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

1. Ranabahuge Chithrasiri,
   Ambagahawatta,
   Kalawana.
2. Udakanda Kankanamalage Karunarathna,
   Ambagahawatta,
   Kalawana.
   Petitioners

CASE NO: CA/38/2016/WRIT

Vs.

1. National Gem and Jewellery Authority,
   No.25, Galle Face Terrace,
   Colombo 3.
   And 7 Others
   Respondents

Before: Mahinda Samayawardhena, J.

Counsel: Nuwan Bopage for the Petitioners.
Indula Ratnayake, S.C., for the 1st-5th and 7th Respondents.
Nandapala Wickramasuriya for the 6th Respondent.

Argued on : 18.05.2018

Decided on: 31.05.2018

Samayawardhena, J.

The Petitioners filed this application seeking to quash the decision of the 1st Respondent National Gem and Jewellery Authority to issue the Gem Mining Licence to the 6th Respondent in respect of the land known as *Dodamgahapelessa*. Pending determination of the Petitioners' application, the validity periods of the 1st and 2nd licences lapsed and the 3rd licence (X21) has now been issued.

Before the 1st licence was issued, admittedly, a formal inquiry has been held by the 1st Respondent with the participation of the Applicant 6th Respondent and the opposing Petitioners. It is not the complaint of the Petitioners that the inquiry was conducted in an unreasonable or unlawful manner *per se*. Their complaint is that the decision taken after the inquiry to issue the Gem Mining Licence to the 6th Respondent is perverse.

There is no dispute that National Gem and Jewellery Authority Act, No. 50 of 1993 repealed the previous Act, namely, State Gem Corporation Act, No. 13 of 1971, but section 54 of the new Act provided *inter alia* that every rule and by-law made under the repealed Act and was in force on the day immediately preceding the appointed date and which are not inconsistent with the provisions of new Act shall be deemed to be rules and by-laws made under the new Act.

The by-laws under the name of "State Gem Corporation by-laws, No. 1 of 1971" made in terms of section 21 of the repealed Act and published in the Government Gazette No. 14, 989/8 dated 23.12.1971 (X5), and also the circular dated 29.06.2007 issued under the hand of the Chairman of the 1st Respondent Authority

(X6) spell out the procedure to be adopted by the officials concerned in issuing Gemming Licences.

No. 8(2) of the aforesaid by-laws reads as follows:

> *No licence shall be granted to any person unless-*
>
> *a) he himself owns the land; or*
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> *b) he has obtained the consent of so many of other owners as to ensure that the applicant and such other consenting owners together own at least two-thirds of the land in respect of which the application has been made.*

This is reiterated in the circular X6 as well (vide in particular page 3 thereof under "Special Matters to be mindful at the Inquiry") where it is stressed that unless two-thirds share is established no licence shall be issued.

Admittedly the Applicant 6th Respondent is not the owner of the land. He has taken the land on lease for the sole purpose of gem mining from certain individuals claiming to be the co-owners of more than two-thirds of the land. According to the circular X6, the Applicant need not necessarily be the owner of the land, and a lessee can also apply for a licence provided the other conditions are fulfilled. That is not an issue before this Court.

Both parties do not have paper title to the land (except some very recent Deeds) and they basically claim title on inheritance.

According to the pedigree of the 6th Respondent unfolded at the inquiry, the original owner of the land *Dodamgahapelessa* was N.V. Appuhamy and the 6th Respondent took leasehold rights to the land from the heirs of N.V. Appuhamy.

However it is interesting to note that the 6th Respondent does not explain the most important question of how N.V. Appuhamy became the original owner of the land *Dodamgahapelessa*.

At the inquiry the 6th Respondent seems to have produced the pedigree accepted by the District Court in a former partition case No. 9390/P filed to partition a totally different land named as *Mahagederawatta* where N.V. Appuhamy was accepted as the original owner. However that does not prove even remotely that the same N.V. Appuhamy who owned *Mahagederawatta* owned *Dodamgahapelessa* (which is the land in respect of which Gem Mining Licence was sought) as well.

When that central question was raised at the argument before this Court, the answer of learned counsel for the 6th Respondent was that the said N.V. Appuhamy figures in the pedigree of the Petitioners as well. In order to substantiate that position, the attention of the Court was drawn to paragraph 2 of the plaint of the partition action (X2) filed by the Petitioners subsequent to the inquiry before the 1st Respondent Authority.

The position of the Petitioners at the inquiry as well as in X2 had been that the said N.V. Appuhamy is one of the three original owners of the land and not the sole owner—vide paragraph 8 of the written submissions of the Petitioners tendered at the inquiry marked X10(i) and paragraph 2 of X2. If that position is accepted by the 6th Respondent, he cannot claim rights for two-thirds of the land from the heirs of N.V. Appuhamy.

In short, both parties have tendered two different pedigrees at the inquiry, and I would hasten to add that the Petitioners have tendered different pedigrees at different times.

In the decision X11 (also marked as 1R8) taken after the inquiry, the Chairman of the 1st Respondent Authority candidly admits that contradictory positions have been taken up by both parties regarding original owners of the land *Dodamgahapelessa*. Nevertheless, he says that despite those contradictory positions as to original owners, (a) as the Applicant 6th Respondent has established his pedigree through the partition action No. 9390/P and (b) the Petitioners claim rights only for undivided one-thirds of the land, the 1st Respondent Authority decides to issue the licence to the 6th Respondent (subject to the 6th Respondent depositing one-thirds share of the ground share of the value of all gems found on the land).

I have no hesitation to conclude that the 1st Respondent Authority manifestly erred on facts when it came to the crucial conclusion that the 6th Respondent's chain of title was proved by the pedigree established in the former partition case. The accepted pedigree of the former partition case may probably prove the devolution of title of the intestate estate of N.V. Appuhamy. But by no stretch of imagination does it prove N.V. Appuhamy was the original owner of the land known as *Dodamgahapelessa* which is totally unconnected to the land partitioned in the partition case, which is *Mahagederawatta*. Therefore the finding (a) above in X11 is palpably erroneous.

Learned State Counsel appearing for the 1st-5th and 7th Respondents in paragraph 12 of the statement of objections and the corresponding affidavit state that "*in any event during the inquiry the Petitioners failed to establish that they had an entitlement to a two third share (2/3 share) of the subject land-Dodamgahapalassa*."

The finding (b) above in X11 is also on the same basis.

Learned counsel for the 6th Respondent also during the course of argument stated that a party who has only less than one-thirds share of the land such as the Petitioners cannot object to the issuance of the Gem Mining Licence, and further went on to say that such a party has no *locus standi* to challenge the decision of the Authority by way of a prerogative writ.

I am unable agree with this line of argument.

I must straightaway say that at the inquiry there was no burden on the Petitioners to prove anything. Conversely, it was incumbent on the part of the Applicant 6th Respondent to satisfy the 1st Respondent Authority that he together with other consenting owners own at least two-thirds of the land. The fact that the Petitioners came out with different pedigrees at different times is beside the point. Even if there were no objections, the 1st Respondent could not have issued the Gem Mining Licence over the counter unless and until it is satisfied that the Applicant together with other consenting owners own at least two-thirds of the land.

According to the by-laws and the circular which I referred to earlier, it is the duty of the 1st Respondent Authority to give publicity about the application for Gemming Licence in respect of a land of which the Applicant is not the sole owner by way of notices affixed on the land, at the Grama Seva Office, Post Office, Divisional Secretary's Office etc. and call for objections if any for the granting of such a licence. There is no restraint that those who object shall have a claim for two-thirds share of the land. The

objector who has no burden to prove can raise that the Applicant does not have two-thirds share and not *vice versa*.

Hence finding (b) of X11 is also plainly erroneous.

Regarding the second part of the argument of learned counsel for the 6th Respondent about *locus standi* all what I have to say in short is that frontiers of writ jurisdiction have now advanced accommodating even a stranger who does not have "personal interest" but has "sufficient interest" to invoke the writ jurisdiction of this Court because of the element of "public interest". *(Wijesiri v. Siriwardene[1], Perera v. Central Freight Bureau of Sri Lanka[2], Jathika Sevaka Sangamaya v. Sri Lanka Ports Authority[3], Premadasa v. Wijewardena[4], Vasudeva Nanayakkara v. Governor, Central Bank of Sri Lanka[5])* I am satisfied that the petitioners have sufficient interest to file this application.

I am conscious of the fact that the pedigree dispute cannot be solved by this Court in the exercise of writ jurisdiction. Nor can it be solved by the 1st Respondent Authority at an inquiry to issue a Gem Licence. *"The adjudication of disputed title is not within its purview". (Weerasinghe v. Podimahatmaya[6])* When there is a pedigree dispute in respect of a land Gem Mining Licence is sought, the 1st Respondent Authority, in my view, cannot issue a licence.

In *Weerasinghe v. Podimahatmaya (supra)* the Respondents who were admittedly co-owners of the entire land objected to the Gem

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[1] [1982] 1 Sri LR 171
[2] [2006] 1 Sri LR 83
[3] [2003] 3 Sri LR 146
[4] [1991] 1 Sri LR 333
[5] [2009] BLR 41
[6] [1994] 3 Sri LR 230 at 233

Mining Licence being issued to the Petitioner (who had acquired the leasehold rights of three-fourths share of the land) on the basis that the Respondents have acquired prescriptive title to the co-owned land. There cannot be any dispute that proof of prescriptive title by one co-owner against other co-owners is an uphill task. Nonetheless, the Gem Corporation on the strength of that objection refused to issue the Gemming Licence. The Petitioner came before this Court seeking certiorari and mandamus against that order but this Court refused that application on the premise that when title is disputed the Corporation was not wrong to have exercised its discretion against the Petitioner in view of the by-laws referred to earlier.

There is a misconception that even if the decision is patently erroneous, writ of certiorari does not lie, if the deciding authority has erred on facts and not on law and the decision making process was flawless.

Whilst conceding that the jurisdiction to issue writs vested in this Court by Article 140 of the Constitution is supervisory and not appellate, I must state that "error of law on the face of the record", which is a well-accepted ground for certiorari, can be made use of to quash perverse administrative or judicial decisions based on patent misapplication or misdirection of facts.

An error of facts can also be an error of law.

By way of analogy, a question of facts can also be a question of law. In *Collettes Ltd. v. Bank of Ceylon*[7], a Divisional Bench of the Supreme Court held that "*Where there is or is not evidence to support a finding, is a question of law.*" And also it was held in the

[7] [1982] 2 Sri LR 514

same case that "*Given the primary facts, the question whether the tribunal rightly exercised its discretion is a question of law.*" It was held in *Sithamparanathan v. People's Bank*[8] that "*Failure to properly evaluate evidence or to take into account relevant considerations in such evaluation is a question of law.*" A similar conclusion was reached in *Fonseka v. Candappa*[9] where it was decided that: "*It becomes a question of law where relevant evidence bearing on a fact has not been considered or irrelevant matters have been given undue importance or the conclusions rest mainly on erroneous considerations or is not supported by sufficient evidence.*"

Coming back to the main matter under consideration, it was held in *Gunasekera v. De Mel, Commissioner of Labour*[10] that: *"A tribunal which has made findings of fact wholly unsupported by evidence or which it has drawn inferences wholly unsupported by any of the facts found by it will be held to have erred in point of law. The concept of error of law includes the giving of reasons that are bad in law or inconsistent, unintelligible or it would seem substantially inadequate. It includes also the application of a wrong legal test to the facts found taking irrelevant considerations into account and arriving at a conclusion without any supporting evidence. If reasons are given and these disclose that an erroneous legal approach has been followed the superior Court can set the decision aside by certiorari for error of law on the face of the record. If the grounds or reasons stated disclose a clearly erroneous legal approach the decision will be quashed. An error of law may also be held to be apparent on the face of the record if the inferences and decisions reached by the tribunal in any given case are such as no reasonable*

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[8] [1989] 1 Sri LR 124
[9] [1988] 2 Sri LR 11
[10] (1978) 79(2) NLR 409 at 426

body of persons properly instructed in the law applicable to the case could have made."

In *Health & Co (Ceylon) Ltd v. Kariyawasam*[11] the decision of the arbitrator was quashed by way of certiorari on the basis that: *"No reasonable man could have...reached that conclusion on the evidence placed before him. The finding here is so completely contrary to the weight of evidence that one can only describe it as perverse."*

The conclusion was almost the same in *Wijerama v. Paul*[12] where the decision was quashed by certiorari *inter alia* on the premise that: "*A tribunal which draws an inference wholly unsupported by the primary facts errs in point of law.*"

In *Virakesari Ltd v. Fernando*[13] is yet another case where an application for certiorari was allowed *inter alia* when it was found that: *"The omission of the first respondent to take into consideration the evidence touching the charge of having instigated a go-slow is....a misdirection amounting to an error of law on the face of the record."*

In *Mudanayake v. Sivagnanasunderam*[14] the decision was not allowed to stand as it was the opinion of the Court that: *"certiorari lies not only where the inferior Court has acted without or in excess of its jurisdiction but also where the inferior Court has stated on the face of the order the grounds on which it had made it and it appears that in law those grounds are not such as to warrant the decision to which it had come."*

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[11] (1968) 71 NLR 382 at 384
[12] (1973) 76 NLR 241 at 258
[13] (1963) 66 NLR 145 at 150-151
[14] (1951) 53 NLR 25 at 31

For the aforesaid reasons, I allow the application of the Petitioners with costs and quash the decisions X11 and X21 of the 1st Respondent Authority based on complete misdirection of facts by way of certiorari on the ground of "error of law on the face of the record".

Judge of the Court of Appeal