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

Wathukarage Shantha Merril Kumara,
Gonakumbura, Ratnapura.
Appellant

**SC/MISL/04/2014**
**02/08/මැණික්/06/2014**

Vs.

1. National Gem and Jewellery Authority,
   No. 25, Galle Face Terrace,
   Colombo 03.
2. Amitha K. U. Gamage,
   Chairman/Chief Executive Officer,
   No. 25, National Gem and Jewellery
   Authority, Galle Face Terrace,
   Colombo 03.

2G. Viraj De Silva,
Chairman/Chief Executive Officer,
National Gem and Jewellery Authority,
Macksons Tower,
Alfred House Gardens,
Colombo 03.

3. N.K.G.K. Nemmawatta,
   Director General,
   No. 25, National Gem and Jewellery
   Authority, Galle Face Terrace,
   Colombo 03.

3E. Janaka Udaya Kumara,
Director General,
National Gem and Jewellery Authority,
Macksons Tower,
Alfred House Gardens,
Colombo 03.

4. N.P. Samaratunga,
Deputy Director (formerly Senior
Regional Manager),
National Gem and Jewellery Authority
Regional Office,
Ratnapura.

4C. H.P. Karunathilake,
Deputy Director Enforcement and
Regional Development,
National Gem and Jewellery Authority
Regional Office,
Ratnapura.

5. B.M.U.D. Basnayake,
Secretary,
Ministry of Environment and Renewable
Energy, 'Sampathpaya',
No. 82, Rajamalwatta Road,
Battaramulla.

5F. J.M. Thikala Jayasundara,
Secretary,
Ministry of Industries,
No. 73/1, Galle Road,
Colombo 3.

6. L. Kiriella,
Legal Officer,

Ministry of Mahaweli Development and Environment,
'Sampathpaya'
No. 82, Rajamalwatta Road,
Battaramulla.

7. D.A. Ranjith,
   1/7, 1st Floor,
   Uktennadeniya,
   Veralupe, Ratnapura.
8. Ranjith Kumarasiri Ratnayake,
   No. 748, Vinil Menik,
   Kahawatta.

Respondents

Before: Hon. Chief Justice Murdu N.B. Fernando, P.C.
Hon. Justice A. L. Shiran Gooneratne
Hon. Justice Mahinda Samayawardhena

Counsel: Anuruddha Dharmarathne with G.S. Kumudini for the Appellant.

Yuresha De Silva, D.S.G., for the 1st to 6th Respondents.

Murshid Maharoof with Ishfan Uvais for the 7th and 8th Respondents.

Argued on: 18.07.2024

Written Submissions on:

By the Appellant on 08.03.2016
By the 7th and 8th Respondents on 07.02.2017
By the 1st to 6th Respondents on 02.09.2024

Decided on: 07.02.2025

**Samayawardhena, J.**

**Factual matrix**

The 7th and 8th Respondents made a joint application to the National Gem and Jewellery Authority (the 1st Respondent) seeking a gemming licence in terms of section 15(3) of the National Gem and Jewellery Authority Act No. 50 of 1993 in respect of the land known as *Bogahawatta* in the district of Ratnapura on the basis that they collectively hold more than two-thirds share of the land. It is common ground that in accordance with No. 8(2) of the State Gem Corporation By-Laws No. 1 of 1971 published in the Gazette Extraordinary No. 14,989/8 dated 23.12.1971 marked A23, a person applying for a gemming licence shall establish that he himself owns the land or he has obtained the consent of so many of other owners as to ensure that he and such other consenting owners together own at least two-thirds of the land in respect of which the application has been made. The Petitioner objected to the application on the ground that the 7th and 8th Respondents do not hold more than a two-thirds share of the land, but he does.

After inquiry, the 1st Respondent Authority, having determined that neither the Petitioner nor the 7th and 8th Respondents had established entitlement to a two-thirds share of the land, dismissed both applications and communicated its decision to the Petitioner by A25 dated 03.05.2013 and to the 7th and 8th Respondents by A26 of the same date.

According to section 15(8) of the Act, when the 1st Respondent Authority refuses such an application, the dissatisfied party may appeal to the Secretary to the line Ministry within thirty days of the refusal. However, instead of following this procedure, both parties appear to have appealed against the decision of the 1st Respondent Authority to the same Authority. Subsequently, the Director General of the 1st Respondent

Authority (the 3rd Respondent), sitting on appeal against the said decision, decided to issue the licence to the 7th and 8th Respondents on the basis that they had established a two-thirds share of the land and communicated this decision to the Petitioner and the 7th and 8th Respondents by A27 dated 06.01.2014.

Aggrieved by this order, the Petitioner appealed to the Secretary to the Ministry of Environment (the 5th Respondent), who by order marked A29 dated 12.09.2014 affirmed the decision of the Director General of the 1st Respondent Authority. The Petitioner filed this appeal before this Court against the decision of the 5th Respondent in terms of section 15(11) of the Act.

At the argument before this Court learned counsel for the Petitioner-Appellant challenged the decisions of the 3rd and 5th Respondents both on the merits and procedural impropriety. In relation to the latter, learned counsel submitted that if an application made to the 1st Respondent Authority is refused, in terms of section 15(8) of the Act, a right of appeal is available to such party to the Secretary to the line Ministry, and in this instance, the appeal made to the Director General of the 1st Respondent Authority against the decision of 1st Respondent Authority is bad in law. The counsel argued that the decision of the Director General in allowing the appeal of the 7th and 8th Respondents is *ultra vires* and made without authority. The subsequent order of the 5th Respondent affirming the decision of the Director General has no force or avail in law.

I have no hesitation in accepting the argument of the learned counsel for the Petitioner-Appellant. The Director General of the 1st Respondent Authority cannot sit on appeal against a decision of his own Authority and reverse it.

Learned Deputy Solicitor General appearing for the 1st Respondent has tendered to Court the inquiry proceedings which led the 3rd Respondent to reverse the decision of the 1st Respondent Authority with the motion dated 29.08.2024. According to the documents filed with that motion it appears to me that the 3rd Respondent has not held an inquiry but has reversed the decision of the 1st Respondent Authority on the recommendations of the Legal Officer of the 1st Respondent Authority dated 03.01.2014. The first paragraph of the said document dated 03.01.2014 reveals that the 7th and 8th Respondents had appealed against the decision of the Authority to the Legal Branch relying on the same material presented at the original application. (බෝගහවත්ත - ඉහත නම් සඳහන් ඉඩමට 1. ඩබ් ශාන්ත මෙරිල් කුමාර 2. ඩි එච් රංජිත්, ආර් කේ කුමාරසිරි රත්නායක යන දෙපාර්ශවය විසින්ම බලපත්‍ර අයදුම්කර තිබියදී ප්‍රාදේශිය කාර්යාලය මගින් පරීක්ෂණයක් පවත්වා දෙපාර්ශවයේම අයදුම්පත්‍ර ප්‍රතික්ෂේප කිරීම හේතුවෙන් දෙවන බලපත්‍ර ඉල්ලුම්කාර පාර්ශවය නීති අංශය වෙත ඉදිරිපත් කරන ලද අභියාචනයට අනුව නීති අංශය මගින් පරීක්ෂණයක් පවත්වා දෙපාර්ශවයේම ලිඛිත දේශණ භාරදෙන ලෙස උපදෙස් ලබාදෙන ලදි. එහිදී පළමු බලපත්‍ර අයදුම්කරු නැවත ලිඛිත දේශණ භාරදෙන ලද අතර දෙවන බලපත්‍ර අයදුම්කරු ප්‍රදේශිය කාර්යාලයේ පරීක්ෂණයකදී ලබාදෙන ලද ලිඛිත දේශණම සලකා බලන ලෙස දැනුම් දෙන ලදි.)

There are no inquiry notes indicating the presence of any fresh material. According to the last document attached to that motion, written by the Legal Officer to the 7th and 8th Respondents, the 7th and 8th Respondents have sent a petition, not an appeal. (<u>ගෝණකුඹුර පිටකුඹුර පිහිටි බෝගහවත්ත නමැති ඉඩමේ පෙත්සම් පරීක්ෂණය -</u> උක්ත ඉඩමට නිකුත් කර ඇති බලපත්‍රය සම්බන්ධයෙන් ඔබ විසින් ඉදිරිපත් කර ඇති පෙත්සම හා සම්බන්ධවයි.) A copy of the said petition has not been tendered to Court for the Court to understand the precise nature of the appeal tendered by the 7th and 8th Respondents which culminated in the 3rd Respondent reversing the decision of the Authority. It is abundantly clear that reversing the decision of the 1st Respondent Authority by the 3rd Respondent in favour of the 7th and 8th Respondents has been done completely outside the purview of appellate procedure laid

down by the Act. The decision of the Director General is *ultra vires* and, therefore, a nullity. Consequently, there is no valid decision in the eyes of the law for the 5th Respondent to affirm.

**A decision made *ultra vires* is a nullity**

If a decision is *ultra vires*, it is a nullity for all intents and purposes. It is void, not voidable. Everything that stems from a decision which is a nullity also automatically becomes a nullity without further ado.

Lord Denning in *Macfoy v. United Africa Co. Ltd.* [1961] 3 All ER 1169 at 1172 articulates this notion in his own inimitable style in this way:

> *If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse.*

This passage was referred to with approval by Justice G.P.S. de Silva (as he then was) in *Rajakulendran v. Wijesundera* [1982] 1 Sri Kantha LR 164 at 168-169, Justice Sharvananda (as he then was) in *Sirisena v. Kobbekaduwa, Minister of Agriculture and Lands* (1978) 80 NLR 1 at 182, and Justice Sripavan (as he then was) in *Leelawathie v. Commissioner of National Housing* [2004] 3 Sri LR 175 at 178 and in many more judgments.

Professor Paul Craig in *Administrative Law*, (3rd Edition, Sweet & Maxwell 1994) at page 456 takes the view that the invalid acts are retrospectively void:

> *As we have seen, this means that the decision-maker never had the power to make the decision, and that, therefore, the decision could have no effect at all. This is encapsulated by the idea that decisions made outside jurisdiction are retrospectively null or invalid.*

Professor William Wade and Professor Christopher Forsyth in *Administrative Law* (11th Edition, 2014) echo the same sentiments when they state at page 249 that "*since a void administrative act is, and always has been, non-existent in law, a finding that an act is void will generally be retrospective*."

Although this general principle vitiates everything which flows from the original *ultra vires* decision, it is customary for Courts to issue formal orders quashing such subsequent decisions, albeit redundantly.

Professor De Smith in *De Smith's Judicial Review* (8th Edition, 2018) at page 1011 under the discussion on the Court's discretion in granting and withdrawing remedies opines:

> *There can be no purpose in purporting to keep alive a decision which is devoid of all content. Subject to there being some purpose in obtaining the decision of a court, if the court comes to the conclusion that a decision is totally invalid and of no effect, it will normally readily be prepared to grant a declaration to this effect. Strictly speaking there is nothing to be achieved in the case of a decision which is a nullity in making a quashing order. You cannot quash something which is already a nullity. However, in practice adopting a pragmatic approach and so avoiding becoming involved in issues as to the quality and status of an invalid administrative decision, the court will be prepared to make a quashing order without resolving the complex issue as to whether or not this is strictly necessary. This is subject to the case being one in which the court would in any event*

*have granted relief, if this were necessary, in the form of a quashing order.*

**Presumption of validity and *ultra vires* decisions**

The presumption of validity deviates from the general principle that there is no need for an order of the Court to set aside a decision which is a nullity because such a decision together with follow up decisions is automatically null and void without any intervention of Court.

Even if a decision is *ex facie* ultra vires, the question of whether it is automatically null and void or requires a formal pronouncement by the Court has now become a matter of contention. This is especially so in view of the presumption of validity, which recognizes that all official decisions are presumed to be valid until set aside or otherwise held to be invalid by a Court of competent jurisdiction. This is to protect the entitlement of the public to rely upon the official decisions and to prevent individuals from taking the law into their own hands.

Clive Lewis in *Judicial Remedies in Public Law* (2nd Edition, London Sweet & Maxwell, 2000) at page 150 states "*The concept of ultra vires and voidness are deceptively simple in appearance but have given rise to theoretical and practical problems*." Wade at page 248 states "*an absolute approach to invalidity, although principled and resting upon high authority, poses conundrums that need to be understood in order to be resolved*." De Smith at page 230 says "*Behind the simple dichotomy of void acts (void ab initio, invalid, without legal effect) and voidable acts (valid until held by a court to be invalid) lurk terminological and conceptual problems of excruciating complexity*." Wade at page 249 stating that "*we see the conundrum that theoretically void administrative acts are functionally voidable*" gives an example at page 250 that "*A common case where an order, however void, becomes valid for practical purposes is where a*

*statutory time limit expires after which its validity cannot be questioned. The statute does not say that the void order shall be valid; but by cutting off legal remedies it produces that result.*"

There are decisions of the House of Lords which vigorously support the view that for an apparent validity to be a nullity there must be judicial intervention and it cannot happen as a matter of course. Lord Radcliffe in *Smith v. East Elloe RDC* [1956] AC 736 at 769 states:

> *An order, even if not made in good faith, is still an act capable of legal consequences. It bears no brand of invalidity upon its forehead. Unless the necessary proceedings are taken at law to establish the cause of invalidity and to get it quashed or otherwise upset, it will remain as effective for its ostensible purpose as the most impeccable of orders.*

This point of view was adopted by the House of Lords in *Hoffman-La Roche and Co. v. Secretary of State for Trade and Industry* [1975] AC 295 at 365 where Lord Diplock stated:

> *Under our legal system, however, the courts as the judicial arm of government do not act on their own initiative. Their jurisdiction to determine that a statutory instrument is ultra vires does not arise until its validity is challenged in proceedings inter partes either brought by one party to enforce the law declared by the instrument against another party or brought by a party whose interests are affected by the law so declared sufficiently directly to give him locus standi to initiate proceedings to challenge the validity of the instrument. Unless there is such challenge and, if there is, until it has been upheld by a judgment of the court, the validity of the statutory instrument and the legality of acts done pursuant to the law declared by it are presumed.*

Lord Diplock at page 366 imposed further restrictions when he stated that the presumption of validity can be rebutted only before a court of competent jurisdiction by a party having *locus standi* to do so.

> *I think it leads to confusion to use such terms as "voidable," "voidable ab initio," "void" or "a nullity" as descriptive of the legal status of subordinate legislation alleged to be ultra vires for patent or for latent defects, before its validity has been pronounced on by a court of competent jurisdiction. These are concepts developed in the private law of contract which are ill-adapted to the field of public law. All that can usefully be said is that the presumption that subordinate legislation is intra vires prevails in the absence of rebuttal, and that it cannot be rebutted except by a party to legal proceedings in a court of competent jurisdiction who has locus standi to challenge the validity of the subordinate legislation in question. All locus standi on the part of anyone to rebut the presumption of validity may be taken away completely or may be limited in point of time or otherwise by the express terms of the Act of Parliament which conferred the subordinate legislative power, though the courts lean heavily against a construction of the Act which would have this effect (cf. Anisminic Ltd. v. Foreign Compensation Commission [1969] 2 A.C. 147). Such was the case, however, in the view of the majority of this House in Smith v. East Elloe Rural District Council [1956] A.C. 736, at any rate as respects invalidity on the ground of latent defects, so the compulsory purchase order sought to be challenged in the action had legal effect notwithstanding its potential invalidity. Furthermore, apart from express provision in the governing statute, locus standi to challenge the validity of subordinate legislation may be restricted, under the court's inherent power to control its own procedure, to a particular category of persons affected by the subordinate legislation, and if none of these persons chooses to*

*challenge it the presumption of validity prevails. Such was the case in Durayappah v. Fernando [1967] 2 A.C. 337 where on an appeal from Ceylon, although the Privy Council was of opinion that an order of the Minister was ultra vires owing to a latent defect in the procedure prior to its being made, they nevertheless treated it as having legal effect because the party who sought to challenge it had, in their view, no locus standi to do so.*

De Smith at page 231 on the dichotomy of acts from "void and voidable" to "lawful and unlawful" suggests that a formal pronouncement of a Court is helpful for the aggrieved party's own safety:

*Again, although an ultra vires decision was ineffective against the party aggrieved, he might need, for his own protection, a formal pronouncement of a court setting the decision or declaring it be void. Meanwhile, he could be enjoined from disregarding the decision until its validity had been finally determined. If he took no judicial proceedings at all within a prescribed statutory time limit, the void decision could become impregnable as if it has been valid in the first place.*

However, Wade at page 249 referring to the presumption of validity comments thus:

*The House of Lords held in 1975 that there is a presumption of validity in favour of a disputed order until set aside by the court. And this is so even where temporary obedience to the disputed order would cause irreparable loss to a party. But their Lordships have since been held that this presumption was 'an evidential matter at the interlocutory stage' and involved no 'sweeping proposition that subordinate legislation must be treated for all purposes as valid until set aside'. (R v. Wicks [1998] AC 92 at 116 by Lord Hoffmann) 'There*

> *is no rule that lends validity to invalid acts'. (Boddington v. British Transport Police [1999] 2 AC 143 at 174) The presumption of validity, therefore, is temporary and procedural only; it does not determine the validity in law of the disputed act.*

The effect of the presumption is that the impugned decision is presumed to be good in law until it is pronounced to be unlawful, but after which it regarded as never having had any legal effect at all.

Lord Denning in *Lovelock v. Minister of Transport* (1980) 40 P. & C.R. 336 at 345 was disconcerted about this conundrum revolving around void and voidability:

> *Assuming that he did fail to take into account a relevant consideration, the result is that, in point of legal theory, his consent was 'void'. It was made without jurisdiction. It was a nullity. Just as if he had failed to observe the rules of natural justice. But, in point of practice, it was 'voidable'. It seems to me to be a matter of words – semantics – and that is all. I have got tired of all the discussion about 'void' and 'voidable'. The plain fact is that, even if such a decision as this is 'void' or a 'nullity', it remains in being unless and until some steps are taken before the courts to have it declared void.*

By virtue of the presumption of validity, a formal pronouncement of nullity is necessary with regard to the initial *ultra vires* decision. While it is desirable to have a formal judicial pronouncement regarding subsequent actions or decisions, such a pronouncement is not mandatory. Nonetheless, prudence dictates that a formal pronouncement be made, depending on the unique facts and circumstances of each case.

For example, if X has been invalidly removed from an office and Y has been appointed in his place, or if the licence issued to X has been invalidly cancelled and allocated to Y, X cannot disregard the invalid decisions and

carry on as if nothing has happened. Conversely, if those invalid decisions made in respect of X are declared null and void by formal pronouncements by Court, in practice, the decisions made in favour of Y cannot have any effect notwithstanding that no such formal pronouncement by Court has been made. This is because, once the initial decision is declared a nullity, there is no room to accommodate Y. In such an event, Y's remedy lies against the wrongful decision maker, and not against X.

**In the backdrop of the presumption of validity, what is the status of the subsequent acts taken on the basis of the first void act?**

Clive Lewis in *Judicial Remedies in Public Law* at page 154 states "*The need to establish illegality says nothing about the remedy that follows once the invalidity has been established. Nor does it necessarily say anything about the legal status of the act in the period between the decision and the court ruling that the act is unlawful.*"

In this regard, Wade at page 252 says:

> *The theory of the second actor holds that the validity of these second acts does not depend upon any presumption of validity or judicial exercise of a discretion to refuse a remedy to an applicant in particular proceedings. It depends upon the legal powers of the second actor. Did that second actor have power to act even though the first act was invalid?*

In *Boddington v. British Transport Police* [1998] 2 WLR 639, Lord Steyn cited with approval the theory of the second actor as advanced by Professor Christopher Forsyth in "*The Metaphysic of Nullity, Invalidity, Conceptual Reasoning and the Rule of Law*", in Christopher Forsyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord: Essays on Public Law in Honour of Sir William Wade* (OUP 1998), as follows:

> *I accept the reality that an unlawful byelaw is a fact and that it may in certain circumstances have legal consequences. The best explanation that I have seen is by Dr. Forsyth who summarised the position as follows in "The Metaphysic of Nullity, Invalidity, Conceptual Reasoning and the Rule of Law", at p. 159:*
>
> *"it has been argued that unlawful administrative acts are void in law. But they clearly exist in fact and they often appear to be valid; and those unaware of their invalidity may take decisions and act on the assumption that these acts are valid. When this happens the validity of these later acts depends upon the legal powers of the second actor. The crucial issue to be determined is whether that second actor has legal power to act validly notwithstanding the invalidity of the first act. And it is determined by an analysis of the law against the background of the familiar proposition that an unlawful act is void."*

If this theory is applied to the facts and circumstances of this case, it becomes evident that the Director General did not possess the jurisdiction to set aside the decision of the 1st Respondent Authority made under section 15(1) of the Act. Consequently, his decision is invalid in law. As a result, the parties are left with the decision of the 1st Respondent Authority, which refused the applications of both parties on the ground that neither had established a two-thirds share of the land. The 5th Respondent does not have the authority to *ex mero motu* review the decisions of the 1st Respondent Authority without a valid appeal filed by a dissatisfied party against such a decision. In this case, neither party appealed against the decision of the 1st Respondent Authority to the 5th Respondent. The petitioner's appeal to the 5th Respondent was against the decision of the Director General. The 5th Respondent affirmed the decision of the Director General, not that of the 1st Respondent Authority.

It is trite law that a party cannot confer jurisdiction where none exists. Accordingly, this emerging exception has no application to the present case.

**Collateral attack against invalid decisions**

The validity of a decision can be attacked directly or indirectly. However, this should be allowed with caution. As a general rule, the decision maker must be heard before the decision is struck down on exceeding powers or any other ground. An order made contrary to the principles of natural justice is outside the jurisdiction and void. This is applicable not only to administrative bodies but also to Courts. Illegality cannot be rectified by another illegality. Therefore, collateral attacks on decisions should not be encouraged.

Wade is not against collateral attacks on void decisions when he says at page 235:

> *The validity of the act or order may be challenged directly, as in proceedings for certiorari to quash it or for a declaration that it is unlawful. But it may also be challenged collaterally, as for example by way of defence to a criminal charge, or by way of defence to a demand for some payment. As a general rule, the court will allow the issue of invalidity to be raised in any proceedings where it is relevant. Where some act or order is invalid or void, that should be able to be raised in any proceedings which depend on the validity of that act.*

Clive Lewis at page 154 states:

> *A challenge to the validity of an act may be by direct action or by way of collateral or indirect challenge. A direct action is one where the principal purpose of the action is to establish the invalidity. This*

> *will usually be by way of an application or judicial review or by use of any statutory mechanism for appeal or review. Collateral challenges arise when the invalidity is raised in the course of some other proceedings, the purpose of which is not to establish but where questions of validity become relevant. The invalidity of subordinate legislation may be raised as a defence in criminal proceedings where an individual is charged with an offence created by that subordinate legislation. A public authority may seek the assistance of the court to enforce a demand for payment, or to recover possession of land, and the invalidity of the acts of the public body may be raised as a defence. Or, an individual may bring a tortious action against a public authority which may claim it is acting lawfully in the exercise of statutory powers. The individual may in turn allege that the public authority is acting unlawfully as its actions are ultra vires.*

An appeal against convictions for bribery before a statutory tribunal may succeed on the ground that the members of the tribunal were invalidly appointed, so that the tribunal was without jurisdiction. The judgment of the Supreme Court in *Ranasinghe v. Bribery Commissioner* (1962) 64 NLR 449 where it was held that "*the conviction of the appellant in this case and the orders made against him are null and inoperative, on the ground that the persons composing the Bribery Tribunal which tried him were not lawfully appointed to the Tribunal*" was affirmed on appeal by the Privy Council in *Bribery Commissioner v. Ranasinghe* (1964) 66 NLR 73.

However, Wade accepts at page 237 that "*There are a number of situations in which the court will not permit an order to be challenged in collateral proceedings. The most obvious is where such proceedings are expressly excluded by statute. Other cases flow partly from the familiar distinctions based on jurisdiction, but partly also they are exceptions to the general rule stated above, made for reasons of convenience.*"

Clive Lewis at page 155 states:

> *Even if invalidity could potentially be established there are circumstances where the court will not intervene to quash the act. Rules governing standing, and the time-limits for bringing applications for judicial review, may prevent a particular individual from establishing the invalidity of an act. In addition, in judicial review proceedings the courts have a wide discretion to refuse a remedy. The courts have recognised that the consequences of retrospective nullity, with its requirement that the invalid act be treated as if it never existed, are on occasions too draconian. Administrative decisions may, for example, have been relied upon by third parties.*

**Futility**

Learned Deputy Solicitor General for the respondents submitted that, consequent to the appeal decision (which this Court now holds *ultra vires*), the 7th and 8th respondents were issued the gemming licence, which has since lapsed. It was therefore argued that, as this appeal has now become academic, it should be dismissed on the ground of futility. I am not inclined to agree with this submission.

It is trite law that the rights of the parties shall be determined as at the time of the institution of the action, not at the time of pronouncing the judgment. When the Petitioner filed this appeal in this Court within the appealable period, it appears that either the gem mining licence had not been issued to the 7th and 8th Respondents or they had not commenced gem mining.

In any event, this Court does not act in vain by formally quashing A27 and A29 to underscore the proper course of action expected of the Respondents in the future. Public authorities entrusted with similar

functions are hereby reminded that actions inconsistent with their legal obligations may attract similar judicial consequences. This judgment serves not only to resolve the present matter but also to reaffirm the importance of adhering to the principles of legality and accountability in the discharge of public functions.

In *Sundarkaran v. Bharathi* [1989] 1 Sri LR 46, the Petitioner-Appellant sought *certiorari* and *mandamus* to challenge the refusal of a liquor license for the year 1987. By the time the matter was taken up before the Supreme Court in 1988, the issue had become academic since the year 1987 had already elapsed. Nevertheless, in allowing the appeal, Justice Amarasinghe observed: "*The court will not be acting in vain in quashing the determination not to issue the licence for 1987 because the right of the Petitioner to be fully and fairly heard in future applications is being recognised.*"

In *Nimalasiri v. Divisional Secretary, Galewela* [2003] 3 Sri LR 85, Justice Sripavan (as he then was) stated:

> *Learned State Counsel urged that it is a futile exercise to issue a writ of certiorari because the decision complained of related to the year 2002 which had already expired. However, following the decision in Sudakaran v. Barathi and others [1989] 1 Sri LR 46 this Court issues a writ of certiorari quashing the decision of the second Respondent contained in the letter dated 27.08.2002 marked (P4). Thus this Court is not acting in vain because the right of the Petitioner to be fully and fairly heard in future application is recognized.*

In the present case despite the lapse of the licence granted to the 7th and 8th respondents, it is important to note that the effect of the court's judgement of nullity operates *erga omnes*, and hence a pronouncement on its invalidity is called for.

As Lord Diplock states in *Hoffman-La Roche and Co. v. Secretary of State for Trade and Industry* (supra) at 365:

> *Although such a decision is directly binding only as between the parties to the proceedings in which it was made, the application of the doctrine of precedent has the consequence of enabling the benefit of it to accrue to all other persons whose legal rights have been interfered with in reliance on the law which the statutory instrument purported to declare.*

**Conclusion**

I formally quash the decision of the 3rd Respondent marked A27 and the decision of the 5th Respondent marked A29 and allow the appeal of the Petitioner with costs payable by the 7th and 8th Respondents to the Petitioner.

Judge of the Supreme Court

Murdu N.B. Fernando, P.C., C.J.
I agree.

Chief Justice

Shiran Gooneratne J.
I agree.

Judge of the Supreme Court