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

In the matter of an application for mandates in the nature of writs of Certiorari and Prohibition in terms of Article 140 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/WRIT/541/2023

1. Weerawarna Kurukulasooriya Boosa Baduge Tanura Lakmal Weerawarna,
   Imbulpe,
   Madagedaragoda.
2. Mohottige Anil,
   Polwatta,
   Aluth Nuwara,
   Imbulpe,
   Balangoda.

PETITIONERS

Vs.

1. National Gem and Jewellery Authority,
   12, Macksons Tower,
   Alfred House Gardens,
   Colombo 03.
2. Viraj De Silva,
   Chairman and Chief Executive Officer,
   National Gem and Jewellery Authority,
   12, Macksons Tower,
   Alfred House Gardens,
   Colombo 03.
3. H.P. Karunatilaka,
   Deputy Director,
   National Gem and Jewellery Authority,
   Regional Office,
   Ratnapura.
4. W.G. Nuwan Premachandra,
   Development Officer,
   Regional Office,

National Gem and Jewellery
Authority,
Ratnapura.

5. Dushan Wijesinghe,
68/1, Mihindu Pedesa,
Amuthagoda,
Hidallana,
Ratnapura.

RESPONDENTS

Before: Sobhitha Rajakaruna J.
Dhammika Ganepola J.

Counsel: Manohara de Silva PC with Hirosha Munasinghe for the Petitioners.
Navodhi De Zoysa SC for the 1st to 4th Respondents.
Navin Marapana PC with Kaushalya Molligoda and Uchitha Wickremasinghe for the 5th Respondent.

Argued on: 30.11.2023

Written Submissions- Petitioners - 15.12.2023
1st to 4th Respondents - 06.12.2023
5th Respondent - 15.12.2023

Decided on: 29.01.2024

Sobhitha Rajakaruna J.

The primary issues of the instant Application emanate from Regulations 2020 (published in Gazette Extraordinary No. 2165/1 on 02.03.2020) made under the National Gem and Jewellery Authority Act No. 50 of 1993 ('Act'). Those Regulations have been promulgated to prevent unlawful gemming and the unlawful removal of gems from Sri Lanka and also for the purpose of issuing licences to carry on the gem industry as stipulated in sections 14(1)(f) and 15 of the said Act. Such Regulations read:

"A licence shall not be granted to any person unless -

(a) he himself owns the land;

(b) he has obtained the written consent of so many of the other owners as to ensure that the applicant and such other consenting owners together own at least two-thirds ownership of the land; or

(c) such person who is not a co-owner of the land, has obtained the written consent of co-owners including lease hold rights for gemming as to ensure that such consenting co-owners own at least two-thirds ownership of the land,

in respect of which the application has been made".

Regulation 8 of the by-laws/original regulations made under the same Act also seem to be similar to the aforesaid Regulations 2020 but the said original regulations have not been tendered to Court by any of the parties.

The stand taken by the Petitioners is that they share co-ownership of the land upon which the impugned Gem Mining License marked 'X10' was issued in favor of the 5th Respondent. The Petitioners challenge the decision of the 3rd Respondent marked 'X6' and the title investigation report marked 'X9'. The 1st Respondent-National Gem and Jewellery Authority ('Authority') has communicated its decision to grant the Gem Mining License (marked as 'X10') to the 5th Respondent based on the reasons contained in the said 'X6' and 'X9'. The Petitioners primarily seek a writ of certiorari quashing the said 'X6', 'X9' and 'X10'.

Referring to the 5th Respondent's application form for such license for the year 2022 ('P27'- at bottom page 246 of the 'X1') and for the year 2023 ('X8'), the Petitioners claim that the 5th Respondent relies on Deed of Transfer No. 72 attested on 20.09.2021 ('P30'- at bottom page 250 of the 'X1') in proof of his title. According to the schedule to the said Deed No. 72 the subject land is referred to as 'Halgaha Digana' in Aluth Nuwara which is in extent of A01- R00- P30. The Petitioners contention is that they also co-own the larger portion of the subject land which is supposed to be a part of 'Halgaha Digana'.

The Petitioners plead that the 1st Petitioner is entitled to a total of 6/20 shares whilst the 2nd Petitioner is entitled to a total of 4/20 shares based on their title deeds. The 1st and 2nd

Petitioners claim entitlement to the total of 10/20 share (1/2 share) of the co-owned land within the said larger land namely, 'Halgaha Digana' which is in extent of 3 *Amuna*.[1]

On a careful consideration of the contents of the said Deed of Transfer No. 72 by which the 5th Respondent allegedly acquired title, it is noted that the said transfer has taken place subject to the '*Rajakari Panguwa*' of the *Uggal Aluth Nuwara Kataragama Dewalaya*. The interest of the said *Dewalaya* in the subject land could be further evinced based on the letter marked 'X11' dated 08.04.2022 through which the *Basnayake Nilame* tenders the auction report marked 'X12'. Accordingly, the said *Dewalaya* is to be provided with 1/10th of the monthly total proceeds after auctioning the gems.

As opposed to the Petitioners contention, the 5th Respondent argues that the land in respect of which the impugned gemming license has been issued is not part of the said larger co-owned land called 'Halgaha Digana'. Further, it is stated that the land subject to the impugned gemming license ('X10') is a separate and distinct land free from any prior co-ownership rights. The said arguments of the 5th Respondent are based on a Statutory Determination ('SD') made by the Land Reform Commission ('LRC') under the Land Reform Law No. 1 of 1972. Accordingly, the contention of the 5th Respondent is that the land subject to the impugned gemming license is within the land described in the SD published in Gazette Extraordinary No.1780/14 dated (16.10.2012) marked 'P42'.

The 5th Respondent in this regard relies on the judgement of ***Jinawathie and Others v. Emalin Perera (1986) 2 Sri L.R. 121.*** Accordingly, he asserts that;

> "Once the statutory determination is made the person in whose favour it was made becomes owner of the land specified in the determination with all the incidents of ownership. The land does not then cease to be a distinct and separate entity and it does not become once again an undivided portion of the larger land from which such specified portion was carved out."

I do not hesitate to accept the findings of the five eminent judges of the Supreme Court in the above judgement. However, a reasonable question arises as to whether this Court could adopt such findings unequivocally into the issues of the instant Application. In this

[1] Generally, one *Amuna*'s sowing is equal to 2 ½ acres, 2 roods and 37 ½ perches in the case of Paddy. See- http://www.negombolawsociety.com

backdrop, I need to firstly, draw my attention to the following specific paragraphs of the aforesaid judgement.

> *"Sec. 7[2] of this Law is the provision which has to be resorted to in such a situation. The provision of this section requires, by the use of a statutory fiction, the interests of a co-owner, which would, at the time this Law comes into operation be only an undivided share of a larger land owned in common, to be treated as a distinct and separate entity. Such an assumption is only "for the purposes of this Law". The purpose, as already stated, is primarily to determine the extent of the holding of such a person so that such holding could thereafter be restricted to an extent of only 50 acres." (Emphasis added) (at p.129)*
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> *"The moment this Law comes into operation the undivided share of a co-owner, whether he be one whose interests are over fifty acres or not, becomes, in the eye of the law, a distinct and separate entity, equal to the undivided extent he was earlier entitled to in the common land. Such entity is, at that time, still not identified or located on the ground, as distinct from the larger land." (Emphasis added) (at p.129)*
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> *"The effect of the operation of the provisions of sec. 7 is to bring about a separation or partition of the undivided share of a person, who, at the time this Law comes into operation, owns such interests in common with several others, and transform such undivided share into a distinct and separate portion. Even though still only notional and only existing on paper, yet, the law requires the extent of land such person is entitled to, to be treated as a distinct and separate entity." (Emphasis added) (at p. 129)*
>
> *"Even in regard to the determination of the specific portion to be given over to a statutory lessee, who was once a co-owner, the other co-owners would not be without an opportunity of making representations to the Commission if their interests are affected. Even though there is no express provision granting an affected co-owner an opportunity of being heard before a statutory determination is made, yet, as the concept of determination connotes a hearing of affected parties, "the justice of the common law" will step in and provide him with such opportunity." (Emphasis added) (at p. 133)*

[2] The said section 7 of the Land Reform Law- For the purposes of this Law, where any agricultural land is co-owned, each co- Owner shall be deemed to own his share in such land as a distinct and separate entity.

"Sec. 29 of this Law, which is relied on strongly by the defendants-appellants, provides for a notice calling upon "every person who was interested in such land immediately before the date on which such land vested" to claim "the whole or any part of the compensation payable under this Law in respect of such land". Hence it has been contended that, in the case of an agricultural land such as Flensberg Estate, which was co-owned by the plaintiff-respondent and the defendants-appellants immediately prior to 26.8.1972, each one of such co-owners would come within the category of "Every person who was interested in such land" and as such each one of them could claim a proportionate share of the compensation payable by the Commission in respect of the land which has vested in the Commission." (Emphasis added) (at p. 136)

"The agricultural land, which is vested in the Commission and in respect of which compensation is payable under this section, is the entirety of the agricultural land which the statutory lessee owned on the day preceding the 26th August 1972, less the extent of fifty acres which the Commission permits such lessee to retain." (Emphasis added) (at p.136)

"Applying the provision of this section to the facts and circumstances of this case, the land, in respect of which such compensation is payable, would be the extent of 78 acres, which the plaintiff-respondent was deemed to own as a distinct and separate entity from and out of Flensberg Estate, less the extent of 50 A.OR.21 P. depicted as Lot 6 in plan P8. The said extent of 78 acres, treated as distinct and separate entity, was taken away from the plaintiff-respondent on the basis that the plaintiff-respondent was the owner of the said entity. No dispute had been raised by any of the other co-owners, the defendants-appellants and the wife of the 3rd defendant-appellant, to the title of the plaintiff-respondent to the said extent of 78 acres. The 50 acres, which is described in P6 and ***which by then has been actually demarcated on the ground,*** *within the said Flensberg Estate, is an extent carved from and out of the aforesaid extent of 78 acres, and given to the plaintiff-respondent as the maximum extent of land the plaintiff-respondent will thenceforth be permitted to hold." (Emphasis added) (at pp. 136, 137)*

After an in-depth study of the above judgment in the said ***Jinawathie*** case I take the view that the Supreme Court has never implied to cure any defects of title that existed before the Land Reform Law came into operation (i.e., 26.08.1972) or before publishing the respective SD. The final conclusion in relation to the Land Reform Law in the judgement is based on a specific purpose and it is to determine primarily the extent of the holding of

a declarant under the said Law and thereafter to restrict such holding to an extent of 50 acres. As per the requirement of law, it is important to ascertain the extent of such a portion of land, for the same to be treated as a distinct and separate entity. In this regard the relevant block of land to be actually demarcated on the ground is also very important. The said judgement has been formulated in a scenario where none of the co-owners, the defendants-appellants and the wife of the 3rd defendant-appellant of the said ***Jinawathie*** case have not raised any dispute to the title of the plaintiff-respondent to the extent of 78 acres referred to therein.

Another significant aspect considered by the Supreme Court in the said judgement is the necessity of giving an opportunity for the co-owners to make representations to the LRC if their interests are affected. Thus, the connotation of hearing of affected parties has been established in the said judgement. The Supreme Court has observed that even after a particular portion of land is considered as distinct and separate from the larger land, each one of the co-owners would come within the category of "every person who was interested in such land".

However, when considering the facts and circumstances of the instant case, it becomes clear that the Petitioners and the 5th Respondent are at disagreement over whether the land upon which the impugned gemming license was granted is a portion of the larger land called 'Halgaha Digana'. It is paramount to note that the Land Reform Law applies only to agricultural land as such a crucial question arises in the instant Application whether *"paraveni nilakaraya"*[3] is left out of the definition of agricultural land stipulated in the said Law. While it is debatable whether the subject land qualifies as *Dewalagam Land*, the reference to the *"Rajakari panguwa"* [4]in the said Deed of Transfer No. 72 implies that the *Uggal Aluth Nuwara Kataragama Dewalaya* is also an interested party whose rights may be

[3] "According to SAWERS there were four chief classes of tenants (q), namely; - (c) Nilakarayas, who held panguwas on condition of cultivating the muttettu, or performing services attached by custom to their particular holdings." (Vide- ***'The Laws and Customs of the Sinhalese or Kandyan Law' by Frederic Austin Hayley, Navarang, New Delhi 1993 at p.239***).

[4] "*paraveni pangu"* shall mean an allotment or share of land in a temple or *nindagama* village held in perpetuity by one or more holders, subject to the performance of certain services to the temple or *nindagama* proprietor;" (Vide- ***'Buddhist Ecclesiastical Law' by Wickrema Weerasooria, 2011, p.211***).

affected if the license were granted to any of the parties involved in the instant Application. No adequate evidence has been made available to this Court through affidavits to arrive at a clear finding on the actual title of the Petitioners or the 5th Respondent. Although the 5th Respondent has tendered to this Court a pedigree such has been annexed only to his written submissions.

In addition to the above, the Petitioners contend that the land subjected to the said Deed No. 72 is also an undivided land and thus, the predecessors of the 5th Respondent had no divided land/share to transfer in favour of the 5th Respondent. Further, the Petitioners referring to Deed No. 1745 attested on 09.08.1995 (at bottom page 290 of 'X1') assert that the 3rd vendor to Deed No. 72 having undivided 1/4th share of 'Halgaha Digana' land (which is the extent of 3 *Amuna*) could not possibly transfer a divided portion of land as described in the schedule to the said Transfer Deed No. 72.

A careful consideration of the contents of the SD marked 'P42' implies that the said SD has been made to deposit the same in favour of the testamentary case No. 31/T which was pending in the District Court of Panadura. Furthermore, the 5th Respondent's claim in respect of the SD is based on the block of land described in its item 16. The said block of land is described in the SD as an undivided portion of Lot No. 199 which is within the 'Halgaha Digana' land and its extent is A00- R02- P15. However, the license marked as 'X10' has been issued in respect of a portion of the said Lot No. 199 which is in extent of A01- R00- P30. Thus, it appears that the license 'X10' has been granted to a larger land than the block of land secured under the said SD. This clearly implies that the land described in item No.16 in the SD marked 'P42' has not been clearly identified or located on the ground and it is further evinced with the existence of the word 'undivided' in the said paragraph of the SD. Therefore, claims made by the 5th Respondent based on the said SD need to be considered only upon clear evidence in respect of his actual title.

Moreover, the judgement in the said ***Jinawathie*** case has been pronounced well before the said Act came into operation and as such there was no necessity for the Supreme Court to give thought to the Regulations promulgated under the said Act. Those Regulations expressly restrict the Authority granting any gemming license to any person unless such person fulfills the specific requirements in Regulations 2022. Hence, the Authority is duty bound to inquire whether those requisites have been duly satisfied before granting license to any person especially when the land described in the SD cannot be physically identified

or located on the ground and further, the extent of the land described in the SD and in the respective license are distinct.

Furthermore, the plaintiff- respondent of the said case has instituted the respective action in the District Court of Kurunegala seeking for a declaration of title and an ejectment order in respect of a land described in a SD whereas the instant Application deals with a gemming license under the said Act.

In the above circumstances, I hold that the dicta and the final determination of the ***Jinawathie*** case cannot be applied to the facts and circumstances of this case in which the parties are at variance on several key aspects. Having considered the applicability of the said ***Jinawathie*** case I must now consider whether the relevant officials of the said Authority have followed the due process when arriving at the decisions reflected in the impugned documents marked 'X6' and 'X9'.

The 3rd Respondent in the said letter marked 'X6' with concurrence of the 2nd Respondent (dated 31.08.2023) has expressed the reasons for the decision to grant the gemming license in favour of the 5th Respondent based on application form marked 'X8'. Such reasons given by the 3rd Respondent stem from the said SD marked 'P42'. He has arrived at a conclusion, based on the said SD, that the land upon which a gemming license was sought by the 5th Respondent is not an undivided land. It is important to draw my attention to the following paragraph of 'X6';

> "එසේම මෙම ඉඩම් සඳහා ඉදිරිපත් කරන ලද පෙර බලපත්‍රයට අදාලව ශ්‍රේෂ්ඨාධිකරනයේ පවරා ඇති අංක CA 78/2022 දරණ නඩුවේ තීන්දුව ලැබෙන තෙක්, නව බලපත්‍රයක් නිකුත් කිරීමට හැකියාවක් පවති ද යන්න සලකා බැලීමේදී, නව අයදුම්පත්‍රයට අදාලව දැන්වීම් ප්‍රදර්ශනය කර විරෝධතා ඉදිරිපත් වන්නේ නම් එම විරෝධතා සලකා බලා ඉදිරිපත්වන කරුණු හා ලේඛන මත බලපත්‍ර අයදුම්කාර පාර්ශවය වෙත බලපත්‍රයක් ලබා දීමේ හැකියාව සලකා බැලිය හැකි බැවින් හා, අධිකාරී පනත ප්‍රකාරව නොබෙදූ 2/3 ක අයිතියක්සපුරා ඇති බව තහවුරු වන අවස්ථාවේ දී මැණික් ගැරීම සඳහා බලපත්‍රයක් නිකුත් කිරීමට හැකියාව පවතින බැවින්ද,

යන කරුණු මත බලපත්‍ර අයදුම්කාර රත්නපුර හිදැල්ලන අමුනාගොඩ මිහිදු පෙදෙස හි පදිංචි දුෂාන් එරංග විජේසිංහ යන අය වෙත අංක 0131385 දරණ

අයදුම්පත මත මැණික් ගැරීමේ බලපත්‍රයක් නිකුත් කිරීමට තීරණය කළ බව මෙයින් කාරුණිකව දන්වමි."

I believe that the long sentence quoted above raises ambiguity about the undivided 2/3rd portion and also how the 3rd Respondent has arrived at such a decision. In my view the 3rd Respondent has failed to consider any of the vital issues I have mentioned above in this judgement. It is obvious that the 3rd Respondent has not considered relevant material concerning the question of whether the land subject to the gemming license ('X10') is co-owned. The 3rd Respondent ought to take into account several other issues regarding the title of parties including the issue whether the land described in item 16 of the SD can be separately and distinctly identified and located on the ground of the larger land called 'Halgaha Digana'. This is especially because the determination of the said ***Jinawathie*** case, as I have decided earlier, cannot be applied to the instant case. Whether the subject land falls within the category of '*dewalagam'* lands is also a vital issue that needs to be addressed.

Similarly, I take the view that the 3rd Respondent has not adopted the due effect of the aforesaid Regulations when arriving at the impugned decisions. It appears that the 3rd Respondent has not taken into consideration the said Regulations 2020 and has failed to exercise his duties diligently by not duly inquiring upon the specific requisites mentioned therein. In other words, the 3rd Respondent without giving effect to the two main limbs (i.e., (i) Ownership of the land; (ii) consent of the other co-owners who own at least 2/3rd ownership) of the said Regulations 2020 has attempted to give an undue interpretation to what was decided in the said ***Jinawathie*** case even without making a single reference to the said Judgement. It is a puzzle to this Court as to how the 3rd Respondent gained such wisdom to adopt the rationale in the said ***Jinawathie*** case to overlook the fundamental requisites stipulated in those Regulations.

I take the view that claiming the ownership of a separate and distinct portion of land described in a SD issued under the Land Reform Law may confirm any person's ownership of a land. Nevertheless, for the purpose of issuing a gemming license under the Act, proving ownership through a SD is not sufficient when the extent of the land in the SD and in the license are different and the land described in the SD cannot be separately and distinctly identified or located on the ground. Especially when a land subjected to a SD cannot be separately and distinctly identified or located on the ground, as in the case, such

a SD cannot undermine the operation of the other main limb of the Regulations mentioned below:

> (a) the 5th Respondent has obtained the written consent of so many of the other owners as to ensure that the applicant and such other consenting owners together own at least two-thirds ownership of the land; **or**
>
> (b) such a person who is not a co-owner of the land has obtained the written consent of co-owners including leasehold rights for gemming to ensure that such consenting co-owners own at least two-thirds ownership of the land.

It is further noted that the 3rd Respondent has failed to hear all the interested parties such as the *Uggal Aluth Nuwara Kataragama Dewalaya* whose rights tend to be affected. As the 5th Respondent has submitted the application forms for such license for the year 2022 and 2023 based on his title referred to in Deed of Transfer No. 72, the 3rd Respondent should have given thought to the genuineness of the information provided specifically in cage 10 of the both the aforesaid application forms ('P27' of 'X1' and 'X8')

On the other hand, the decisions reflected in the title investigation report marked 'X9' have been reached on the basis that the land subject to the license 'X10' and the SD are one and the same land. The Inquiry Officer has failed to consider the difference of the extent of the land mentioned in 'X10' and the SD. No reasons have been given as to how the license has been granted in respect of a larger land than the land described in the SD marked 'P42'. The Petitioners strenuously argue that the relevant officials of the Authority have given a wrong interpretation in the said 'X9', to the interim order issued by this Court on 28.03.2022, in the application bearing case No. CA/Writ/78/2022 filed by the Petitioners named above. This Court in the said order issued an interim relief as prayed for in paragraph (d) (i) of the prayer of the said petition and accordingly restricted the Authority to issue license to the 5th Respondent. I am not convinced with the reasons given by the Authority for them to deviate from the said interim order and to make contrary decisions causing prejudice to the interested parties whose rights have been affected. The Authority or any of its officials cannot take law into hand and take such arbitrary decisions perhaps for their personal gains.

Therefore, I hold that the 2nd and 3rd Respondents and the unnamed Inquiry Officer who issued 'X9' have taken decisions without taking into consideration the relevant material

but considering irrelevant material. In light of the reasons given above, I am of the opinion that the objections raised on behalf of the 1st to 4th Respondents have no bearing to the facts and circumstances of the instant Application and therefore, those objections are devoid of merit.

In the circumstances, I proceed to issue a Writ of Certiorari quashing the decisions contained in the documents marked 'X6', 'X9' and also the license marked 'X10'. Anyhow, I am not inclined to grant any other reliefs as prayed for in the prayer of the Petition. However, this judgement is not an impediment for the Authority to arrive at a fresh but a lawful decision upon fresh applications that may be submitted by any party for license in respect of any portion of the land subjected to this case. The Authority must assay such applications considering relevant material based on lawful grounds and also according to law.

Judge of the Court of Appeal

Dhammika Ganepola J.
I agree.

Judge of the Court of Appeal