

The Failure of Guardians: Mount Lavinia Artificial Beach and Public Trust Doctrine

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Abstract - Sri Lanka has been identified as one of the most visited tourist destinations due to environmental and the archaeological background. The projects that have been carrying out by the government for the purpose of restoring the environment should entertain the process which is prescribed by the legal system of the country. The applicable legal authorities for the Mount Lavinia artificial beach project are the Coast Conservation Act No 57 of 1981, the National Environmental Act, and the constitution which has laid down the process applicable to the projects which may adversely affect the environment. Carrying out EIA(Environmental Impact Assessment) is the yardstick to estimate the environmental impact which will result from the project. The power of exercising the EIA is with the director-general of the coast conservation. The sovereignty of the people is exercised by the executive, judiciary, and the legislature. Fails to carry out a prescribed process by the authorities violate the sovereignty of people thus results in the violation of public trust. As per the possible remedies filling a fundamental rights violation, writ application, or can apply for an injunction. This research will examine the relationship between the environmental impact assessment and the public trust doctrine relating to the Mount Lavinia artificial beach project and how the project has violated the public trust by not conducting an EIA thus violating the sovereign power of people. The research is carried out to identify the existing legal framework of the study area, to understand the practical issues in developing the project, and to provide recommendations as remedies to curb such violations. The black letter approach has been

used to identify and clarify the status of the project.

Keywords - Environmental Impact Assessment, Public Guardianship, Public Trust Doctrine

I. INTRODUCTION

As per the constitution, it is a fundamental duty of every citizen to protect nature and conserve its riches. Even though safeguarding natural resources is declared as a fundamental duty under the constitution of Sri Lanka, at the same time it can be considered as a responsibility of the consumers of natural resources and human beings as a part of nature. Sri Lanka As an island, it is important to pay considerable attention to the coastal conservation when launching projects which can adversely affect the coastal environment.

Recently Sri Lanka has been started several artificial beach development projects in west coastal areas such as Calido, Agulana, and Mount Lavinia in order to control the coastal erosion of respective areas. This research is mainly focused on the legal aspect which governs the artificial beach project in Mount Lavinia, the practical issues of the project, and possible remedies to curb the current and future violations in this area of study. The law requires carrying out an environmental impact assessment prior to the conduct of development projects in environmentally sensitive areas. The decision-making power of coastal related matters lies with the authorities of central environmental and coastal conservation. In the abuse of these designated powers results in violation of the public trust doctrine impliedly protected by the constitution of Sri Lanka.

II. RESEARCH PROBLEM

Do the responsible authorities have acted within their capacity to protect the environmental rights in developing Mount Lavinia artificial beach?

III. METHODOLOGY

The research is based on a qualitative study. This Research paper complies with the mixed research method. Primary and secondary sources are used as a black-letter approach to identify and clarify loopholes and issues of the study area and as empirical approach expert information has been gathered by a senior environmentalist was used in order to examine and understand the current status of the project. All the existing literature including legislations, judicial decisions, juristic writing, and other writing has been used as secondary data.

IV. DISCUSSION AND ANALYSIS

Environmental Impact Assessment

EIA is a process of assessing the socio-environmental effects of a proposed development project which likely to alter the physical nature of the environment. The main object of conducting an EIA is to examine, analyze, and assessment of positive and negative impact of the planned activity. Environmental impact assessment is used to make decisions more transparent and to mitigate the negative impact of the relevant development project and enhance the potential positive impact.

The act has interpreted the EIA as a written analysis of the prediction of environmental consequence of a proposed development activity under the Interpretation Section 42 of the Coast Conservation Act (CCA). This section states that a development activity including the avoidable and unavoidable adverse environmental effects, alternatives which can be less harmful to the coastal zone along with the reasons to reject such alternatives and irreversible or irretrievable commitments of

resources required by the proposed development activity.

Analysis

The project of the creation of an artificial beach in Mount Lavinia can be taken as an amalgamation of two components. The main component is the creation of the artificial beach in Mount Lavinia and the dependent component is the sand integration from the Ratmalana area with the purpose of creating the artificial beach.

Sand filling project

The main project is governed under the Department of Coast Conservation and Coastal Resources Management (DCC&CRM) since it is a development activity carried out on the coastal area which results in the project proponents to adhere to the Coast Conservation Act No 57 of 1981 and National Environmental Act No 47 of 1980. According to Section 42 of the Coast Conservation Act(CCA) the term “development activity” has been interpreted as any activity likely to alter the physical nature of the coastal zone in any way including the construction of buildings and works, the deposit of wastes or other material from outfalls, vessels, or by other means, the removal of sand, coral, shells, natural vegetation, seagrass or other substances, dredging and filling, land reclamation and mining or drilling for minerals, but does not include fishing.

Further, the Act has laid down certain ground rules to protect the coastal area of the country and has prescribed a permit procedure to be attended before conducting a development activity within the coastal area. CCA Section 14(1) submits that any person cannot engage in a development activity other than the activities prescribed within the coastal area except under the authority of a permit issued on behalf of the director. Further in favor of the sustainable development Section 14(2) of the Act has authorized the minister to prescribe certain categories of development concerning the long term stability, productivity, and environmental

quality of the coastal zone which is allowed without a permit issued under subsection (1).

After such authorization Section 16(1) of the said Act acquiesces that upon the application for a permit to conduct a development activity within the coastal zone the director shall require the applicant to furnish an environmental impact assessment (EIA) concerning the said activity and the duty to comply for the requirement is within the applicant. The EIA process firstly mandated for the large scale development projects and environmental sensitive areas by the Gazette no. 772/22 of 1933. It also prescribes the type of projects which require to conduct an EIA. Further elaborates if there are less adverse environmental impacts initial environmental examination (IEE) can be prescribed instead of an EIA.

The creation of an artificial beach undoubtedly alters the physical nature of the coastal zone. Thus, according to the CCA, it mandates a permit in order to carry out this project. However, even though the objective of this project is to protect the environment or the project provides nourishment as a soft solution to the beach, it does not justify the fact that the project does not require an EIA. It exists within the discretion of the Director-General to demand an EIA for the development activities. The EIA report is the authentic document to determine whether the project will result beneficially or detrimental to the environment. The effect on the environment due to a proposed project cannot be predicted before the process of EIA. Thus, the lack of furnishing the requirement of the EIA report evidently results in abuse of discretionary power which is given to the Director-General of the DCC&CRM. Noncompliance with such given power amounts to abuse of power.

The Director-General has an absolute power to prescribe projects which shall not require an EIA report, whether the EIA or the IEE should be conducted and authorize a project to be conducted after furnishing the EIA or IEE. Thus,

the Act seems to have given high discretionary power to the Director-General (Ranasinghe and Gunawardena, 2020)

In the process of the EIA main actors are the project proponent and the Project Approving Agency (PAA). The PAA is the administrative authority that guides the project proponent in the EIA process and to obtain the approval.

The fact that coast conservation being the both project proponent and the project approving agency violates the natural justice principle “nemo iudex in causa sua” (no one is judge of his own case). The project proponent and the deciding authority cannot be the same person whether such project is environmental adverse or not. It violates the main rationale of implementing such a procedure which is

to determine the environmental impact. In the process of obtaining the permit from the Director-General of the DCC&CRM for a project conducting within the coastal zone the Director-General of the coast conservation should require the applicant to furnish an EIA relating to the said project. The purpose of conducting an EIA is to figure out the environmental impact which will result due to the process of the project.

In the process of implementing a soft solution such as creating an artificial beach, the engineers and the related authority should consider where all sand will be collecting due to the waves of the beach. However, it has predicted that the area was “Wallawatta” but it is doubtful. It proves the fact that the project was conducted without proper expert knowledge.

Further, it can be identified that the project has not been conducted in to a proper time scale and as a result of that sand has been caused to erosion due to the high tide in May to September. According to the DCC&CRM they have suggested a soft solution in order to prevent coastal erosion. But this had affected adversely resulting in the great portion of filled sand had gone away back to the ocean. Thus,

resulted in a complete change of the inborn environmental beauty of the beach. The long identified tourism destination has been changed and the fisheries industry has caused a detrimental effect due to this creation of artificial beach. The result after the nourishment project is not better what appeared prior to the nourishment identified as the No action alternative principle.

The sand mining project

The depending component of the Mount Lavinia Beach nourishment project is the subordinate activity which was conducted to procure the required sand for the project. According to the report of the sand nourishing projects made by the DCC&CRM, it necessitates 150,000 cubic meters of sand for the project and it has been extracted from the sea in Ratmalana. This area at the sea in Ratmalana was 2 KM ahead from the coastal area and is famous for a vast amount of biodiversity which was created by a coral reef lagoon with four reef sites (Lack of Environmental and Social Considerations in Mt. Lavinia Beach Development Project – Ejustice, 2020). Further, this area is most important for the fishermen to engage in their fishing activities as this place provides a sufficient fish catch for the fishermen. However, due to the sand dredging which was carried out between the areas of Palagala and Degalmada reefs into the depth of 15–20 feet, it can be predicted that the reef lagoon will be filled by the sand up to the 1st reef which runs parallel to the coastal area from Mount Lavinia to Colombo (Lack of Environmental and Social Considerations in Mt. Lavinia Beach Development Project – Ejustice, 2020). As a result of this, the reef will be destroyed and the biodiversity surrounding the reef lagoon will be disappeared.

As this sand mining project adjacent to a reef lagoon, this can be considered as a highly environmentally sensitive project, and also the dredging activities were carried from 2Km from the coastal area (outside of the coastal zone). Thus, the project should be conducted regarding the laws that are provided by the

National Environmental Act No.47 of 1980(NEA). According to Section 23AA of the National Environmental (Amendment) Act N0.56 of 1988, it has provided that all the prescribed projects that are decided to carry out is required to obtain the approval from an appropriate Project Approving Agency (PAA). That duty of PAA as mentioned by Section 23BB of the amended Act is to require the authorities to provide an Initial Environmental Examination (IEE) or an Environmental Impact Assessment (EIA) including all the particulars required by the Minister.

However, the commentators enunciate that responsible authorities for the sand mining project which correlate with the main project of Mount Lavinia beach nourishment has not conducted a required EIA or IEE under the NEA which could be deemed as an absolute violation of the law.

Public trust doctrine

As it was consolidated by the above-mentioned facts the Mount Lavinia beach nourishing project is a total violation of the Coast Conservation Act and the National Environmental Act can be verified as a total abuse of powers by the authorities. According to Article 3 of the 1978 constitution, the sovereignty is in the people and it is inalienable. The governmental authorities are representatives who are appointed by the people as trustees for a prescribed period of time to hold the powers on behalf of the general public and as their representatives in the parliament. However, if these governmental authorities use their powers ultra virus it involves the violation of the Constitution and the rule of law. The doctrine of Public Trust was introduced as a remedying process for the people in a contravention of their power. However, the Constitution of Sri Lanka has not expressly recognized the Public Trust Doctrine (PTD) and courts generally refer to the Articles of 3,4 and 12(1) of the constitution in applying PTD regarding the situations where the governmental authorities breach the trust of

the general public. Basically, the Supreme Court in Sri Lanka apply the PTD other than the abuse of discretionary public power, upon an exploitation of the natural and national resources for private benefit and in a violation of the sovereignty of the people (Samararatne, 2010)

Focusing on the limb of exploitation of the natural resources *Bulankulama and six others v. Ministry of Industrial Development and seven others [2000]* (Eppawala case) case Amarasinghe J elaborates the exact scope of the PTD in the law of Sri Lanka by explaining its connection between the Article 3 of the Constitution. It affirms that as the sovereignty is in the people and it is inalienable, holders of the governmental powers who are considered as the trustees by the general public, should exercise their powers solely upon the interest of the people. Further Amarasinghe J explains governmental authorities should act as guardians and protect the natural resources by relying on the approach adopted by Weeramantry J in the case of *Hungary V Slovakia, [1997]* which provides that natural resources are needed to be used by the authorities in trust of the public.

Further, the use of PTD for protection on natural resources which was identified in the Eppawla case was also adopted in *Watte Gedara Wijebanda V Conservator General of Forests and Others, [2009]*. Through this case, Shiranee Tilakawardena J. has clarified the connection between PTD, sustainable development, and intergenerational equity in taking decisions relating to natural resources. Moreover, the government has an obligation to protect and conserve the riches of the natural resources which are for the purpose of the public use from exploitation. As a part of this obligation, the government should make policies with a long term view relating to the useful utilization of the natural resources by protecting the interests of the general public and the intergenerational use of those resources. Further, it also mentioned in the said case that

by adhering to the PTD state should pay its attention to the sustainable development demands through protecting, managing, and regenerating those resources.

Violation of the Public Trust Doctrine

Sovereignty of the people shall be exercised through the legislature, executive, and the judiciary and all the said actors should act on behalf of the people for their benefit. The Mount Lavinia beach is a natural resource that belongs to every citizen as a whole. Authorities cannot conduct any act which will adversely affect the said common natural resource. If the authoritative actors are violating the law that will result in the violation of the public trust.

In the Eppawala case through the Guide for Implementing the EIA Process, No. 1 of 1998 (P20), issued by the Central Environmental Authority has mentioned the purposes of environmental impact assessment (EIA) are “to ensure that developmental options under consideration are environmentally sound and sustainable and that environmental consequences are recognized 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 environmental consequences and take actions that protect, restore, and enhance the environment”.

Case further states that “if they were to comply with the law they would have conducted an EIA” explains that lack of an EIA report and the proposed agreement seeks to circumvent the law and its implementation is biased in favor of the Company as against the members of the public.

As per the National Environment Act, the governmental authorities should require to conduct EIA prior to the carrying out of the mass development projects. However, there are a number of development projects that were conducted by the governmental authorities in Sri Lanka without satisfying the required

qualification of EIA, and the affected parties by the environmental impacts through these projects have been filled cases in the respective courts. Among them, the *Centre for Environmental Justice & Ports Authority & 07 Others., [2017]* (Colombo Port City Case) and *Center for Environmental Justice and 3 others V Secretary, Ministry of Mahaweli Development and Environment and 3 others, [2016]* (Uma Oya project case) can be named as two main case which took the advertence of the public. In the Uma Oya project case, the main consideration was the absence of a standard EIA before the carryout of the project which amounts to a complete violation of the National Environmental Act. Thus, it can be identified as an abuse of powers by the authorities and as a result of that, the project causes several adverse impacts to the environment and the residents of the areas of Badulla and Bandarawela.

The port city development project was also conducted without a proper EIA and the governmental authorities who are responsible for the project have given the approval irrespective of the adverse impacts to the 575 acres of the coastal area opposite to the port city. Thus, the natural resources of the country which belong to the general public have been exploited by the arbitrary use of the powers by the governmental authorities.

The Mount Lavinia sand mining project also a definite violation of law as in the above-mentioned projects which were conducted without holding a proper EIA. In the meaning of the principle of trusteeship over natural and national resources state should be trustee over the natural resources on behalf of the people. If the authorities are violating the law and abuse the powers of the people it involuntarily violates the principle of trusteeship (Samararatne, 2010). The existing remedies for the Violation of Public Trust Doctrine and Fundamental rights of the people are filing a Fundamental Right case or Writ Case. The other available remedy is to bring an injunction order

to compel the party to refrain from carrying out the specific project.

The Centre for Environmental Justice (CEJ) has filed a court case against the entire Mount Lavinia Artificial Beach project holding the number of PCA/WRT/128/2020 in Court of Appeal against the Coast Conservation Department (DCC&CRM), Central Environmental Authority (CEA), Minister of Environment, Marine Environment Protection Authority (MEPA) and Attorney General based on sand pollution and failed sand filling in Mount Lavinia without following the due procedure. And also under this petition, CEJ seeks to grant a Writ of Mandamus based on eight points under the environmental degradation caused by carrying out this project (Press Release—CEJ Filed Legal Action on Mt. Lavinia Sand

Filling and Beach Pollution CA/WRT/128/2020 – Ejustice,2020). Moreover, the state is needed to be act upon the public benefit according to the role of trusteeship. Nevertheless, when the government exploits the natural resources through these so-called development activities it is clear that the public authorities neglect their obligation to act upon the benefit of the public. Thus, the abandonment of the public benefit can be used as a criterion to measure that the governmental authorities have violated the public trust.

V. CONCLUSION

Sri Lanka is an island surrounded by the Indian Ocean and it owns the world most attractive tourist destinations. Mount Lavinia is one of highly attracted coastal area which has a scenic beauty and natural benthos. An artificial beach project in Mount Lavinia is carried out by the Central Environmental authority to prevent the coastal erosion of Mount Lavinia beach. Due to the risk of environmental degradation enact the Coast Conservation Act and the National Environmental Act to protect and foster the coastal nature. Acts recommend Environmental impact assessment should be carried out prior to the projects of large scale and environmental

sensitivity area based projects. Sand pumping is the available soft solution for coastal erosion with minimum environmental harm. Authority used the soft solution method of sand pumping from the nearest sand mines by dredging to the coastal area. Even though the project is carried out for environmental protection the authority must be carried out proper EIA to examine and analyze the positive and negative impacts of the project. Most of the large scale projects carried out in environmental sensitivity areas in Sri Lanka did not carry out proper Environmental Impact Assessments and later on arises unexpected negative impacts. Central Environmental Authority is the responsible party for the environmental-related projects carried out within Sri Lanka because it is their duty to act according to the prescribed procedures and laws. Failure to perform their duty arise the responsibilities. Under the Supreme law of Sri Lanka sovereignty vested upon the people and is exercised by the parliament via the authorities. The sovereign power of the people is transferred to the authorities with the trust and failure to act or act in a wrongful manner will automatically breach the public trust. Protection of natural resources in its riches are not only a responsibility of authorities but also citizen. But the decision making, managing powers are entrusted with the authority. Mount Lavinia artificial beach project highlighted the despotic decisiveness of the authorities and failure to carried out proper EIA is a breach of the trust of citizens or the violation of the public trust doctrine. The main fact this research proposed is that the Central Environmental Authority and coast conservation authority should highly consider the fact that conducting a proper EIA prior to a project and try to enhance the positive impacts while mitigating the negative impacts unless the authorities violate the trust of the people and constitute the violation of Public Trust Doctrine.

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ACKNOWLEDGMENT

We wish to express our grateful thanks to Mr. Jagath Gunawardena, a veteran Lawyer and an Environmentalist for dedicating his valuable time and sharing his ideas on the research topic and also for the endless encouragement to make this research fruitful.

Also, debt of gratitude is granted to Ms. Asanka Edirisinghe, Lecturer, Kotelawala Defence University for the immense support and guidance that gave throughout the effort that made to complete the research.

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