

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

In the matter of an Application for Order in the nature of Writs of Certiorari and Mandamus under Article 140 of the Constitution.

M. A. I. M. P. Kumara
Thalkatuwa Watte, Dummalasooriya.

Petitioner

Vs.

Case No. C. A. (Writ) Application 425/2013

1. S. M. L. Chandrasiri
Divisional Secretary,
Divisional Secretariat, Mahawewa.
2. M. Kingsley Fernando
District Secretary,
District Secretariat, Puttalam.
3. Provincial Environmental Authority
(North-Western Province)
Maligawa, Kurunegala.
4. Saman Senanayake
Director,
Provincial Environmental Authority
(North-Western Province),
Maligawa, Kurunegala.
5. Geological Survey and Mines Bureau
No. 569, Epitamulla Road, Pitakotte.

Respondents

Before: Janak De Silva J.

Counsel:

Ikram Mohommed P.C. with Thisath Wijayagunawardhena P.C. and Gihan Liyanage for the Petitioner

Maithree Amerasinghe SC for the Respondents

Written Submissions tendered on:

Petitioner on 03.08.2018 and 03.05.2019

Respondents on 12.03.2019

Argued on: 22.02.2019

Decided on: 09.08.2019

Janak De Silva J.

The Petitioner claims to be the co-owner (5/12th share) of the land named Munhena situated at Thimbirigaswela more fully described in the schedules to deeds marked P1, P3 and P5. He started a fish farming project on the said land with the consent of the other co-owners for which he applied and obtained a clearance certificate for a period of three months from the 3rd and 4th Respondents (P6). The clearance certificate has been issued for lot 5 of plan no. 1521 (P7) drawn by Licensed Surveyor Indratissa Kotambage.

The Petitioner claims that in order to construct the water ponds for inland fishing, sand had to be removed from the land and in early September 2009 he applied to the 5th Respondent for an "Industrial Mining Licence" with the recommendation from the predecessor of the 1st Respondent (P8) who had stated in item 2 thereof that the land does not belong to the State or a State institution.

The Petitioner was issued a Mining Licence initially on 29.09.2010 for the period 29.09.2010 to 28.12.2010 which has apparently been extended from time to time.

A dispute appears to have arisen with regard to the title of the land to which the Mining Licence has been granted although the Petitioner claims that this was due to his refusal to sell the sand mined from the said land at a very low price to the supporters of a politician in the area named Dayasritha Tissera.

The predecessor of the 1st Respondent by letter dated 11.07.2011 (P10) wrote to the Director, Land Settlement Department informing that a dispute as to the title of land named Munhena situated in No. 520 Madagoda village has arisen as a permit bearing no. 5848 has been issued to one Bandappuhamy while a deed of transfer bearing no. 2919 (P3), which is a document relied on by the Petitioner to establish his co-ownership, is there in the name of one Kumuduni Mallawaarachchi. A request was made to settle this land in order to establish its title. The said letter also refers to a request made to the Surveyor Puttlam to confirm whether the said land is state land. The Mining Licence granted to the Petitioner was apparently not extended due to this letter (P10) been copied to the 5th Respondent with the request to stop further action until the issue of title is resolved [paragraph 19 of the petition].

The Director, Land Settlement Department has by letter dated 18.08.2011 (P11) replied to P10 stating that there has been no settlement made in relation to Madagoda village and that their records do not indicate any steps taken to settle the village referred to as Thimbirigawela referred to in deed of transfer no. 2919 (P3). Accordingly, he has requested that further inquiries in that regard be made from the Land Commissioners Department which issued permit bearing no. 5848.

On 15.09.2011 (P15) the clearance certificate granted to the Petitioner earlier (P6) was extended by a further three (3) months.

The Surveyor Puttalam has in his report dated 30.11.2011 (P12) informed that it is not possible to indicate whether the land in dispute is state land or not as it is situated in an unsurveyed area. The Land Commissioner by letter dated 07.09.2011 (P13) informed the 1st Respondent that the permit may be rejected based on the report of the Surveyor Puttalam (P12) presumably on the basis that the said permit is not for the land in dispute.

The Petitioner claims that the 1st Respondent did not vary his earlier decision (P10) despite the above communications from the Land Settlement Department, Survey General's Department and the Commissioner General of Lands. Hence the Petitioner by letter dated 21.12.2011 (P16) requested the 1st Respondent to inform the reasons for preventing the project of the Petitioner.

The 1st Respondent by letter dated 27.12.2011 (P17) informed that the Ministry of Lands and Land Development has requested the Land Settlement Department to settle the title within four months and that further steps will be taken thereafter.

However, the Petitioner claims that due to representations made by him based on the report of the Puttalam Surveyor (P12) and the above communication from Land Settlement Department, the 5th Respondent extended the Mining Licence granted to the Petitioner from 27.01.2012 to 26.07.2012 (P9) and accordingly he resumed operations of his project.

Thereafter the 1st Respondent by letter dated 21.02.2012 (P18) copied to the Regional Manager of the 5th Respondent directed the Petitioner to immediately stop the mining until the exact identification of the land based on the deeds and plans submitted by the Petitioner is ascertained and that his Mining Licence can be cleared after the settlement of the land. Thereafter the Director General of the 5th Respondent by letter dated 28.02.2018 (P19) informed the Petitioner that a decision has been taken to temporary suspend the mining in relation to his Mining Licence in terms of section 44(f) of the Geological Survey and Mines Bureau Act No. 33 of 1992 until the issues relating to the title of the land is settled and directed the Petitioner to stop mining activity forthwith.

The Petitioner then by letter dated 05.03.2012 (P20) brought the conduct of the 1st Respondent to the attention of the Secretary, Ministry of Public Administration who by letter dated 15.03.2012 (P21) requested the 1st Respondent to inform the Secretary through the 2nd Respondent the basis on which approval is not granted for the project. The 2nd Respondent by letter dated 10.04.2012 (P22) informed the Secretary, Ministry of Public Administration that the 1st Respondent had acted on the decision of the District Agricultural Committee.

The Petitioner continued to make representation by pointing out that there has been a suppression of facts. The Director General of the 5th Respondent by letter dated 22.05.2012 (P26) informed the 1st Respondent that according to the legal division of the 5th Respondent the Petitioner had title to the land in issue and called for a report from the 1st Respondent as to why the title of the Petitioner is disputed. As the 1st Respondent did not respond to the said letter the 5th Respondent issued the Mining Licence from 26.07.2012 to 26.01.2013 (5R10). This has from time to time being extended up to 29.11.2013 by 5R13(a) to 5R13(d) and has now lapsed. The Petitioner did not submit a further application for renewal of the licence.

The Petitioner also obtained an Environmental Protection Licence (EPL) dated 18.02.2013 (P29) for the project which was valid up to 13.08.2013.

The complaint of the Petitioner is that while he was continuing with the project on or about 29.09.2013 he received letter dated 26.09.2014 (P31) from the 4th Respondent referring to a letter dated 03.09.2013 (P33) addressed to him by the 1st Respondent which indicated that a decision had been taken by the District Agricultural Committee to prohibit the Petitioner from mining on the land in dispute and as such the EPL issued to the Petitioner cannot be extended.

The Petitioner has sought the following relief:

- (a) Writ of certiorari quashing the decision of the 1st and 2nd Respondents and/or the District Agricultural Committee of Puttalam reflected in P33 and P32 to prohibit the Petitioner mining sand in the land,
- (b) Writ of certiorari quashing the decision of the District Forest and Environmental Committee of Puttalam reflected in P31 and P32 to prohibit the Petitioner mining sand in the land,
- (c) Writ of certiorari quashing the decision of the 3rd and 4th Respondents reflected in P31 not to extend/renew the Petitioner's Environmental Protection Licence for the project,
- (d) Writ of mandamus directing the 4th Respondent to extend/renew the Petitioner's Environmental Protection Licence for the project.

The position of the Respondents is that the land referred to in the deeds submitted by the Petitioner when obtaining the license from the 5th Respondent as well as the 3rd Respondent was the land named as "Munhena watta" situated at Thimbirigaswela, Madampe falling within the jurisdiction of the Madampe Divisional Secretariat but that it transpired that the Petitioner was at material times carrying out mining activities on a land situated in the "Madagoda Grama Niladari wasama" falling within the jurisdiction of the Mahawewa Divisional Secretariat and as such the land on which the Petitioner is carrying out mining activities does not belong to the Petitioner. There were also complaints received from the public about the harm caused to the environment as a result of the mining activities of the Petitioner.

Accordingly, the Respondents state that the District Agricultural Committee meeting held on 14.02.2012 (1R4) a decision was taken to stop the mining activity and consequently P18 and P19 was dispatched. At a further meeting held on 20.11.2013 (1R8) it was revealed that the land on which the Petitioner is carrying out mining activities is state land.

Necessary Parties

The Respondents have raised an objection to the writs of certiorari sought claiming that necessary parties have not been made Respondents and as such this application must be dismissed in limine. They point out to the fact that the members of the District Agricultural Committee and District Forest and Environmental Committee of Puttalam have not been made Respondents and as such the writs of certiorari sought cannot be granted.

The Supreme Court in *Wijeratne (Commissioner of Motor Traffic) v. Ven. Dr. Paragoda Wimalawansa Thero and 4 others* [(2011) 2 Sri.L.R. 258 at 267] held that the first rule regarding the necessary parties to an application for a writ of certiorari is that the person or authority whose decision or exercise of power is sought to be quashed should be made a respondent to the application. If it is a body of persons whose decision or exercise of power is sought to be quashed each of the persons constituting such body who took part in taking the impugned decision or the exercise of power should be made respondent. The failure to make him or them

respondents to the application is fatal and provides in itself a ground for the dismissal of the application in limine.

The Petitioner is seeking writs of certiorari quashing the decision of the 1st and 2nd Respondents and/or the District Agricultural Committee of Puttalam reflected in P33 and P32 and the quashing the decision of the 1st and 2nd Respondents and/or the District Agricultural Committee of Puttalam reflected in P33 and P32. The Petitioner submits that these Committees do not have the power to take such decisions. However, before deciding the *vires* of the said decisions, the persons who took the decision must be given a hearing as required by the rules of natural justice. All the members of the said two committees who took part in the impugned decision have not been made Respondents. As such the application is liable to be dismissed in limine on that ground alone.

Disputed Questions of Fact

Our courts have consistently held that it will not exercise writ jurisdiction where the facts are in dispute [*Thajudeen v. Sri Lanka Tea Board and another* (1981) 2 Sri.L.R. 471]. The Supreme Court has in *Dr. Puvanendran and another v. Premasiri and two others* [(2009) 2 Sri.L.R. 107, 2009 BLR 65] held that the Court will issue a writ only if the major facts are not in dispute and the legal result of the facts are not subject to controversy.

The rationale is that where the major facts are in dispute and the legal result of the facts is subject to controversy it is necessary that the questions should be canvassed in a suit where parties would have ample opportunity of examining the witnesses so that the Court would be better able to judge which version is correct.

In fact, in *Wijenayake and others v. Minister of Public Administration* [(2011) 2 Sri.L.R. 247] this Court held that the material furnished suggest that a title/boundary dispute is agitated before the Kurunegala District Court and as such finality (subject to appeal) of title and boundary of the land in dispute lies in the action filed in the District Court of Kurunegala and that these are all disputed facts which cannot be decided in a writ court.

In this case there is a dispute as to the identity of the land which is interconnected to the question of title that has arisen between the State and the Petitioner. This entails disputed questions of fact.

It is true that there has been earlier communication indicating that the land in dispute is not State land. However, a mistake of fact cannot be the basis of a legitimate expectation [*Rootkin v. Kent County Council* (1981) 1 W.L.R. 1186, *Vasana v. Incorporated Council of Legal education and Others* (2004) 1 Sri.L.R. 154].

The Petitioner has tendered a further affidavit to Court dated 11th June 2015 to which is annexed marked as X3 a certified copy of the proceedings in D.C. Puttalam Case No. 4234/L which according to the Petitioner is an action against the Hon. Attorney General seeking a declaration of title in respect of the land, which forms part of the subject matter of this application [paragraph 4 of the said affidavit]. Hence the question of title is now before the appropriate Court which better placed to determine that issue. This is also a ground to refuse exercising the discretionary power of judicial review.

For all the foregoing reasons, this application is dismissed with costs.

Judge of the Court of Appeal