

**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 Writ of *Certiorari* in terms of the
Provisions of Article 140 of the Constitution of the
Democratic Socialist Republic of Sri Lanka**

CA/WRIT/268/2015

1. Wikramasinghe Wasala Mudiyansele Dayaratne
Bandara,
2. Wikramasinghe Wasala Mudiyansele Menaka
Bandara both of
No. 635/2, Ambalanwita,
Eeriyandaluwa,
Pelmadulla.
3. Dasanayake Mudiyansele Yamuna Kumari
Dasanayake,
Thanayamwatte,
Opanayake.
4. Dasanayake Mudiyansele Saman Kumari
Dasanayake,
Polwatte, Ambalanwita, Eeriyandaluwa,
Pelmadulla.
5. Dasanayake Mudiyansele Priyanka Ranjani
Dasanayake,
No. 62/2, Thanayamwatte,
Opanayake.

6. Dasanayake Mudiyansele Kamani Srimathi
Dasanayake,
Eeriyandaluwa,
Pelmadulla.
7. Yapita Mudiyansele Seneviratne Bandara,
No. 157, Delgashandiya,
Opanayake.

PETITIONERS

Vs,

1. National Gem and Jewellery Authority,
No. 25, Galle Face Terrace,
Colombo 03.
2. Mr. Aruna Gunawardane,
Chairman/ Chief Executive Officer,
National Gem and Jewellery Authority,
No. 25, Galle Face Terrace,
Colombo 03.
3. Mr. M.P.N. Wikramasinghe,
Director General,
National Gem and Jewellery Authority,
No. 25, Galle Face Terrace,
Colombo 03.
4. N.P. Samarathunga,
Deputy Director-Land Regional Development,
Regional Office,
National Gem and Jewellery Authority,
Ratnapura.

5. D.T. Kulananda,
Director- National Enforcement and Regional
Development,
National Gem and Jewellery Authority,
No. 25, Galle Face Terrace,
Colombo 03.
6. Kottewatte Arachchillage Rukman Kottewatte,
No.110, Rakwana Road,
Pelmadulla.
7. D.M. Sumith Gamini Dasanayake,
Thanayamwatte,
Opanayake.

RESPONDENTS

**Before: Vijith K. Malalgoda PC J (P/CA) &
H. C. J. Madawala J**

Counsel: Gamini Marapana PC, with Navin Marapana for the Petitioners

Manohara R. de Silva PC with Anuruddha Dharmaratne for the 6th Respondent

Ruwanthi Hearth Gunaratne, SC for 1st -5th Respondents

Inquiry on: 11.09.2015

Written Submission on: 23.09.2015, 30.09.2015

Order on: 04.11.2015

Order

Vijith K. Malalgoda PC J (P/CA)

Petitioner to the present application had come before this court seeking inter alia,

- ii. issue a mandate in the nature of Writ of *Certiorari* quashing the decision of the 4th Respondent to issue a license to the 6th Respondent to gem on aforesaid land depicted on lot 1 in final plan No. 1750 dated 31.08.2011 prepared by Kapila Edirisinghe License Surveyor and/ or quash any license issued to the 6th Respondent to gem on the said land.
- iii. Issue an interim order staying the operation of the decision of the 2nd and 5th Respondents to issue a license to gem to the 6th Respondent as evidenced by the letter of the 5th Respondent P-19 and also prevent the 6th Respondent, his servants, agents and/or employees from carrying out any gemming activities in the land depicted as lot 1 in Final Partition Plan bearing No 1750 dated 31.08.2011 prepared by Kapila Edirisinghe, Licensed Surveyor including but not limited to mining for gems, washing gem gravel, removing gem gravel and the use of mechanized gemming equipment pending the final determination of this application

The petitioners when supporting the application submitted that, the 1st Respondent, the National Gem Jewellery Authority and 2nd to 5th Respondents have taken a decision to issue and/or issued a gemming license to the 6th Respondent as evinced in the document dated 18.05.2015 (P-19). The Petitioner⁷ further submitted that the 6th Respondent who is a complete outsider who does not possess soil rights to the land in question has claimed leased rights which he said to have acquired whilst a partition action was pending.

Since the said decision of the 1st and/or 2nd to 5th Respondents were purely based on the 2/3 share the 6th Respondent is claiming on the said document petitioner moved to quash the said decision by way of a

Writ of Certiorari and considering the outcome of the said decision, further moved for grant interim relief as prayed, to prevent further damage to the said property.

This court being satisfied with the submission made on behalf of the Petitioners decided to issue notices as well as a limited stay as prayed in sub paragraph (iii) to the Petition.

The 1st to 5th and 6th Respondents who appeared before this court on notice objected to the extension of the said interim order and the present inquiry was held in order to consider the extension of the said interim order.

At the inquiry before us it was revealed that the 1st Petitioner W.W.M. Dayaratne Bandara, one G.M. Heenmenike and one G.M. Cyril Welagedara entered into an Agreement No. 26790 dated 25.08.2010 with the 6th Respondent, whereby it was agreed that they would lease the portion of land allotted to them by the Final Decree in District Court of Ratnapura Case No. 11210/P to the 6th Respondent for a period of 10 years. It was further revealed that at the time the said agreement was reached the 1st Petitioner was entitled to an undivided 1/3 share of the said land and the said Heenmanike who is the predecessor in title to the 3rd to the 6th Petitioners was also entitled to the undivided 1/3 share of the said land.

It appears that the 2/3 share the 6th Respondent was relying, was mainly based on the said agreement 26790 dated 25.08.2010 which was produced marked P-10 and the entire case will be focused on this document. The 6th Respondent's argument before this case was based on section 66 (1) of the Partition Act to the effect;

“After a partition action is duly registered as a lis pendens under the Registration of Document Ordinance **no voluntary alienation, lease or hypothecation** of any undivided share or interest of or in the land to which the action relates shall be made or affected until the final determination of the action by dismissal thereof, or by the entry of a decree of partition under section 36 or by the entry of a certificate of sale”

and submitted that said agreement does not refer to voluntary alienation, lease or hypothecation of any undivided share or interest but it contains only a promise and/or undertaking and therefore the said agreement remains valid and binding upon parties and therefore the 1st Respondent Authority and/or 2nd to 5th Respondents has rightly taken cognizance of it.

However the Petitioners challenged the validity of the license issued by the 1st and/or 2nd -5th Respondents, based on P-10 since final decree has now been entered in the said partition action. The position taken up by the Petitioners were that, at best P-10 can only considered as a document purporting to create an encumbrance as referred to in section 48 (1) of the Partition Law.

Petitioners have strengthen their argument by referring to Regulation 8 (2) of the Regulations made under the National Gems and Jewellery Authority Act which reads thus;

“No license shall be granted to any person unless-

- a. He himself owns the land, or
- b. He has obtained the 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 of the land in respect of which the application has been made”

The position taken up by the Petitioners on this issue was that the 6th Respondent is not a soil owner and therefore, in law, he could not have been issued a license to gem in the land in question.

When considering the arguments placed by both parties before us, the court is of the view that both these positions placed by the two parties will have a significant bearing on the final outcome of this case. The court further observes that it is too early for this court to reject one version against the other. However, the most important issue this court will have to now consider is the extension of the interim relief this court has already issued.

Circumstances under which interim reliefs are granted by our courts were discussed in a number of cases such as *Billimoria V. Minister of Lands (1978-1979) 1 Sri LR 10*, *Duwearachchi and another V. Vincent Perera (1984) 2 Sri LR 94*, *Mahindasoma V. Mithripala Senanayake and others (1996) 1 Sri LR 180*.

This court bears in mind the useful reminder of that celebrated jurisprudence as propounded by Neville Samarakone CJ in the case of *Billimoria V. Minister of Lands, Land Development and Mahaweli Development and Two Others (1978-1979) I Sri LR 13* that “the interest of justice therefore required that a stay order be made as an interim measure. It would not be correct to judge such stay order in the same strict manner as final orders by their very nature must depend a great deal on a judge’s opinion as to the necessity for interim action.”

Court of Appeal in the case of *Deuwearachchi and another V. Vincent Perera and another (1984) 2 Sri LR 94* held that the court should be guided by the following principle when granting interim relief.

- I will the final order be rendered nugatory if the petitioner is successful
- II where does the balance of convenience lie
- III will irreparable and irremediable mischief or injury be caused to either party

Petitioners have come before this court seeking the issuance of a Writ of *Certiorari* to quash the gemming license issued to the 6th Respondent, according to them is completely an outsider who does not have soil right to the land in question. As submitted by them if the interim order is vacated now, the Petitioners suffer grave, irremediable and irreparable loss to them. On contrary the extension of the interim order will not cause any loss to either party since the gems who ever the party intending to take out will continue to remain on the land. However the 6th Respondent submitted that he invested nearly 400000/- to develop the gem pit but we observe that the license issued on him had expired on 25.10.2015 and therefore the extension of the interim order will any way not cause further loss to the 6th Respondent.

For the reasons discussed above I see no grounds to vacate the interim order already issued by this court as prayed by the Petitioner in sub paragraph (iii) to the Petition and decided to extend the said order until the final determination of this case.

PRESIDENT OF THE COURT OF APPEAL

H.C.J. Madawala

I agree,

JUDGE OF THE COURT OF APPEAL