

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

In the matter of an application for Writs in
the nature of Certiorari, Mandamus and
Prohibition under Article 140 of the
Constitution of the Democratic Socialist
Republic of Sri Lanka

CA (Writ) Application No. 197/2012

W. Samaratne,
Kanaththegedara, Halpawala,
Panawenna, Kahawatta.

Petitioner

Vs.

1. National Gem & Jewellery Authority
No. 25, Galle Face Terrace, Colombo 3.
2. P. Galhena,
Chairman & Chief Executive Officer,
3. W.H.M.N. Bandara,
Director General,
Both of National Gem & Jewellery Authority,
No. 25, Galle Face Terrace, Colombo 3.
4. W. Muthugala,
Senior Regional Manager – Ratnapura,
National Gem & Jewellery Authority,
Ratnapura.

5. Mangalika Guneratne,
Manager – Legal,
National Gem & Jewellery Authority,
No. 25, Galle Face Terrace, Colombo 3.
6. R.N. Werulape,
Halpawala, Kahawatta.
7. A. Gamage
Chairman & Chief Executive Officer,
- 7A. Aruna Gunawardena
Chairman & Chief Executive Officer,
- 7B. Dr. D.M.D.O.K. Dissanayake
Chairman & Chief Executive Officer,
8. R.M. J. Udayakumara
Director General,
- 8A. M.P.N.M. Wickremasinghe,
Director General,
- 8B. W.M.A.P.B. Wanninayake,
Director General,
- 8C. M.L. Gammanpila,
Director General,
All of National Gem & Jewellery Authority,
No. 25, Galle Face Terrace, Colombo 3.
9. N.P. Samaratunga,
Senior Regional Manager- Ratnapura,

9A. H.P. Karunathilake

Senior Regional Manager- Ratnapura,

9B. K. Gunawardena,

Senior Regional Manager- Ratnapura,

10. K.S. Abeynayake

The Assistant Director,

Enforcement & Regional Development of
All of National Gem & Jewellery Authority,
Ratnapura.

Respondents

Before: Arjuna Obeyesekere, J

Counsel: J.C.Weliamuna, P.C with Pasindu Silva for the Petitioner

Ms. Anusha Fernando, Deputy Solicitor General for the 1st – 5th
and 7th – 9B Respondents

Sachintha Ratnayake with Sandaruwan Senanayake for the 6th
Respondent

Written Submissions: Tendered on behalf of the Petitioner on 4th July 2018

Tendered on behalf of the 1st – 5th and 7th – 9B
Respondents on 11th September 2018

Tendered on behalf of the 6th Respondent on 7th
September 2018

Decided on: 21st March 2019

Arjuna Obeyesekere, J

When this application was taken up for argument on 4th July 2018, the learned Counsel appearing for all parties moved that this Court pronounce its judgment on the written submissions that would be tendered by the parties. Thereafter, when this matter came up for judgment on 7th December 2018, this Court requested the parties to provide clarification on two matters, which was duly provided on 29th January 2019.

The Petitioner has filed this application, seeking *inter alia* the following relief:

- (a) A Writ of Certiorari to quash the gemming licence No. 2298 issued to the 6th Respondent by the 1st Respondent, National Gem and Jewellery Authority (NGJA) in respect of a land co-owned by the Petitioner;
- (b) A Writ of Certiorari to quash the gemming licence No. 7099 issued to the 6th Respondent by the NGJA in respect of the said land;
- (c) A Writ of Prohibition, prohibiting the NGJA from issuing a gemming licence to the 6th Respondent;
- (d) A Writ of Mandamus directing any one or more of the Respondents to grant the Petitioner his share of the entitlement in respect of the gemming license issued to the 6th Respondent.

The primary issue that needs to be determined in this application is whether the NGJA can issue a gemming license to a person who is only a lessee of the land in respect of which the license is being issued.

The facts of this matter very briefly are as follows.

The gemming licenses that are sought to be quashed in this application have been issued in respect of a land called Udagumbura situated in Halpawala, Panawenna in the District of Ratnapura. The Petitioner states that he is a co-owner of the said land and claims that he is entitled to an undivided 1/3rd share of the said land together with 29/240 shares of gem mining rights in the said land. Although this claim of the Petitioner is disputed by the 6th Respondent who claims that the Petitioner owns less than 1/3 of the said land, this Court observes that the Ground Share Agreement annexed to the petition marked 'P28b' between the NGJA and the 6th Respondent acknowledges that the Petitioner in fact owns 1/3 of the said land. In any event, it is not disputed that the Petitioner owns at least part of the said land.

Be that as it may, for the purposes of this application, this Court does not have to determine the extent of the land owned by the Petitioner. What is important for a determination of the primary issue arising in this application, is the claim by the Petitioner that the 6th Respondent does not own any part of the said land and that the only claim that the 6th Respondent has to the said land is a lease agreement that the 6th Respondent is said to have entered into with persons who claim to co-own the said land.¹

¹ A copy of lease agreement No. 26959 has been annexed to the petition, marked 'P4'.

The NGJA has been established in terms of Section 2(1) of the National Gem and Jewellery Authority Act No. 50 of 1993 (the NGJA Act) and has been entrusted with the development, regulation and promotion of the gem and jewellery industry in Sri Lanka.

'Gem industry' is defined in Section 55 of the NGJA Act to mean:

"any trade or business of all or any of the following classes or descriptions:

- (a) mining for gems or gemming;
- (b) importing gems into or exporting gems from Sri Lanka;
- (c) selling, purchasing or supplying gems;
- (d) valuing gems;
- (e) cutting, polishing, engraving or carving gems;
- (f) heat treatment of gems and any other method of enhancing the value of gems;
- (g) examination and certification of gems and assaying of precious metal;
- (h) lapidary training."

In terms of Section 15 (1) of the NGJA Act, “Notwithstanding anything to the contrary in any other written law, the Authority shall be the sole authority responsible for the issue of licenses to carry on the gem industry whether such industry is, or is proposed to be, carried on in or over any State or private land.” Section 15(2) of the NGJA Act specifies that, “no person shall carry on the gem industry except under the authority of a license issued by the Authority.”

Issuing of licences to carry out mining for gems (gemming licenses) is governed by the State Gem Corporation by-laws No.1 of 1971, made by the State Gem Corporation under Section 21(1) of the State Gem Corporation Act No. 13 of 1971. The said by-laws, which have been published in the Ceylon Government Gazette No. 14989/8 dated 23rd December 1971, have been annexed to the petition marked ‘P3’.² It is admitted between the parties that the said by-laws are valid and followed by the NGJA when issuing gemming licenses.³ This Court has examined ‘P3’ and observes that detailed provisions setting out the procedure that should be followed when issuing licenses are contained in by-laws 2 - 10 thereof.

By-law No. 8(2) of ‘P3’ is relevant to the issue before this Court and reads as follows:

“No license shall be granted to any person, unless –

² Although the State Gem Corporation Act has been repealed – vide (Section 54(1) of the NGJA Act), in terms of Section 54(2)(h) of the NGJA Act, every by-law made under the State Gem Corporation Act, and in force on the day immediately preceding the date on which the NGJA Act came into operation and which are not inconsistent with the provisions of the NGJA Act, shall be deemed to be rules and by-laws made under the NGJA Act.

³ Paragraph 6 of the Statement of Objections of the 1st Respondent.

- (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 effect of by-law No. 8(2) in 'P3' is that the applicant for a gemming license must either own the land in its entirety or in the case of co-owned land, the applicant must be a co-owner himself and obtain the consent of those persons who co-own the land so that the applicant together with the consenting co-owners will own at least two thirds of the land on which the gemming is to take place. The by-laws 'P3' clearly does not provide for a license to be issued to a person who is not an owner but only a lessee.

This Court observes that the First Schedule of 'P3' contains a specimen application for a gemming license in terms of which the applicant is required to declare the nature of his title or claim to the land and the names and addresses of co-owners or others believed by the applicant to have an interest in the land. Where the applicant is not the sole owner of the entire land, written evidence of consent of other persons having an interest in the land must be provided. Thus, this Court is of the view that, when it comes to co-owned land, ownership to at least a part of the land is a condition precedent to submitting an application for a gemming license. This Court is further of the view that a person who only has leasehold rights to the land is not entitled in terms of the said by-laws 'P3' to apply for a gemming license.

Upon an application made to the NGJA by the 6th Respondent,⁴ the NGJA had initially issued the 6th Respondent the licence annexed to the petition marked 'P19' to carry out gemming on the said land during a period of one year ending on 26th January 2012. The said license had thereafter been extended for a further period of one year.

It is the position of the Petitioner that the 6th Respondent does not own any part of the land in question and that the 6th Respondent is only a lessee. This Court has examined the said lease agreement, annexed to the petition marked 'P4' and observes that the extent of the land that the lessors claim to co-own has not been set out in the schedule. The Petitioner claims that as the 6th Respondent does not own any part of the land and is only a lessee, the issuance of the said gemming licences to the 6th Respondent is contrary to the by-laws 'P3' and hence the said licenses are liable to be quashed by a Writ of Certiorari.

This Court has examined the Statement of Objections filed on behalf of the 6th Respondent and observe that this position has not been disputed by the 6th Respondent. Although the NGJA was under a duty to verify the ownership of the 6th Respondent prior to issuing a gemming license to the 6th Respondent, it does not appear that the NGJA has in fact done so.

This Court, being mindful that the said by-laws having been made as far back as 1971 may have been amended or repealed, sought clarification from the

⁴ This Court observes that a copy of the application submitted by the 6th Respondent has not been tendered to this Court by the Respondents.

parties whether a gemming license can be granted to a person who is only a lessee. The response of the parties was that 'P3' was still valid.

In the above circumstances, this Court is of the view that as the 6th Respondent did not own any part of the said land, had not satisfied the ownership criteria laid down in 'P3' and was only a lessee, the NGJA could not have issued the 6th Respondent a gemming license in respect of the said land co-owned by the Petitioner. The NGJA must understand correctly the law that regulates its decision making power and must give effect to it. A failure to do so renders the said decision, illegal. As the NGJA has acted outside the provisions of 'P3' when it issued the said gemming licenses to the 6th Respondent, the decision of the NGJA to issue the said licenses and the licences itself are liable to be quashed by a Writ of Certiorari.

The learned Counsel for the Respondents have submitted that the said licenses have already expired and that it would be futile to quash the said licenses at this stage. This Court is in agreement with the said submission and for that reason refrains from issuing the Writs of Certiorari. This Court must observe that the gemming license issued to the 6th Respondent was in fact valid at the time this application was made and that the 6th Respondent continued to benefit by virtue of the said license to which he was not entitled to in terms of the law, even while this action was pending.

Although it is futile to issue a Writ of Certiorari, this Court would now consider whether the Petitioner is entitled to the Writ of Prohibition preventing the 6th Respondent from being issued a gemming license to the land in question, without satisfying the criteria stipulated in 'P3' relating to the ownership to the

land. Even though the gemming licenses issued in 2012 and 2013 have expired and there is no evidence that the 6th Respondent has made an application for a fresh license, irreparable loss can be caused to the Petitioner unless this Court prevents a license being granted to the 6th Respondent in the future. Accordingly, this Court issues the Writ of Prohibition prayed for in paragraph (f) of the prayer to the petition, prohibiting the NGJA from issuing the 6th Respondent, a gemming license in respect of the land pertaining to this application, unless and until the 6th Respondent satisfies the ownership criteria laid down in 'P3'.

The next issue that this Court is called upon to consider is whether the Petitioner is entitled to the aforementioned Writ of Mandamus. The second schedule to 'P3' contains a specimen of a gemming license that would be issued including the conditions subject to which the said license would be issued. Condition No. 16 of the 2nd schedule to the by-laws 'P3' requires the licensee:

1. To furnish the State Gem Corporation with an inventory of all gems mined, extracted, excavated, won or otherwise found from or on the land once every month;

2. Within 3 days after the date of the sale of the gems, to pay to the State Gem Corporation, out of the sale proceeds of the said gems, a sum of money equivalent to the share of the land owned by those co-owners and other persons who, having an interest in the land, withheld their consent at the time of granting the license, to enable the State Gem Corporation to pay such money to the said persons.

Ground Share Agreement 'P12' has been increased to 21% in 'P14b' and finally to 33.33% in 'P28b'. These revisions have infact been admitted by the Respondents.

It is in this context that the complaint of the Petitioner that a proper inquiry has not been held by the 1st Respondent with regard to his share becomes important. Although many inquiries have been held, the Petitioner claims that a proper determination has not been made with regard to his entitlement to 1/3 of the said land.

This Court therefore issues a Writ of Mandamus in terms of paragraph (i) of the prayer to the petition, directing the NGJA to pay the Petitioner his share of the value of the gems deposited by the 6th Respondent, as morefully set out in the motion dated 25th January 2019 filed by the NGJA. Furthermore, this Court directs the NGJA to ascertain the exact share of the land that is co-owned by the Petitioner and, having determined the correct sale value of the gems mined by the 6th Respondent from the said land, to direct the 6th Respondent to deposit the difference, if any, with the NGJA, so that any such monies can be paid by the NGJA to the Petitioner. The NGJA shall be entitled to conduct an inquiry with the participation of the Petitioner and the 6th Respondent in order to ascertain the above details.

This Court makes no order with regard to costs.

Judge of the Court of Appeal