

**DINGIRI MAHATMAYA AND OTHERS**

v

**SAMARAWEERA AND OTHERS**

COURT OF APPEAL

UDALAGAMA, J.

C.A. 2228/2002

SEPTEMBER 4 AND 15, 2003

*National Gem and Jewellery Authority Act, No.10 of 1993 – Issue of licence – Lease bond for 2/3 share – Partition Law, sections, 66, 66 (1) and 66(2) – Lease bonds executed pending partition – Validity – Registration of Documents Ordinance, section 12(1).*

A licence for mining of gems was issued to the 1st respondent on the basis that he had 2/3 share of the corpus on two lease bonds and had the consent of the other co-owners. It was contended that the two bonds were executed pending a partition action instituted in respect of the corpus and are therefore not valid.

**Held**

- i) The trial court after holding that the plaintiff is disentitled to proceed with the action due to the faulty registration of the *lis pendens* directed the plaintiff to file an amended plaint with a fresh *lis pendens*, if necessary.
- ii) The two lease bonds were executed after the said order and before the amended papers were filed and a fresh *lis pendens* registered.

In the circumstances the said bonds are valid for the purpose of consideration of the issue of a licence to mine for gems.

**APPLICATION** for a writ of certiorari**Case referred to:**

1. *Kanagasabai v Velupillai* 52 NLR 241

*Nihal Jayamanne*, P.C., with *A.Nanayakkara* and *D.de Silva* for petitioner.

*L.C.Seneviratne*, P.C., with *C.Abeysekera* for 1st respondent.

*Anusha Samaranyake*, State Counsel, for 2nd respondent.

October 3, 2003

**UDALAGAMA, J.**

The facts of this case show that vide P8, a license for mining of gems, had been issued by the 2nd respondent to the 1st respondent in respect of the land called 'Dabaraliyadda' in terms of the provisions of the National Gem and Jewellery Authority Act, No.10 of 1993.

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It is also observed that the aforesaid land is co-owned and that a partition action bearing No.1777/P had been filed in D.C.Ratnapura. This fact is not disputed.

It is also admitted by the 1st respondent that the latter was entitled to a 1/96 share of the aforesaid land.

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The license for the mining of gems would issue under Regulation 8 of the State Gem Corporation Act only on the consent of other co-owners who together are entitled to claim ownership to an undivided 2/3 share. This provision is unambiguous.

The basis of the claim of the 1st respondent to a license was primarily the leases obtained from other admitted co-owners including some petitioners as evident from the documents marked P6 and P7 which, two leases significantly are dated 17.11.99 and 10.12.99 respectively. Purportedly the lease bonds referred to above entitled the 1st respondent to claim an undivided 2/3rd share of the aforesaid land and also claim rights as per the license issued marked P8. It is also obvious to this court that the aforesaid document P8 had been issued subject to conditions no doubt, to allay any prejudice to the lessors (including some petitioners)

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The pivotal point on which the petitioners claimed that the aforesaid P6 and P7 ought to be set aside and declared void is on the basis that the provisions of section 66 of the Partition Law renders the said two documents to be null and void *ab initio* as the provisions of section 66(2) declares such voluntary alienation to be void as same conflicts with the provisions of section 66(1) of the Partition Law.

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It is also the position of the petitioners that D.C.Ratnapura case No.1777/P referred to above was instituted in September

1976 and that the *lis pendens* was duly registered. The petitioners also stated that accordingly the 1st respondent was disentitled to claim ownership to 2/3 share of the land as he had done to obtain the impugned license as P6 and P7 was void in law, with no rights flowing therefrom.

However, document P3 filed of record which relates to the proceedings of 27.09.99 containing the order of the learned District Judge in the aforesaid case No.1777/P pertaining to a preliminary objection taken up as to the maintainability of the said action, had in that order upheld the objection and had in view of the fact that the *lis pendens* in respect of the 4 lands sought to be partitioned including 'Dabaraliyadde' had not been duly registered, made order that the plaintiff file a fresh *lis pendens*. 40

*Vide* the provisions of section 66(1) of the Partition Law the plaintiff in a partition action is required to file with the plaint the *lis pendens* addressed to the Registrar of Lands of the district in which the land sought to be partitioned is situated. The failure to do so in terms of the provisions of section 12(1) of the Registration of Documents Ordinance renders the decree entered in the action void by reason of the lack of jurisdiction in the court which entered it. (*Kanagasabai v Velupillai*,<sup>(1)</sup>) 50

The learned District Judge in the instant case by P3 referred to above clearly held and as stated earlier, that the plaintiff was disentitled to proceed with the action due to the faulty registration of the *lis pendens* and in fact directed the plaintiff to file amended plaint with a fresh *lis pendens* if necessary. Accordingly amended plaint appears to have been filed on 24.11.95 and a fresh *lis pendens* registered on 15.12.99. 60

Importantly, the leases referred to above, P6 and P7 were executed prior to the registration of the fresh *lis pendens* rendering the compliance of section 66 referred to above, in respect of the alienation in P6 and P7, inapplicable.

I am inclined to the view that P6 and P7 are in fact valid for the purpose of the consideration of the issue of a licence to mine for gems.

In any event the petitioners now seek to quash P8 almost at the expiry of the one year period to which same was issued on 11.12.02 which in fact renders this application for writ almost futile. 70

Furthermore the issue of a fresh license or an extension of the impugned license is another matter which would not warrant interference of this court as such instance has not occurred as yet and would amount to mere speculation. Besides the petitioners are not precluded from objecting to the issue of another license under the provisions of the Act.

I would also disagree with the submissions of the learned President's Counsel for the petitioners that the respondent had obtained P8 without having the required 2/3rd share of the relevant land for the reasons stated above and also hold that in view of the findings of the learned District Judge vide P3, lease bonds P6 and P7 were valid for the purpose of the issue of the impugned license. 80

This application is dismissed with costs.

*Application dismissed.*