011
CA Writ No. 814/2007

Vs.

1. **Geological Survey & Mines Bureau**
   No. 4, Galle Road,
   Dehiwala.

2. **Dr. N.T.S. Wijesekera**
   Chairman,
   Geological Survey & Mines Bureau,
   No. 4, Galle Road,
   Dehiwala.

3. **Dr. D.M.O.K. Dissanayake**
   Director,
   Geological Survey & Mines Bureau,
   No. 4, Galle Road,
   Dehiwala.

4. **M.A.R.D. Jayathilake**
   Secretary,
   Ministry of Environment and
   Natural Resources,
   'Sampath Paya',
   Battaramulla.

5. **Patalee Champika Ranawaka**
   Minister,
   Ministry of Environment and
   Natural Resources,
   'Sampath Paya',
   Battaramulla.

6. **Director General**
   Central Environmental Authority,
   'Parisara Piyasa',
   No. 104, Denzil Kobbekaduwa
   Mawatha,
   Battaramulla.

7. **Sarath Fernando**
   Conservator of Forests,
   'Sampath Paya',
   Battaramulla.

8. **Nilmini Attanayake**
   Environmental Officer,
   'Parisara Piyasa',
   No. 104, Denzil Kobbekaduwa
   Mawatha,
   Battaramulla.

9. **Anura de Silva**
   Deputy Conservator of Forests,
   'Sampath Paya',
   Battaramulla.

10. **Dr. Preme**
    Geological Survey & Mines Bureau,
    No. 4, Galle Road,
    Dehiwala.

11. **Anil Peries**
    Deputy Director of Mining,
    Geological Survey & Mines Bureau,
    No. 4, Galle Road,
    Dehiwala.

Respondents

And now between

Sarath Fernando
Conservator General of Forests
'Sampath Paya',
Battaramulla.

7th Respondent – Appellant

7A. Hitisekara Mudiyanselage Piyasena Hitisekera
Conservator General of Forests
'Sampath Paya',
Battaramulla.

1st Added Appellant

7B. Chandrasiri Weragoda
Conservator General of Forests
'Sampath Paya',
Battaramulla.

2nd Added Appellant

Vs.

1. **P.B.S. Dissanayake**
   No. 241,
   Sri Sangaraja Mawatha,
   Colombo 10.

2. **S.K. Senarathna**
   No. C9,
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   Conducting business in the nature of a partnership under the name and style of "Uva Magnetite" at No. 241, Sri Sangaraja Mawahta, Colombo 10.

Petitioner – Respondents

1. **Geological Survey & Mines Bureau**
   No. 4, Galle Road,

Dehiwala.

2. **Dr. N.T.S. Wijesekera**
   Chairman,
   Geological Survey & Mines Bureau,
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    Deputy Director of Mining,
    Geological Survey & Mines
    Bureau,
    No. 4, Galle Road,
    Dehiwala.

Respondents – Respondents

Before: **Hon. P. Padman Surasena, J.**
Hon. Yasantha Kodagoda, PC, J.
Hon. Mahinda Samayawardena, J.

Counsel: Mahen Gopallawa, Deputy Solicitor General (as he then was) for the 7th Respondent – Appellant and for the 1st to 6th and 8th to 10th Respondent - Respondents.

Senaka de Saram with Gayathree Nawaratne and Shaheem Wazeer instructed by Upendra Gunasekera for the Petitioner – Respondents.

Argued on: 3rd August 2021

Written Submissions filed on: For the 7th Respondent – Appellant and for the 1st to 6th and 8th to 10th Respondent - Respondents on 24th January 2018 and 4th March 2022.
For the Petitioners – Respondents on 21st April 2022.

Judgment delivered on: 8th October, 2024

Yasantha Kodagoda, PC, J.

Introduction

1. This Judgment relates to an Appeal filed by the Appellants praying for the setting aside of the Judgment of the Court of Appeal dated 28th October 2011 delivered in CA Writ Application No. 814/2007. [That judgment (which is the subject matter of this Appeal) has been reported as ***Dissanayake and Others (Uva Magnetite) vs. GSMB and Others,*** *in (2011) 2 Sri L.R. 354.*] Through the impugned Judgment, the Court of Appeal has issued a Writ of Mandamus on the 7th Respondent to that Application (presently, the 7th Respondent – Appellant) directing him to act in compliance with section 23BB(4) of the National Environmental Act, No. 47 of 1980 (as amended) and publish in the *Gazette* the approval pertaining to a project of which the project proponents were the Petitioners to that Application (presently, the Petitioners – Respondents). Being aggrieved by the said Judgment of the Court of Appeal, the 7th Respondent - Appellant filed a Petition in this Court dated 8th December 2011, and sought *Special Leave to Appeal* against the afore-stated Judgment of the Court of Appeal. Having considered the Petition, this Court granted *Special Leave to Appeal* in respect of the following questions of law:

   (a) Has the Court of Appeal erred in law by holding that the proposed project had been approved by the Technical Evaluation Committee (TEC)?

   (b) Has the Court of Appeal erred in law by holding that the 7th Respondent - Petitioner and / or the Project Approving Agency had approved the proposed project?

   (c) Has the Court of Appeal erred in fact and in law by holding that the Central Environmental Authority had approved the proposed project?

(d) Has the Court of Appeal erred in fact and in law in holding that the presence of officers of the Project Approving Agency and the Central Environmental Authority in the TEC which recommended the approval of the proposed project, amounts to approval of the proposed project by the 7th Respondent – Petitioner and / or the Project Approving Agency and the Central Environmental Authority?

(e) Has the Court of Appeal erred in law in failing to appreciate that the approval of the Environmental Impact Assessment (EIA) Report and / or the proposed project cannot be published in the gazette in terms of section 23BB(4) of the National Environmental Act in the absence of the approval for the proposed project by the 7th Respondent – Petitioner and / or the Project Approving Agency together with the concurrence of the Central Environmental Authority?

Background

Position of the Petitioner – Respondents (Uva Magnetite) presented to the Court of Appeal:

2. The three Petitioner – Respondents carry on a partnership in the name of 'Uva Magnetite'. The partnership commenced business activities on 3rd July 2003 for the purpose of mining for and processing mined magnetic iron ore in Sri Lanka. In early 2003, 'Uva Magnetite' applied for an Exploration Licence from the Geological Survey and Mines Bureau (1st Respondent – Respondent) (hereinafter sometimes referred to as 'the GSMB'). Accordingly, on 21st July 2003, the GSMB acting under section 28 of the Mines and Minerals Act, No. 33 of 1992, issued to the Petitioner – Respondents an exploration licence bearing No. EL/119 ("P3"). The licence was for a period of six (6) months in respect of an area of one square kilometer grid unit bearing No. 245165 situated within the official licencing control system map No. 77, situated in the Monaragala District in the Uva Province of Sri Lanka. Sequel to being contracted by the Petitioner – Respondent, the exploration work was carried out by Geological Survey & Mines Bureau Technical Services (Pvt.) Ltd, a subsidiary of the 1st Respondent – Respondent. In this regard, the Petitioner – Respondents had to make a payment to this company. The validity period of the licence (6 months) was extended from time to time up to July 2007.

3. Following the completion of exploration for iron ore within the area stipulated in the licence and having considered the information gathered through such exploration, the Petitioner – Respondent submitted an Application ("P21") along with a Report ("P20") revealing the results of the exploration work carried out and an Economic Viability Report ("P19") to the 1st Respondent – Respondent (the GSMB) under section 34 of the Mines and Minerals Act. The Petitioner – Respondent sought from the GSMB an Industrial Mining category 'B' licence.

Subsequently, the Petitioner – Respondents amended the Application seeking a category 'A' Licence.

4. Under the provisions of the National Environmental Act, the project of the Petitioner – Respondents being a 'prescribed project', was required to undergo an Environmental Impact Assessment (EIA). Accordingly, for the purpose of processing this Application, the GSMB informed the 6th Respondent – Respondent who is the Director General of the Central Environmental Authority (hereinafter sometimes referred to as "the CEA") that the proposed project needs to be subjected to an Environmental Impact Assessment (EIA) and for that purpose requested that a Project Approving Agency (PAA) be appointed to prepare the Terms of Reference (ToR) of the environmental examination that had to be carried out. Accordingly, by letter dated 7th February 2005 ("P25"), the CEA appointed the Forest Department as the PAA. Following a field inspection by the relevant officials, the 7th Respondent – Appellant (Conservator of Forests) in his capacity as the Head of the Forest Department called upon the Petitioner – Respondents to carry out an Environmental Impact Assessment (EIA) relating to the proposed project, and submitted the ToR for the EIA.

5. Consequently, in September 2006, the Petitioner – Respondents submitted to the 7th Respondent – Appellant the Report ("P27") of the EIA that was conducted. Following an evaluation of the said Report, in March 2007, the 7th to 10th Respondents – Respondents (an Environmental Officer of the CEA, a Deputy Conservator of Forests, and two officers of the GSMB, respectively) recommended the approval of the EIA, and such outcome was conveyed by the 7th Respondent – Appellant to the Petitioner - Respondents.

6. The Petitioner – Respondents claimed before the Court of Appeal that, notwithstanding the approval granted to the EIA, the 7th Respondent – Appellant refrained from publishing the EIA Report ("P27") in the *Gazette* under section 23BB(4) of the National Environmental Act. The Petitioner – Respondents alleged that the 7th Respondent – Appellant's refusal to publish "P27", was notwithstanding several requests by them and a letter of demand being submitted by an Attorney-at-Law on their behalf.

7. In this backdrop, the Petitioner – Respondents complained to the Court of Appeal regarding (i) the arbitrary failure on the part of the 7th Respondent – Appellant to publish "P27" in the *Gazette*, and (ii) for having failed to give reasons in respect of such failure. The Petitioner – Respondents claimed in the Court of Appeal that

they entertained a 'legitimate expectation' that the afore-stated Report will be published in the *Gazette*, and in the circumstances alleged that the conduct of the 7th Respondent – Appellant was unlawful. The Petitioner – Respondents sought from the Court of Appeal a Writ of Mandamus directing the 7th Respondent – Appellant to publish the afore-stated Report in the *Gazette*.

Position of the 7th Respondent – Appellant (Conservator General of Forests) and the 8th Respondent (Environmental Officer, Central Environmental Authority) presented to the Court of Appeal:

8. In response to the allegation of the Petitioner – Respondents, the position presented to the Court of Appeal by the 7th Respondent – Appellant and the 8th Respondent (in these proceedings the 7th Respondent) on behalf of all State functionaries including the Forest Department, the GSMB and the CEA was that, the EIA Report ("P27") could not have been published in the *gazette* since the project proposal of the Petitioner – Respondents had not been approved by the Project Approving Agency (Forest Department) which was headed by the 7th Respondent – Appellant. Furthermore, the Technical Evaluation Committee (TEC) had not approved in full the EIA Report. The TEC had only decided to recommend the project on a phased-out basis initially for a two-year period subject to certain terms and conditions specified by the TEC including the implementation of a close monitoring and evaluation mechanism. These terms and conditions are contained in Annexure I of the TEC Report. Furthermore, the TEC had expressed the view that as (a) the project would result in handing-over the mining of iron ore to a single private sector institution without any competitive bidding, and (b) the export of iron ore would take place in its raw form without any value addition, a policy directive was required to be obtained from the 4th Respondent – Respondent – Secretary to the Ministry of Environment and Natural Resources. Accordingly, the 7th Respondent – Appellant had sought a policy directive from the 4th Respondent. Following a consideration of the matter, 4th Respondent – Respondent had decided that exportation of iron ore in its raw form should not be permitted.

9. In his affidavit filed in the Court of Appeal, the 7th Respondent – Appellant also submitted that in terms of the National Environmental Act, a public hearing must be held in respect of the Environmental Impact Assessment of the proposed project, and therefore two public hearings were conducted. At such hearings, several persons including residents of the area and civil and non-governmental organisations raised objections to the proposed project on the basis that the project proponent had not been selected through a transparent, open competitive bidding

process. Furthermore, according to the project proposal, during the first four years of the project, excavated iron ore was to be exported from Sri Lanka in its raw form without any value addition. This would deprive the government of revenue. The 7th Respondent – Appellant also stated in his affidavit that the exact extent of the iron ore to be excavated had not been stipulated by the project proponents. The 7th Respondent – Appellant also submitted to the Court of Appeal that the policy of the GSMB is that approval will not be granted for the export of minerals in their raw form, and that all minerals that are extracted must be exported only after a value addition is carried out within the country, thus ensuring that the country benefits to the fullest extent by the export of its natural resources. Mineral Investment Agreements entered into between the 1st Respondent – Respondent (GSMB) and other licencees were also for the export of value-added mineral products. Furthermore, the CEA had not given its concurrence to the EIA Report, and thus, the EIA Report could not be published in the *Gazette*.

Judgment of the Court of Appeal

10. In its Judgment dated 28th October 2011 (the impugned judgment), the learned Justice of the Court of Appeal observed that the CEA and the Forest Department had been represented in the Technical Evaluation Committee (TEC). The TEC in its 'Final Report' had recommended the approval of the proposed project. In the circumstances, the 7th Respondent (the present 7th Respondent - Appellant) was *"in breach of a statutory duty involving unfairness amounting to abuse of power when he did not comply with section 23BB(4) of the NEA read with NEA Regulation 13(i)"*. The learned Justice also observed that, "*the 7th Respondent had only to comply with the provisions contained in the Act and the NEA regulations and gazette the project under section 23BB(4) and NEA regulation 13(i) as the TEC had recommended and approved the proposed project*". The learned Justice has also noted that after the Petitioner (the present Petitioner – Respondent) submitted the EIA Report in September 2006, the CEA had not acted in compliance with the Regulations (No. 1 of 1993) of the National Environment Act. It is on this footing that the learned Justice issued a Writ of Mandamus on the 7th Respondent (the present 7th Respondent - Appellant) directing him to act in compliance with section 23BB(4) of the National Environment Act, Regulations 13(i) and 15 promulgated under the NEA, and publish the approval for the project within 30 days from the date of the Judgment. Furthermore, the learned Justice directed the Project Approving Agency to comply with Regulation 14 of the Regulations promulgated under the National Environment Act and forward to the Central Environmental Authority a plan to monitor the proposed project.

Analysis of the evidence and the sequence of events

11. Based on the evidence placed before the Court of Appeal by the 1st Petitioner – Respondent, the 7th Respondent - Appellant (Conservator of Forests) and the 7th Respondent – Respondent (Environmental Officer, Central Environment Authority), to the extent relevant to the determination of this Appeal, the applicable items of evidence and the sequence of events pertaining to this matter are as follows:

i. Following an Application being tendered by the Petitioner – Respondents on 21st July 2003 to the 1st Respondent - Respondent (Geological Survey and Mines Bureau - GSMB), acting in terms of Mining (Licensing) Regulations No. 1 of 1993 promulgated under the Mines and Minerals Act, No. 15 of 1958 (as amended), the GSMB issued an exploration licence (No. EL/119) ("P3") to the Petitioner – Respondents (Uva Magnetite) to explore for iron ore (magnetite) in an area of one square kilometer grid unit No. 245165 falling within the Official Licensing Control System Map No. 77 situated within the District of Monaragala in the Uva Province of Sri Lanka. This licence was initially valid for a period of 6 months, and on the request of the licencee (Petitioner – Respondents), it was extended from time to time. The final such extension was valid until 20th July 2007.

ii. Consequently, exploration for iron ore had been conducted on the stipulated site on behalf of the Petitioner – Respondents by a company [GSMB Technical Services (Pvt.) Ltd] which had been contracted for such purpose by the Petitioner – Respondents. This company comes within the purview of the 1st Respondent – Respondent (GSMB).

iii. Ostensibly, the exploration revealed the existence of deposits of iron ore of a commercially viable quantity which attracted the Petitioner – Respondents, and thus they decided to obtain a commercial mining licence to proceed to engage in commercial mining for iron ore in the site.

iv. In the meantime, it appears that on 28th November 2003, the Petitioner – Respondents had entered into an agreement ("P14") with Ispat Industries Limited of Mumbai, India, for the sale and purchase of 'Iron Ore Fines' valid for a period of 10 years. Thus, what was agreed between the Petitioner –

Respondent and Ispat Industries Limited of India was for iron ore to be exported from Sri Lanka to India in its raw form, without any value addition.

v. In October 2004, the 1st Petitioner – Respondent submitted to the 1st Respondent – Respondent (GSMB) an Application seeking an Industrial Mining Licence ("P21"). To the Application was attached *inter alia* a Report containing the findings of the exploratory work conducted under the authority of the exploration licence ("P20").

vi. On 10th December 2004, the Deputy Director (Mines) of the 1st Respondent – Respondent (GSMB) wrote to the Director General of the Environmental Pollution Control Division of the CEA requesting that an Initial Environmental Examination (IEE) be conducted in terms of the National Environmental Act (NEA). ("P24") Therefore, he requested that arrangements be made to appoint a Project Approving Agency (PAA). It had also been brought to the notice of the CEA that land on which the proposed mining project was to be carried out was under the purview of the Forest Department.

vii. By letter dated 7th February 2005, the 6th Respondent – Respondent (Director General, CEA) notified the 7th Respondent – Appellant Sarath Fernando, Conservator of Forests of this matter. It was brought to his attention that as stipulated in Gazette (Extraordinary) No. 772/22 of 18th June 1993, the proposed project (mining of minerals) is a 'prescribed project' as it falls within the projects and undertakings for which approval shall be necessary under provisions of Part IV(C) of the National Environmental Act. As such, in terms of section 23BB(1) of the National Environmental Act, it was necessary that a Report of an Environmental Impact Assessment (EIA) / Initial Environmental Examination (IEE) be prepared by the project proponent before considering the grant of approval. Since the project area came within the purview of the Forest Department, the Director General of the CEA opined that it will be appropriate if the Forest Department were to function as the Project Approving Agency (PAA) for the EIA / IEE process. Therefore, the Conservator of Forests was requested to prepare the Terms of Reference (ToR) for the EIA / IEE ("P25").

viii. Accordingly, the 7th Respondent – Appellant appointed a Technical Evaluation Committee (TEC) to evaluate the project. It comprised of the following:

   a. Anura De Silva, Senior Deputy Conservator of Forest, Forest Department (8th Respondent - Respondent)

b. B.A. Peris, Deputy Director (Mines), Geological Survey and Mines Bureau
c. C.H.E.R. Siriwardena, Deputy Director (Geology), Geological Survey and Mines Bureau
d. Nilmini Attanayaka, Assistant Director (Environmental Management Assessment Division), Central Environmental Authority (8th Respondent – 7th Respondent)
e. A.M. Wimalasiri, Environmental Officer, Pradeshiya Sabha, Buttala

ix. With the assistance of the TEC, the 7th Respondent – Appellant prepared the Terms of Reference (ToR) for the EIA. However, following a field inspection carried out by members of the TEC on 3rd June 2005, the said ToR was revised. By his letter dated 28th June 2005, the revised ToR was forwarded to the 1st Petitioner – Respondent ("P26").

x. Consequently, based on the amended ToR, an EIA had been conducted by a team of officials comprising of the following:
a. Dr. H.S. Welideniya, Senior Lecturer / Consultant Mining and Geotechnical Engineering of the Department of Earth Resources Engineering of the University of Moratuwa
b. A.S.K.D. Sibera, Senior Lecturer, Department of Earth Resources Engineering of the University of Moratuwa
c. K.M. Prematilaka, Hydrologist
d. Dr. A.M.K.B. Abeysinghe, Senior Lecturer of the Department of Earth Resources Engineering of the University of Moratuwa
e. Dr. B.M.P. Singhakumara, Head / Senior Lecturer of the Department of Forestry & Environmental Sciences of the University of Sri Jayawardenapura
f. Dr. U.K.G.K. Pathmalal, Senior Lecturer of the Department of Zoology of the Open University
g. M.K.S. Shantha Siri, Sociologist of the National Water Supplies and Drainage Board

Though there is no direct evidence, it appears that these experts had been identified, selected, appointed and their consultancy services were remunerated by the Petitioner – Respondents.

xi. Following the conduct of the EIA, the Report which emanated from such EIA had been presented to the 7th Respondent – Appellant.

xii. On or about 22nd November 2006, acting in terms of section 23BB(2) of the Act, the 7th Respondent – Appellant had published a Notice in three national newspapers notifying the location where the EIA Report had been kept for scrutiny by the public, and calling for observations regarding the said Report.

xiii. As provided for by section 23BB(3) of the Act, two public hearings had been conducted regarding the proposed project and the EIA Report, at which several individuals and civil society organisations had objected to the proposed project.

xiv. To the extent that is relevant to the determination of this Appeal, it is necessary to observe that the *'Environmental Impact Assessment Report'* together with its *'Addendum addressing public concerns raised at 'Public Hearing' held on 27.06.2007 and TEC Recommendations'* ("P27") contain findings and recommendations which are favourable to the interests of the Petitioner – Respondents.

xv. The EIA Report had been examined by the TEC which comprised of the 8th, 9th and 11th Respondents and a Report ("R2") in that regard was submitted by the TEC to the 7th Respondent – Appellant. (This Report is cited as the 'TEC Report'.) Though the Petitioner – Respondents claim that the TEC 'approved' the EIA Report ("P27"), the position of the 7th Respondent – Appellant is that the TEC did not approve it. According to the 7th Respondent – Appellant, the TEC;

a. recommended the project on a phased-out basis initially for a period of two (2) years, subject to certain terms and conditions specified by the TEC Report,
b. specified that the implementation of the project should be closely monitored through a suitable mechanism and be evaluated, and
c. insisted that in order to address the public concerns regarding handing over the deposit of magnetite (iron ore) to a single private sector institution (Petitioner – Respondents) without any competition, and permitting the exportation of magnetite in its raw form during the initial period of the project, a directive should be sought from the 4th Respondent – Secretary to the Ministry of Environment and Natural Resources, since that matter relates to an aspect of national policy.

Given the evidence before Court including the Report of the TEC ("R2"), the subsequent conduct of the 7th Respondent – Appellant in seeking a direction from

the 4th Respondent – Respondent, and the inability on the part of the Petitioner – Respondents to effectively counter the position of the 7th Respondent – Appellant in this regard, this Court accepts the position of the 7th Respondent – Appellant that the TEC did not approve the EIA Report.

xvi. The TEC Report ("R2") *inter-alia* contains the following findings:

a. The available geological data is insufficient to produce an accurate iron ore resource estimation and therefore predicting the life-time of the project will be extremely difficult.
b. The royalty rate (4%) to be charged from the project proponent by the GSMB for the extraction, removal and exportation of this particular natural resource is very much on the 'low side'.
c. There is concern by the public that this national natural resource should not be handed over to a private entity without calling for competitive bids.
d. Both the local people and the political authority of the area had expressed concern that a private sector entity should not be permitted to export iron ore without any value addition.

xvii. Consequent to receiving the TEC Report, the 7th Respondent – Appellant sought a policy directive from the 4th Respondent - Respondent regarding the policy of the State pertaining to granting permission to export iron ore in its raw form (without any value addition). The 4th Respondent – Respondent considered the matter, and as a matter of State policy decided that the export of iron ore in its raw form should not be permitted.

xviii. The Central Environmental Authority did not grant approval to the EIA Report. Nor did it express its concurrence.

xix. On 21st December 2006, the 7th Respondent – Appellant had received a representation from the *Environmental Foundation Limited* ("R1B"), pertaining to the project proposed by the Petitioner – Respondents. This had been in response to the above-mentioned Notice published in the newspapers. The said representation contains a critique pertaining to the EIA Report relating to the proposed project, which includes the following observations:

a. The EIA Report does not contain a reference to whether birds, mammals, reptiles, amphibians and other fauna listed in Table 3.8 who are said to live in the vicinity of the proposed mining site are classified as 'rare' or 'endangered' species, and whether such species are protected

under the Fauna and Flora Protection Ordinance, and are listed in the global 'red list' of the International Union for Conservation of Nature (IUCN).

b. It is not clear whether the mining method (vertical slicing) which is intended to be adopted during the underground mining operation for iron ore would cause effects of vibration with the possibility of causing damage to nearby houses. Further, whenever blasting activities are carried out, considerable damage would be caused to the forest and to the fauna and flora in the forest. The project proponent should site case studies from other countries to show that the intended method of mining would not cause such consequences.
c. The EIA Report does not contain a consideration of the disturbing effects to the wildlife of the area (due to sound emanating from machinery to be used in the mining operation which would exceed 50 Db (A), which is the daytime upper limit with regard to noise pollution in respect of sensitive eco-systems) and possible mitigatory measures that may be taken in that regard.
d. Issues associated with soil erosion have not been considered and there is no reference to curtailment methods regarding soil erosion.
e. The Report does not contain reference to a proper restoration and rehabilitation plan for the mines following the completion of the mining operation.

In view of the foregoing, the Environmental Foundation Limited has proposed that till the above-mentioned issues are addressed by the project proponent, granting of approval for the project be withheld by the Forest Department and a further public hearing be conducted.

xx. On 26th December 2006, the 7th Respondent – Appellant had received a representation from the *Community Organization Forum – Monaragala* ("R1D") containing the following observations regarding the proposed project and the EIA Report:

a. A proper study has not been conducted to ascertain the actual size of the magnetite deposits in the area.
b. The exportation of raw iron ore without any value addition causes economic loss to the country.
c. The EIA Report has been prepared for a mere business purpose, and does not contain a detailed study of the environmental and social consequences that would arise when the project is being implemented.

d. The EIA Report makes no reference to the possibility of other minerals being associated and existing with the magnetite deposits.
e. The proposed mining site will be situated across a corridor presently being used by approximately 150 elephants, that regularly access the nearby Handapanagala reservoir. In the circumstances, once the mining work commences, the existing human – elephant conflict in the area will intensify and the ensuing consequences will be very serious.

xxi. On 27th December 2006, the 7th Respondent – Appellant had received a letter from Member of Parliament (MP) representing the Monaragala District, Padma Udaya Shantha Gunasekara ("R1C") objecting to the EIA Report and the proposed magnetite mining project of the Petitioner – Respondents. His objections were founded upon the following:
a. The amended EIA does not adequately address objections raised at the public hearing.
b. The proposed project will result in magnetite being exported from the country in its raw form, and thereby causing considerable economic loss to the country.
c. Magnetite deposits which can be used for another 100 – 150 years will be exhausted within a short period of 4 years.
d. The EIA Report does not contain any reference to other minerals that may be associated with magnetite and the associated soil that is to be mined and excavated.
e. The Handapanagala reservoir is situated in close proximity to the proposed mining site. The lives of 2,000 families are depended upon this reservoir. The EIA Report does not contain a detailed reference regarding the possible effects of the proposed mining activity on this reservoir.

xxii. Similarly, on 28th December 2006, the 7th Respondent – Appellant had received a representation from the *Green Movement of Sri Lanka* ("R1A") relating to the proposed project of the Petitioner – Respondents stating *inter alia* that;
a. mineral deposits are not renewable resources, and thus they have a high value,
b. the government being the trustee of natural resources has a duty to protect such resources for the benefit of future generations,
c. the government must mobilise mineral resources for the welfare of the public,

d. if implemented, the proposed project will give rise to both environmental and economic consequences, and
e. government intervention is required to ensure that the proposed project is carried out while protecting the environment and the community.

Questions of law in respect of which Special Leave to Appeal has been granted

(a) Has the Court of Appeal erred in law by holding that the proposed project had been approved by the Technical Evaluation Committee (TEC)?

12. From the above analysis of the evidence, it is clear that though the Technical Evaluation Committee (TEC) had recommended the grant of approval for the project on a phased-out basis initially for a period of two years, it had expressed concerns regarding the (i) insufficiency of data to produce an accurate iron ore resource estimation (and therefore predicting the life-time of the project being difficult), (ii) royalty rate of 4% specified by the GSMB being 'on the low side', (iii) objections raised by the community regarding the methodology adopted by the GSMB in selecting the project proponent, and (iv) exportation of iron ore without effecting a value addition. Furthermore, the TEC had recommended to the 7th Respondent – Appellant that a policy direction be sought from the competent authorities of the government regarding the afore-stated fourth concern. In this backdrop, it would be egregiously wrong to conclude that the TEC had by its Report ("R2") 'approved' the proposed project. In view of the foregoing, the recommendation by the TEC to the 7th Respondent – Appellant that approval be granted subject to concerns it had raised, and a further recommendation that policy approval be obtained from the relevant competent authority, cannot by any means be equated to an 'approval' by the TEC. Thus, I hold that the Court of Appeal had erred in that respect in holding that the TEC had approved the project proposed by the Petitioner - Respondents.

(b) Has the Court of Appeal erred in law by holding that the 7th Respondent - Petitioner and/or the Project Approving Agency had approved the proposed project?

13. The evidence and the sequence of events which this Court has accepted as being correct, reveal clearly that upon receiving the TEC Report, the 7th Respondent – Appellant had sought a policy directive from the Secretary - Ministry of Environment and Natural Resources (4th Respondent – Respondent) as to whether permission could be granted for the exportation of iron ore in its raw form (without any value addition). Understandably, the 4th Respondent – Respondent had stated that approval cannot be granted. Thus, the 7th Respondent – Appellant claims that he did not grant approval for the proposed project. Additionally, the

7th Respondent – Appellant had not approved the project due to the other concerns contained in the TEC Report and due to the concerns raised by civil society organisations. Furthermore, the Petitioner – Respondents have not placed before the Court of Appeal any documentary evidence indicating that the 7th Respondent – Appellant had approved the project.

14. As explained above, the 7th Respondent – Appellant had received a series of complaints objecting to the proposed project of the Petitioner – Respondents. In the circumstances, it was incumbent on the 7th Respondent – Appellant to have given consideration to the said objections and consider whether in view of the objections raised and the policy of the government (that permission should not be granted for the exportation of iron ore without first causing a value addition), approval should be granted for the proposed project. Possibly, if not for this litigation, the 7th Respondent – Appellant would have notified the concerns of civil society organisations and those of the Member of Parliament for the Monaragala District and called upon the Petitioner – Respondents (the project proponent) to address those concerns by modifying the proposed project and re-submit an amended EIA Report. In the circumstances, there is no basis in fact or in law to conclude that the 7th Respondent – Appellant (who is the Head of the PAA) had approved the project.

15. Thus, I hold that the Court of Appeal had erred in concluding that the 7th Respondent – Appellant / PAA had approved the project of the Petitioner – Respondents. I must emphasise that in light of the evidence placed before the Court of Appeal, to say the least, I was surprised by the finding arrived at in this regard by the learned Justice of the Court of Appeal.

(c) Has the Court of Appeal erred in fact and in law by holding that the Central Environmental Authority had approved the proposed project?

16. The Petitioner – Respondent has not presented to the Court of Appeal any evidence to substantiate their claim that the Central Environmental Authority (CEA) had approved the proposed project. No person representing any of the parties (excluding the Petitioner – Respondent) has stated in their affidavits that the CEA approved the project. In fact, there is absolutely no evidence that the CEA had approved the proposed project. Furthermore, the 8th Respondent – Respondent who is a Deputy Director of the CEA has, in her affidavit dated 6th February 2008 filed in the Court of Appeal clearly stated that the CEA did not grant its concurrence or approval to the EIA Report. The material presented before the Court of Appeal clearly reveals that the CEA had valid reasons to withhold

approval for the proposed project of the Petitioner - Respondents. In the circumstances, I must say that, the finding arrived at in this regard by the Court of Appeal is completely ill-founded. Thus, I hold that the Court of Appeal had erred in arriving at the finding that the CEA had approved the proposed project of the Petitioner – Respondents.

(d) Has the Court of Appeal erred in fact and in law in holding that the presence of officers of the Project Approving Agency and the Central Environmental Authority in the TEC which recommended the approval of the proposed project, amount to approval of the proposed project by the 7th Respondent – Petitioner and / or the Project Approving Agency and the Central Environmental Authority?

17. Indeed, officials of the Project Approving Agency (Forest Department) and the Central Environmental Authority (CEA) served on the Technical Evaluation Committee. However, as pointed out above, the TEC did not approve the proposed project of the Petitioner – Respondents. Thus, there is no factual basis for the Court of Appeal to have arrived at the finding that the TEC Report amounts to the proposed project having been approved by the PAA and the CEA. The TEC Report also makes no such assertion. Even otherwise, the representative officials of the PAA (Forest Department) and the CEA were not authorised by the respective organisations to grant approval for the proposed project. Their role was limited to participating in the technical evaluation of the proposed project based upon a consideration of the EIA Report and other details relating to the proposed project, and making recommendations, as opposed to approving the project. Thus, the Court of Appeal has erred in that respect too.

(e) Has the Court of Appeal erred in law in failing to appreciate that the approval of the Environmental Impact Assessment (EIA) Report and / or the proposed project cannot be published in terms of section 23BB(4) of the National Environmental Authority Act in the absence of the approval of the proposed project by the 7th Respondent – Petitioner and / or the Project Approving Agency together with the concurrence of the Central Environmental Authority?

18. It is not in dispute that for the purposes of Part IV(C) of the National Environmental Act, the project proposed by the Petitioner – Respondents (mining for the purpose of extracting iron ore) is a 'prescribed project'. That is because, acting under section 23Z of the NEA, the Minister has published in the *Gazette* an Order declaring that mining for iron ore (magnetite) is a 'prescribed project', for the purposes of Part IV(C) of the NEA. Therefore, the project proposed to be carried out by the Petitioner – Respondent is an activity in respect of which the Minister has determined under and in terms of section 23AA(2) read with section 23AA(1) that an approval is required for the implementation of the project to be

granted by the relevant 'Project Approving Agency'. Furthermore, it is also not in dispute that, the proposed project comes within the ambit of the proviso to Section 23AA(2) of the NEA. Thus, the project approving agency is required to grant approval for a proposed project only with the concurrence of the Central Environmental Authority. Thus, for the Petitioner – Respondents to carry out the proposed project, in addition to a Mining Licence issued in terms of the Mines and Minerals Act, in terms of section 23AA(2) the approval of the Project Approving Agency is required. It is also not in dispute that, the CEA had appointed the Forest Department (of which the 7th Respondent – Appellant was the Head) as the Project Approving Agency for the proposed project. Furthermore, it is also not in dispute that the 7th Respondent – Appellant was entitled in terms of section 23BB(1) of the Act, to have required the Petitioner – Respondents (project proponents) to cause the conduct of an Environmental Impact Assessment (EIA) pertaining to the proposed project, and submit the Report of such EIA to him for his consideration. Furthermore, in compliance with this requirement, the Petitioner – Respondents had submitted an EIA Report to the 7th Respondent – Appellant.

19. In terms of section 23BB(2) of the NEA, upon the receipt of the EIA Report, the Project Approving Agency is required to publish a Notice in the *Gazette* and in one newspaper each in the Sinhala, Tamil and English languages, notifying the place and times at which the Report will be available for inspection by the Public to make comments, if any, thereon. It is inferentially evident that the 7th Respondent – Appellant complied with this requirement. Furthermore, the Petitioner – Respondents do not allege that the 7th Respondent – Appellant did not comply with this requirement.

20. From documents "R1B", "R1D", "R1C" and "R1A" it is apparent that in terms of section 23BB(3) of the Act, members of the public, civil society organisations and a Member of Parliament have taken cognisance of the newspaper Notice, examined the EIA Report, considered environmental, ecological, economical and other implications and consequences of the proposed project including the impact on national interests, and expressed adverse comments regarding the proposed project and the contents of the EIA Report ("R27").

21. In terms of section 23BB(3), in determining whether to grant its approval for the implementation of the prescribed project, the Project Approving Agency is entitled in law to have regard to such comments received. In ***Ravindra Gunawardena Kariyawasam v. Central Environment Authority,*** *SC/FR No. 141/2015, SC Minutes of 4th April 2019*, Justice Prasanna Jayawardena has observed that "*once and EIAR*

relating to a 'prescribed project' is submitted, the public must be notified that the EIAR can be inspected and that any member of the public is entitled to submit his comments on the EIAR. A person who submits his views is entitled to be heard, where appropriate. The project approving agency has a duty to consider the views of the public when deciding whether to grant approval for the implementation of the 'prescribed project'." Thus, in that regard, it would be seen that the Project Approving Agency has been vested with discretionary authority to arrive at a decision on the matter, upon *inter-alia* taking into consideration the EIA Report and the views received from the public. Public Consultation enhances democracy and good governance. It leads to the decision taken after such consultation to be widely accepted and enhances transparency.

22. The importance of the EIA procedure is illustrated in various environment-related international instruments. Furthermore, the importance and the purpose of EIAs is contained in several key national documents.

23. In this regard, the guidelines promulgated by the CEA are of particular importance. It is titled as *'Guidance for Implementing the Environmental Impact Assessment (EIA) Process: No. 1 – A General Guide for Project Approving Agencies'* (4th Edition – 2006).

    Item 1.1 of 1 of this Guide provides the following:
    "The purposes of Environment Impact Assessment (EIA) are to ensure that development options under consideration are environmentally sound and sustainable and that environmental consequences are recognised and taken into account early in project design. EIAs are intended to foster sound decision-making, not to generate paperwork. The EIA process should also help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore and enhance the environment."

    It is seen from these guidelines that principles such as the precautionary principle, sustainable development, principle of rational planning, inter-generational equity and transparency are embedded in the EIA process.

24. Furthermore, in terms of section 23BB(4), where approval is granted for the implementation of the prescribed project, such approval shall be published in the *Gazette* and in one newspaper in the Sinhala, Tamil and English languages. (It is that step of publication in the *Gazette* which the Petitioner – Respondent is insisting that the 7th Respondent – Appellant implements.) Thus, it is seen that, section 23BB(3) read with section 23BB(4) of the Act has conferred on the Project

Approving Agency (the Head of which is the 7th Respondent – Appellant) discretionary authority in determining whether or not approval should be granted to a particular proposed project. The Project Approving Agency is not expected to act in a perfunctory manner. Doing so would be unlawful. In the circumstances, I am unable to accept the submission of the learned counsel for the Petitioner – Respondent that *'in the event the Petitioners submitted such an EIA, the 7th Respondent was obliged to gazette the said EIA in accordance with section 23BB(4) of the NEA'.*

25. Indeed, it is important to note that the exercise of discretionary authority should be founded upon application of criteria which are relevant and necessary, applied and determined objectively, and decided upon in *good faith* and with due diligence. The decision arrived at by the 7th Respondent – Appellant on behalf of the Project Approving Agency (Forest Department) should be founded upon diligent enquiry, objective assessment of the merits, and must be reasonable. Reasons for the decision must be recorded contemporaneously with the decision being taken. The duty to publish in the *Gazette* arises only if the Project Approving Agency decides to grant approval to a prescribed project. In this instance, the necessity to do so did not arise, since the 7th Respondent – Appellant had not decided to grant approval, and had rightfully decided to take certain other steps which would have enabled him to decide on whether or not to grant approval for the proposed project. Thus, the entitlement of the project proponent to have its EIA Report published in the *Gazette* is not unqualified, and is subject to these processes recognised by law.

26. The evidence elucidated above, clearly reveals that upon the receipt of the EIA Report, the 7th Respondent – Appellant had forwarded it to the TEC and had awaited its Report. Following the receipt of the TEC Report, the 7th Respondent – Appellant had acted in terms of a critical decision contained therein, which related to State policy, pertaining to whether or not the State should permit iron ore to be exported in its raw form (without any value addition). The response he had received from the 4th Respondent – Secretary to the Ministry of Environment and Natural Resources had been in the negative. Furthermore, it is evident that the 7th Respondent – Appellant had received a spate of representations from concerned civil society organisations and from a Member of Parliament (MP) representing the Monaragala District. Thus, there was ample justification for the 7th Respondent – Appellant in deciding to withhold the grant of approval for the proposed project of the Petitioner – Respondents, pending further inquiry. Had he not done so, his conduct would have been contrary to the legal principles enunciated by this Court in ***Bulankulama and Others v. Secretary, Ministry of Industrial Development and***

Others *[2000] 3 Sri L.R. 243* and in ***Watte Gedera Wijebanda v. Conservator General of Forests and Others*** *[2009] 1 Sri L.R. 337,* to which I shall advert to shortly. This becomes critical, particularly because the 1st Respondent – GSMB when it forwarded the request for a mining licence presented to it by the Petitioner – Respondent to the CEA, it does not seem to have applied any of those legal principles. This is troubling because the GSMB is in fact the trustee and custodian agency of the State of the natural mineral resources of Sri Lanka. This is in view of the fact that in terms of section 12(d) of the Mines and Minerals Act, the GSMB is entrusted with the task of regulating by the issue of licenses the exploration and mining of minerals and processing, transporting, storing, trading in and exporting of such minerals. When the Petitioner – Respondents preferred an Application for a commercial mining licence, prior to forwarding the matter to the CEA which was for the purpose of applying and enforcing provisions of the National Environmental Act to the proposed project, it was the responsibility of the GSMB to have considered whether a mining licence should be issued for the proposed project. That is, even if environmental clearance was to be issued by the CEA and by the relevant Project Approving Agency. The evidence placed before the Court of Appeal does not reveal the GSMB having performed that legal duty.

27. Arising out of the observations made by the TEC, concerns and objections raised by the public (raised on their behalf by certain civil society organisations and by a Member of Parliament), prior to a decision being taken on whether or not approval should be granted for the proposed project, the following among other concerns had to be taken into consideration by the 7th Respondent – Appellant:
    1) By awarding a mineral mining licence to a project proponent who had not been selected by following a transparent competitive bidding process, did the GSMB act in the best interests of the State and her People?
    2) Given the fact that deposits of iron ore are a form of a non-renewable mineral resource of high value, was it desirable and in conformity with the legally recognised principles laid down in ***Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others*** namely –
        a) the duty of the State to ensure **inter-generational equity** (the conservation of natural resources for the benefit of future generations),
        b) achieve **sustainable development** (development that meets the needs of the present without compromising the ability of future generations to meet their own needs), and
        c) ensure the **integration of environmental considerations into economic and other development plans**, through appropriate use of the natural resources of the country, while ensuring the protection of the environment,

to permit the Petitioner – Respondents to mine and excavate an unlimited quantity of iron ore and thereafter export the mineral in its raw form (without any value addition) in the manner stated in the EIA Report?

3) Was the decision to charge a payment of 4% royalty to the State, a reasonable (optimal) amount which was in the best interests of the State and her People?
4) Was the decision by the GSMB to act on an unsolicited proposal submitted to it by the Petitioner – Respondent without calling for public tender / bidding for the mining of the relevant magnetite mineral natural resource in Buttala, lawful, and acting in the best interests of the State and her People?
5) Given the fact that the project proponents had planned to export iron ore in its raw form without any value addition, was the granting of approval for the proposed project in the best economic interests of the country, and therefore, should the proposed project be permitted?
6) Does the proposed project contain necessary and sufficient mechanisms to prevent or mitigate environmental pollution and other adverse impact to the environment?

28. In arriving at findings on these matters, as the Head of the Project Approving Agency, the 7th Respondent – Appellant was required to consult and take into consideration the views of the relevant competent authorities, which would in this instance include the Secretary to the Ministry of Environment and Natural Resources, the Central Environmental Authority and the Geological Surveys and Mines Bureau. It is necessary for this Court to note that, the factors contained in '1)' to '6)' above should have been considered by the GSMB prior to forwarding the proposed project to the CEA for action in terms of the National Environmental Act. As the GSMB had failed in its duty to consider these matters, it became the responsibility of the 7th Respondent – Appellant to consider these factors prior to deciding on whether or not to grant approval to the proposed project of the Petitioner - Respondents.

29. In view of the foregoing, I hold that, in the circumstances which I have outlined in detail above and in the absence of the approval of the proposed project by the 7th Respondent – Petitioner (PAA) together with the concurrence of the Central Environmental Authority (as per section 23AA(2) of the Act), the Court 7th Respondent – Appellant could not have published the EIA Report in the *Gazette*. Thus, the Court of Appeal had erred in law in failing to appreciate that the approval of the EIA Report and approval for the proposed project could not have been published by the 7th Respondent – Appellant in the *Gazette* in terms of section 23BB(4) of the National Environmental Authority Act.

(f) Has the Court of Appeal erred in fact and in law in holding that the Appellant was in breach of a statutory duty amounting to unfairness and an abuse of power when he did not comply with gazetting the proposed project approved by the TEC?

30. In view of the reasoning contained above, which I choose not to repeat, I hold that the 7th Respondent – Appellant had acted in terms of the law in having refrained from publishing in the *Gazette* the EIA Report ("P27"). More specifically, I hold that the 7th Respondent – Appellant had acted in terms of the discretionary authority vested in him, exercised such discretion in an objective and reasonable manner and in the best interests of the State and her People, in having withheld the grant of approval for the proposed project of the Petitioner - Respondents. Thus, I hold that the finding of the Court of Appeal that the Appellant was in *'breach of a statutory duty amounting to unfairness and had abused power vested in him by law'*, is an error in both fact and law.

31. It is pertinent to note that, the Writ of Mandamus would not lie in a situation where a public functionary who is empowered by law to perform a certain function, and for such purpose been vested with discretionary authority, has exercised such authority in *good faith*, diligently, and within the realm of the purpose for which such discretionary authority has been vested in him, and decided for valid reasons not to perform a particular function which he has been empowered to perform. As held in ***Amerasinghe v. Jayathilake, Director General of Customs and Others*** *[2004] 2 Sri L R 169*, "*No person shall be compelled by mandamus to exercise his discretion one way or other if he has honestly and reasonably exercised his discretion.*" This case reflects such a situation where the 7th Respondent – Appellant has exercised the discretionary authority vested in him by section 23BB(4) of the NEA in a lawful manner. Thus, it was not possible for the Court of Appeal to have issued the Writ of Mandamus on the 7th Respondent – Appellant.

32. In this regard, it is important in my view to delve into the law relating to the management and regulation of exploitation of natural resources, which is the responsibility of the State, executed by its agent - the Geological Survey and Mines Bureau (GSMB). In this regard, the starting point is to note that natural resources such as minerals fall into the category of non-renewable resources. Though natural resources are necessary to sustain the livelihoods of people and to facilitate economic growth, global experience is that natural resources are being over-exploited and the reserves are fast diminishing.

Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others:

33. In this regard, it is important to go beyond the black letter of the law contained in the Mines and Minerals Act, and consider the responsibilities cast on the GSMB by law. Justice Dr. A.R.B. Amerasinghe in ***Bulankulama and Others v. Secretary, Ministry of Industrial Development and Others,*** has observed that *"undoubtedly, the State has the right to exploit its own resources, pursuant, however to its own environmental and development policies. … Rational planning constitutes an essential tool for reconciling any conflict between the needs of development and the need to protect and improve the environment. … Human beings are at the centre of concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature. … In order to achieve sustainable development, environmental protection shall constitute an integral part of the development process and cannot be considered in isolation from it. … due regard should be had by the authorities concerned to the general principle encapsulated in the phrase 'sustainable development', namely that human development and the use of natural resources must take place in a sustainable manner. … humankind bears a solemn responsibility to protect and improve the environment for present and future generations. … The non-renewable resources of the earth must be employed in such a way as to guard against their future exhaustion and to ensure that benefits from such employment are shared by all humankind. … ".*

Watte Gedera Wijebanda v. Conservator General of Forests and Others:

34. Justice Shiranee Tilakawardane in ***Watte Gedera Wijebanda v. Conservator General of Forests and Others,*** has observed that *"… the right of all persons to the useful and proper use of the environment and the conservation thereof has been recognized universally and also under the national laws of Sri Lanka. While environmental rights are not specifically alluded to under the fundamental rights chapter of the Constitution, the right to a clean environment and the principle of inter-generational equity with respect to the protection and preservation of the environment are inherent in a meaningful reading of Article 12(1) of the Constitution. … The Constitution in Article 27(4) of the directive principles of state policy enjoins the state to protect, preserve and improve the environment. Article 28 refers to the fundamental duty upon every person in Sri Lanka to protect nature and conserve its riches. … Correspondingly, courts in Sri Lanka, have long since recognized that the organs of state are guardians to whom the people have committed the care and preservation of the resources of the people. This recognition of the doctrine of 'public trust', accords a great responsibility upon the government to preserve and protect the environment and its resources. … The power of the state and public servants to grant or refuse licences and take suitable action for the protection and conservation of both the environment and natural resources is derived from its status as a public trustee. In this capacity state officials have a paramount duty to serve as a safeguard against private and*

commercial exploitation of common property resources, and the degeneration of the environment due to private acts. The principle of inter-generational equity and the long-term sustainability of our delicate eco-system and biological diversity vests mainly in the hands of such officials."

35. It would be thus seen that this Court has previously too observed the imperative need and the requirements of the law, for the State to;

    (a) hold natural resources in trust for the benefit of the present and future generations of this country (inter-generational equity and the public trust doctrine),

    (b) use mineral and other natural resources to achieve its developmental goals only in conformity with the principles of sustainable development,

    (c) consider environmental protection as an integral part of the development process in order to achieve sustainable development, and,

    (d) plan rationally in order to ensure reconciling the possible conflict between the needs of development and the need to protect the environment.

Protection of the Environment

36. The environment is an essential component of the planet earth on which the survival of human beings, other living animals, trees, plants and other vegetation are dependent upon. These living beings are also components of the environment. Contemporary science reveals that the environment the planet earth has been blessed with, is unique. The environment of planet earth is a seamless layer above, at and below ground level that serves as a shield protecting the entire globe, and is a blessing of the nature conferred on all living beings of planet earth. Thus, it is to be treated and used by all human beings with utmost care, with due regard to ecology, and subject to the duty of preservation, conservation and non-pollution.

37. Protection of the environment is not the responsibility of the People of any one country or a particular group of countries. Nor is it the responsibility of any one State. It is the responsibility of the entire human civilisation. I am reminded of the invaluable words of the world-renowned Naturalist, Sir David Attenborough in his documentary titled 'Life on Planet', where he states the following:

    "… the fact is that no species has ever had such wholesale control over everything on Earth, living or dead, as we now have. That lays upon us, whether we like it or not, an awesome responsibility. In our hands now lies not only our own future, but that of all other living creatures with whom we share the Earth".

38. Natural resources are a component of the environment, and are unique blessings of the nature vested in the past, present and future generations of humankind and other living beings. It is necessary to recognise that natural resources and the environment are inextricably interwoven and therefore, natural resources should be treated as environmental resources. The use of natural resources which would include minerals and other material of economic value, must be subject to the overarching duty of preservation, conservation, non-degradation and non-pollution of the environment. This duty is of utmost importance, as the long-term survival of the entire human race and other living beings are dependent upon the protection of the environment.

39. A consideration of evolving and developing internationally recognised legal norms and standards reveal the gradual emergence of the overarching legal duty for the protection of the environment as a peremptory norm of general international law (*jus cogens*). Thus, the emergence of an universal recognition that the long-term survival of the human race would be considerably dependent upon the protection of the environment. Moreover, international law has begun to recognise the interdependence and indivisibility of human dignity and environmental rights.

Use of natural resources and Transgenerational Equity

40. In terms of domestic law, nation States may possess ownership of such natural resources within their respective country. However, that ownership is subject to the recognition that the natural resources of a particular country is to be held in trust not only for the benefit of the present and future generations of that particular country, but for the benefit of all living creatures and plants of the entire planet. States may through national legislation be vested with legal authority to manage such resources and regulate their use. However, those intra-state creations which are components of the domestic written law, cannot take away the rights of the people to use such natural resources for the benefit of the entire community of living beings of this planet. Therefore, not only all persons of a particular country must be able to benefit equitably from the sustainable use of natural resources of that country, the interests of the rest of humanity and other living beings must also be taken cognisance of.

41. In the ***Advisory opinion on the Legality of the Threat or Use of Nuclear Weapons*** *(1996 ICJ Reports 241, para 29),* Judge C.G. Weeramantry, the then Vice President of the International Court of Justice has expressed the view that *"the existence of the general obligation of States to ensure that activities within their jurisdiction and control*

respect the environment of other States or of areas beyond national control is now part of the corpus of international law relating to the environment". States must bear in mind possible collateral adverse impacts arising out of the use of natural resources on the entire global environment and particularly on the common good of the entire human race. Thus, the need to respect the use of natural resources of one country are subject to their transnational border implications. Therefore, the use of the natural resources of one country must be subject to ***transgenerational equity***, which arises out of the impact the exploitation of the natural resources of one country may have on the global environment and the lives of human beings of other countries. The use of natural resources subject to *transgenerational equity* is a matter to be regulated by International Law.

Use of natural resources and Intra-generational Equity

42. At national level, in Sri Lanka, while Article 27(14) of the Constitution requires the State to **protect, preserve and improve the environment for the benefit of the community**, Article 27(2)(e) necessitates the State to ensure **equitable distribution** among all citizens of the **material resources** of the community and the social product, **so as best to subserve the common good**. Article 27(2)(f) provides that the State has a duty to establish **a just social order in which the means of production, distribution and exchange are not concentrated and centralised in the State, State agencies, or in the hands of a privileged few**, **but are dispersed among, and owned by, all the People of Sri Lanka**. Furthermore, paragraph (f) of Article 28 of the Constitution recognises the principle that **the exercise and enjoyment of rights and freedoms are inseparable from the performance of duties and obligations**, and that accordingly it is the duty of every person in Sri Lanka **to protect nature and conserve its riches**.

43. As held in ***Ravindra Gunawardena Kariyawasam v. Central Environmental Authority and others*** *(cited above)*, these principles are "*not wasted ink in the pages of the Constitution*" and are "*a living set of guidelines which the State and its agencies should give effect to*". In that case, Justice Prasanna Jayawardena has observed the need for the State to ensure **an equitable division of prosperity**. Therefore, the use of natural resources including mineral resources and the opportunity to benefit from them must not only be subject to the protection of the environment, it should be **permitted by the State to be used in an equitable manner among all People of Sri Lanka**. Thus, Sri Lanka's domestic law recognises the need to ensure the use of its natural resources in a manner that is not harmful to the environment, and in an equitable manner for the benefit of all People of the country. Therefore,

it must be appreciated that Sri Lanka's law recognises the legal principle of **intra-generational equity.**

44. **Intra-generational equity is the equitable right of all persons of the present generation to access and benefit from *inter-alia* the natural resources of the country, while recognising the need and providing for *inter-generational equity*.** In as much as *inter-generational equity* is a component of the right to equality recognised by Article 12(1) of the Constitution, ***intra-generational equity* is yet another manifestation of the fundamental right to equality**.

45. Therefore, the Executive branch of the State entrusted with the task of having custody of natural resources and managing and regulating the use of natural resources, cannot exercise the powers of management and regulation of the use of natural resources, to usher benefit only to a chosen few. The Executive has the duty to permit all people to gain equitable access to natural resources, and to ensure that the People as a whole are benefitted from such riches. The Executive must also ensure that individuals of the community are benefitted from such riches in an equitable manner.

Adherence to Intra-generational Equity and the duty of the GSMB

46. Therefore, if the GSMB were to act on an unsolicited proposal presented by one project proponent and unilaterally grant a mineral exploration licence to such party, and thereafter grant a commercial mining licence to such party without affording an opportunity to other interested parties to compete with the project proponent and offer competitive and better terms to the State in consideration for permitting such other party to mine for a particular mineral which exists at a particular site, that in my view would be inconsistent with the principle of *intra-generational equity*. It would thus be in violation of Article 12(1) of the Constitution.

47. All persons who possess a commercial interest to mine for minerals, should be treated in an equal manner, and be publicly informed of the availability of a particular site for mining for a particular mineral. All parties interested in mining for the extraction of such mineral should be placed on a level playing field, and be permitted to compete amongst each other for the limited opportunities available to engage in commercial mining for the relevant mineral. The party that offers the most favourable terms to the State and guarantees compliance with legal and regulatory standards relating to environmental protection should be awarded the mining licence.

48. It would thus be seen that the 7th Respondent – Appellant has conducted himself in respectful obedience with the afore-stated principles, and therefore to allege that he acted against the law would be a travesty of justice. For a court to direct him to act contrary to these principles would be inconsistent with the law.

Economic development and the exploitation of natural resources

49. Particularly at a time when the State is attempting under trying circumstances to steadfastly emerge from a serious economic disaster and financial turmoil, economic policy-makers may be strained to recommend that natural resources such as minerals be exploited to achieve rapid economic benefit and an increase in the gross domestic product (GDP). However, such harnessing of what Sri Lanka has been blessed with, must be carried out in accordance with the principles contained in the Constitution, standards and procedures laid down in law, and in consonance with the legal principles enshrined in the above-mentioned judgments of this Court. Learned Justices have laid down those principles and made observations contained in such judgments for the purpose of ensuring inter-generational equity, preservation of the riches of the nature for the benefit of future generations, ensuring the protection of the environment, and achieving sustainable development.

50. This judgment highlights additionally the legal requirement to adhere to intra-generational equity. In this regard, it may be noted that the Sri Lanka Sustainable Development Act, No. 19 of 2017 has been enacted by the Parliament for this very purpose.

51. The four-fold delicate balance between;

    (i) achieving rapid economic development with the engines of growth being the People of Sri Lanka including the private sector,
    (ii) achieving sustainable development through effective management and regulation of the use of natural resources,
    (iii) ensuring environmental protection, and
    (iv) respecting intra-generational and inter-generational equity, may be difficult to achieve, but, is an absolute necessity.

    These four criteria are no longer governance related prudential policies, but legal requirements recognised by the Constitution.

52. In this regard, it is pertinent to be reminded of the observations of Judge C.G. Weeramantry contained in his separate opinion in the case of ***Hungary v. Slovakia***

(Gabcikovo-Nagymaros Project Case) decided by the International Court of Justice (ICJ), wherein he has observed that, the needs of development can be reconciled with the protection of the environment, using the ancient traditions followed in Sri Lanka. Referring to an excerpt from a sermon preached in approximately 223 B.C. by Arahat Mahinda Thero to King Devanampiya Tissa as recorded in chapter xiv of Sri Lanka's ancient chronicle *"The Mahawansa"* ["*O great King, the birds of the air and the beasts have as equal a right to live and move about in any part of the land as thou. The land belongs to the people and all living beings; thou art only the guardian of it.*"], Judge Weeramantry has while accentuating the first principle of environmental law - the principle of trusteeship of resources of the earth, observed that while the land belongs to the people and to all other living beings, the King or the ruler is only the guardian of it. Thus, recognising the public trust doctrine, he envisages that natural resources of the State are to be protected and preserved for the benefit and best interests of the present, as well as for the future generations.

53. The Supreme Court has also recognised that the violation of that sacred duty which the State and the leaders of this country hold in trust on behalf of the public and the country itself is an infringement of Article 12(1) of the Constitution. This is observable from several judgments of this Court including *Bulankulama v. Secretary to the Ministry of Industrial Development, Watte Gedara Wijebanda v Conservator General of Forests and Others, Sugathapala Mendis and Another v. Chandrika Kumaratunga and Others [2008] 2 Sri LR 339,* and *Environmental Foundation Limited and Others v. Mahaweli Authority of Sri Lanka and Others [2010] 1 Sri LR 1.*

54. It would also be pertinent to note that, in ***M.C. Mehta v. Kamal Nath and Others****, [1996] SC 711,* the Supreme Court of India has held the following:

> *"… The State is the trustee of all natural resources which are by nature meant for public use and enjoyment. Public at large is the beneficiary the sea-shore, running waters, airs, forests and ecologically fragile lands. The State as a trustee is under a legal duty to protect the natural resources. These resources meant for public use cannot be converted into private ownership. The esthetic use and the pristine glory of natural resources, the environment and the eco-systems of our country cannot be permitted to erode for private, commercial or any other use unless the court finds it necessary, in good faith, for the public good, and in public interest to encroach upon the said resources."*

Conclusion

55. In view of the findings of this Court with regard to the questions in respect of which *Special Leave to Appeal* had been granted, I am of the view that the Judgment of the Court of Appeal cannot stand, and is therefore set aside. The Petition presented to the Court of Appeal by the Petitioner – Respondents must stand dismissed.

56. Accordingly, this Appeal is allowed.

57. In the circumstances of this case, no order is made with regard to costs.

Judge of the Supreme Court

P. Padman Surasena, J.

I agree.

Judge of the Supreme Court

Mahinda Samayawardena, J.

I agree.

Judge of the Supreme Court