

NAVARATNE
v
PREMARATNE AND OTHERS

COURT OF APPEAL
WIJETUNGA, J.
ANANDACOOMARASWAMY, J.
CA 964/87
CALA 111/87
DC RATNAPURA 261/P
APRIL 28, 29, 1988

Interim injunction – Restraining gemming on co-owned land – Partition action – Gemming licence valid for six months – Is gemming of the whole land by a co-owner justifiable?

Held:

- (1) A co-owner even though he may not have the consent of his co-owners is entitled to use the common land reasonably for the common advantage proportionate to his share for the purpose for which the land is intended.
- (2) Gemming will exhaust a limited resource on which value of the land depends and therefore cannot be considered natural use.
- (3) Gemming of the whole land by a co-owner is not justifiable.

APPLICATIONS for Revision/Leave to appeal.

Faiz Musthapha PC with Hemasiri Withanachchi and Ms. S. Arul-pragasam for petitioner.

W.P. Gunatilleke with J.A.J. Udawatte and C. Gamage for 2-11 defendant-respondents.

Cur.adv.vult.

July 15, 1988

ANANDACOOMARASWAMY, J.

This is an application to Revise the order of the Learned District Judge dated 17.8.87 and an application for leave to appeal against the said order. By this order an interim

injunction was issued at the instance of the plaintiff-respondent restraining gemming by the 30th defendant-petitioner (hereinafter referred to as petitioner). The learned Counsel for the petitioner submitted that the learned District Judge had not made a proper assessment of the relevant material and as such had misdirected himself on the primary facts when he ordered the issue of the interim injunction. At the request of both Counsel both these applications were taken together.

The relevant facts are as follows:

The land in question is about 21/2 acres and had been used as a paddy field but gemming had been carried on even earlier in the years 1982 and 1983. The 29th defendant-respondent claims 30/48th share of the land and on that basis the petitioner on 10.12.86 obtained a lease of the whole land from the 29th defendant-respondent for Two (2) years. Thereafter the petitioner obtained from the State Gem Corporation a licence for gemming. Only 8 Co-owners objected to the issue of licence in respect of their shares. The plaintiff-respondent did not attend the inquiry held by the State Gem Corporation before the issue of the licence. The 2nd to 11th defendant-respondents who are now seeking to support the plaintiff-respondent) and the 12th, 22nd, 28th and 29th defendant-respondents are owned some shares gave their consent. The gemming licence was issued by the State Gem Corporation for a period of 6 months.

Subsequent to the issue of licence on 05.06.87 the plaintiff-respondent instituted a partition action on 22.07.87. He and his brother the 1st defendant-respondent claimed 4/32 shares and the plaintiff-respondent left "16/32" shares unallotted. No share was given to 29th defendant. He thereafter sought and obtained an interim injunction restraining the petitioner from gemming on the said land for the reason that the petitioner had no interest in the land, whereas his brother the 1st defendant-respondent in the years 1982-1983 obtained a licence for gemming stating that D.A. Caldera late husband of Mrs. Caldera the 29th defendant-respondent owned 5/8 share of the land.

The petitioner objected to the interim injunction and stated that his lessor owned 30/48 shares and that in the years 1982 and 1983 the 1st defendant-respondent obtained a gemming licence, and further that the plaintiff-respondent obtained a gemming licence, and further that the plaintiff-respondent did not attend the inquiry which preceded the issue of licence by the State Gem Corporation.

These applications are by the petitioner and they are resisted by the 2nd to 11th defendant-respondent who consented to the issue of the licence and not by the plaintiff-respondent at whose instance the interim injunction was issued.

From the foregoing facts it is quite clear that the 29th defendant is a co-owner of the land along with the plaintiff-respondent and others and that the land originally a paddy field had been used for gemming earlier by the 1st defendant-respondent a brother of the plaintiff-respondent.

The plaintiff-respondent at whose instance the interim injunction was issued had not objected either to the issue of the gemming licence or to these applications before this Court. The consenting 2nd to 11th defendants' position is that they consented to the issue of licence for the period of a 6 months only. Its continuance is the only matter now in issue.

Having regard to the fact that it is a co-owned land the 1st principle is that any act of a co-owner rests for its legality on the consent of the remaining co-owners either expressed or implied, but even a co-owner even though he may not have the consent of his co-owners is entitled to use the common land reasonably for the common advantage, proportionate to his share, for the purpose for which the land is intended. Gemming will exhaust a limited resource on which value of the land depends and therefore cannot be considered natural use. Therefore gemming of the whole land by a co-owner is not justifiable.

For the foregoing reasons gemming beyond a period of 6 months is not justified and the interim injunction restraining gemming before the 6 months period is also not justified. The enjoining order was issued on 23.07.87 and interim injunction was issued on 17.08.87. The gemming licence was issued on 05.06.87. The stay order suspending the operation of the interim injunction was issued on 10.09.87 and is in force now. As more than 6 months had passed it is necessary to bring into force the operation of the interim injunction which was issued on 10.09.87 and is in force now. As more than 6 months had passed it is necessary to bring into force the operation of the interim injunction until the final disposal of the Partition action in the District Court.

We therefore order that the interim injunction shall be operative with immediate effect and accordingly dismiss the application of the petitioner. We are not inclined to order costs as both parties are to blame for this situation.

WIJETUNGA, J. – I agree.

Application dismissed.