GENERAL METALS LTD.,
V.
PERERA, SECRETARY, MINISTRY OF INDUSTRIES, SCIENCE AND TECHNOLOGY AND OTHERS

SUPREME COURT.
AMERASINGHE, J.,
DHEERARATNE, J. AND
WIJETUNGA, J.
S.C. APPEAL 99/94.
14 & 15 MAY AND 07 JUNE, 1996.

Mines and Minerals Act, No. 33 of 1992, ss. 39(1), 40(2) - Exploration and Mining Licences.

The Geological and Mines Bureau (2nd Respondent) refused to issue the Appellant two licences: one for exploring and the other for mining a defined extent of 50 acres containing rock phosphate at Eppawala. The Secretary, Ministry of Industries, Science and Technology (1st Respondent) to whom an appeal was made affirmed the refusal. The exploration licence was refused because the defined 50 acres partly overlaps (leaving a balance) the area to which an exploration licence was already issued in favour of the 3rd Respondent. The mining licence was refused because it was for the same 50 acres and it fell within the same area for which an exploration licence had been already isssued in favour of the 3rd Respondent.

Held:

(1) In terms of the rules made by the Minister under section 64 read with section 34 of the Mines and Minerals Act, No. 33 of 1992, an application for a licence for Exploration (Regulation 4(1) and Form 2.1) must necessarily be made with reference to identifiable numbered metric grid units of the area requested. There was nothing before the 1st Respondent to identify which metric grid units comprised the area in regard to which licences were already granted or the application made by the 3rd Respondent related and which metric grid units covered the 50 acre area claimed by the Appellant.

(2) Although according to section 40(2) of the Mines and Minerals Act, read with Article 118(8) of the Constitution an appellate jurisdiction has been conferred on the Supreme Court to "affirm or reverse" it must be interpreted to include jurisdiction to remit the case for a re-hearing.

APPEAL from decision of the Secretary, Ministry of Industries, Science and

Technology under section 40(2) of the Mines and Minerals Act, (read with Article 118 (8) of the Constitution)

*K.N.Choksy,P.C.*with *Faisz Musthapha, P.C.*, *Ananda Kasturiarachchi* and *A.Panditaratne* for Appellant.

K.Sripavan, D.S.G. for 1st Respondent.

Mohan Peiris with *Jayantha Fernando* for 3rd Respondent.

Cur.adv.vult.

July 08, 1996.
DHEERARATNE, J.

This is an appeal from a decision of the Secretary, Ministry of Industries, Science and Technology (1st Respondent), affirming the refusal of the Geological Survey and Mines Bureau (the 2nd Respondent), to issue the Appellant two licences one for exploring, and another for mining, a defined extent of 50 acres containing rock phosphate at Eppawala.

On 7th June, 1994 the Director, Geological Survey and Mines Bureau wrote to the Appellant two letters P20 and P21 refusing to issue the licences. P20 which relates to the refusal to issue the licence to **explore**, stated;-

> "reference to your application No. ..... submitted to us on 13th March 1994 and your letter dated 3rd June 1994 in respect of exploration for phosphate at Eppawala, we wish to inform you as follows:
>
> (i) the area you have applied for **partly overlaps** an area for which an Exploration Licence has already been issued to Lanka Phosphate Ltd. and also an area which is being presently considered in favour of the same Company (ii) in processing your application for the **balance** area, we have written to and awaiting the concurrence of (a) Ministry of Forestry Irrigation and Mahaweli Development and (b) Department of Agricultural Services."

P21 which relates to the refusal to issue the licence to **mine** reads:

> "We regret to inform you that the above application submitted by you on 10th May 1994 in respect of an Industrial Mining Licence to mine at Eppawala is refused as the area you have requested for mining **falls within** the area where an exploration licence has already been issued to Lanka Phosphate Ltd."

The 3rd Respondent company was incorporated on 10.7.1992 in terms of the Conversion of Public Corporations and Government Owned Business Undertakings into Public Companies Act, No.23 of 1987, to take over the Eppawala Phosphate Project of the State and Minerals Development Corporation; it is a company fully owned by the Secretary to the Treasury on behalf of the Government of Sri Lanka.

It is not disputed that the appellant sought both licences for a defined area of 50 acres depicted in surveyor K.K.Silva's plan No.794 dated 15th June, 1993 (vide para 12 of the petition filed before the 1st Respondent and para 14 of the petition filed before this Court). According to P20, the Appellant's application for an **exploration licence** was refused because the defined 50 acres partly overlaps (leaving a balance) the area to which an **exploration licence** was already issued to the 3rd Respondent; according to P21, the **mining licence** for the same 50 acres was refused because it falls within the same area for which an **exploration licence** was already issued in favour of the 3rd Respondent. These two letters thus present two contradictory and inconsistent positions.

The Appellant appealed from the decision of the GSMB to the 1st Respondent and his order sent to the appellant affirming the refusals reads as follows:

> The appeal dated 14.06.94 made to me in terms of section 39(1) of the Mines and Minerals Act, No.33 of 1992 refers. (*sic*)

Having carefully considered, the several averments in the petition of appeal, the annexures P1 to P23 and documents X and Y and the submissions made at the hearing of this appeal by your counsel Mr.Faisz Musthapha PC, I hereby disallow the appeal made by you to set aside

the following decisions of the Geological Survey and Mines Bureau dated 07.06.94, refusing issue of

(a) an Exploration licence, and

(b) an Industrial Mining licence for the reasons given below.

Reference the submission made in respect of the area for which an application for an exploration has been tendered.

The 50 acre extent of land referred to in paragraph (a) to the prayer of the appeal falls within the area to which an Exploration Licence has been issued to Lanka Phosphate Ltd.

Lanka Phosphate Ltd. held a valid mining licence for the said area well before the date of operation of the Mines and Minerals Act, No.33 of 1992.

Reference the submission made in respect of the date of tendering applications.

It is observed that the General Metals Ltd. "duly completed application" for an Exploration Licence for 40 square km. in terms of the Mining (Licensing) Regulation 4(5) and (7) of the Extra Ordinary Gazette No.794/23 dated 26.11.93 has been received by the Geological Survey and Mines Bureau on 23.3.94 whereas the Lanka Phosphate Ltd. "duly completed application" for an Exploration Licence for 36 square km. had been received by the Bureau on 18.03.94, and therefore was pending before the application of General Metals Ltd.

Document "P6" attached to the submission refers to a "proposal to mine and export rock phosphate" and a request made to "allocate 50 acres of land from the rock phosphate belt from Eppawala", purported to have been received by the Geological Survey and Mines Bureau on 22.01.93, and prior to the operation of the Mines and Minerals Act, No.33 of 1992, and the coming into operation of the GSMB. It is therefore observed that I am unable to accept the authenticity of the seal on P6 and consequently unable to place reliance on this document. On the said date, i.e., 22.01.93, Lanka Phosphate Ltd. held a valid mining licence in terms of the Mines and Minerals Law, No 4 of 1973, covering

a large extent of land in the rock phosphate belt of Eppawala which also included the 50 acres extent of land requested by the General Metals Ltd.

Reference Industrial Mining Licence

In terms of section 5 (1)(a) of the Mining (Licencing) Regulations aforementioned, only a holder of an Exploration Licence shall apply for an Industrial Mining Licence. Hence, your application for an Industrial Mining Licence contravenes the said provision of the regulations, as no Exploration Licence was held by General Metals Ltd. at the time of tendering application for an Industrial Mining Licence.

Thus, the decision of the 1st Respondent has been reached having considered the several averments in the petition of appeal, annexures P1 to P23, documents X and Y and submissions made by learned President's Counsel for the Appellant at the hearing. The correctness of that decision could be reviewed by us only on the material available to the 1st Respondent at the time he made that decision. We have therefore refrained from considering any fresh material submitted later to us in the proceedings before this court, in particular the documents R1 to R9 filed on 07.11.95 along with "written submissions on behalf of 1st, 2nd and 3rd Respondents". I must observe at this point, that filing joint written submissions by one attorney on behalf of the appellate body, the decision making body and the party successful before the appellate body, although they all happen to be State agencies, gives us matter for concern; such an act could also hardly inspire confidence in the aggrieved party, the Appellant, that he was treated fairly by the statutory authorities. I may add however that subsequently at the hearing, the 1st and 3rd Respondents were separately represented by counsel.

The following positions emerge from the decision of the 1st Respondent:

(i) The defined 50 acres falls within the area for which an **exploration licence** was issued to the 3rd Respondent.

(ii) The duly completed application for an **exploration licence** for

40 square km. (50 acres) made by the Appellant was received by the GSMB when the duly completed application for an **exploration licence** for 36 square km.(45 acres) by the 3rd Respondent was pending.

(iii) The 3rd Respondent had a valid **mining licence** in terms of the Mines and Minerals Law No. 4 of 1973 covering a large extent of land in the Eppawala Phosphate belt which included the 50 acres.

Licences referred to in (i) and (iii) and the application of the 3rd Respondent referred to in (ii) above, do not seem to have been before the 1st Respondent when he reached the decision. It was absolutely necessary for the 1st Respondent, for the purpose of deciding the appeal made to him, to identify the area covered by those licences, before he came to the conclusion that the defined 50 acre area fell within one of those areas. It is so even with regard to the area of 36 square km. referred to in (ii) above.

The question as to who had made a prior application for an exploration licence would arise only if rival applicants compete for the same area or part of the same area. What material did the 1st Respondent have to show that land in respect of which the Appellant applied for licences fell within the area in respect of which a licence had been already issued to the 3rd Respondent? The Appellant seeks licences for the defined 50 acres from lot 70 in the Final Village Plan No. 337. A supplement plan No. 2 (P23) dated 10.06.91 was prepared in relation to lots 68, 69 and 70 of the Final Village Plan No.337 by officers of the Surveyor General's Department; the survey for this purpose was done in May 1991. The tenement sheet relating to that supplement plan P23 was produced before us as P26, a document which was not before the 1st respondent when he heard the appeal. This tenement sheet shows that lot 68 (and not 70) of the Final Plan was claimed in May 1991 by the Acting Project Manager, Phosphate Project Eppawala, as "being possessed at present by the State Mining and Minerals Development Corporation and to be given out on a long lease to Lanka Phosphate Ltd". It is these documents P23 and P26 which had persuaded the appellant to assume that no exploration or mining licences had been granted to the 3rd Respondent in respect of lot No.70 in the Final Plan 337. Plan P23 and its tenement sheet P26 are not conclusive as to whether any licences were or were not already issued to the 3rd Respondent in respect of lot 70 in the Final Village Plan.

To come to a decision on the question whether the area in respect of which the Appellant claims licences fell within the area to which licences have been issued or an application made by Ms. Lanka Phosphate Ltd., there should have been a plan before the 1st Respondent superimposing those respective areas at least with reference to a Final Village Plan. Such a plan was not before the 1st Respondent. On the other hand, in terms of the rules made by the Minister on 23.11.93 under section 64 read with section 34 of the Mines and Minerals Act, No.33 of 1992, an application for a licence for Exploration (Regulation 4(1) and form 2.1) and an application for a licence for mining(Regulation 4(3) and form 2.3) must necessarily be made with reference to identifiable numbered metric grid units of the area requested. There was nothing before the 1st Respondent to identify which metric grid units comprised the area in regard to which licences were already granted or the applilcation made by the 3rd Respondent related and which metric grid units covered the 50 acre area claimed by the Appellant. For this reason alone we cannot permit the order of the 1st Respondent to stand. Mr. Sripavan DSG in the best traditions of the Attorney-General's Department, correctly conceded that the 1st Respondent's order cannot be supported.

The resulting position would be to set aside the determination of the 1st Respondent and remit this matter for a fresh consideration by him. Mr. Choksy PC for the Appellant drew our attention to subsection 40(2) of the Mines and Minerals Act, in relation to our jurisdiction. He submitted that it is an appellate jurisdiction conferred on this Court in terms of Article118(8) of the Constitution read with subsection 40(2) of the Mines and Minerals Act; and he drew our attention by way of contrast to the wider wording used in Article 127(2). His contention was that in terms of section 40(2) we are empowered either to "affirm or reverse" the decision of the 1st Respondent; if we do not affirm, he submitted, it *ipso facto* follows that we must reverse the decision and grant the licences applied for by the Appellant. This would mean that we have to order granting of licences to the Appellant when there is nothing to indicate whether the 50 acre area fell within the area covered by licences purported to have been issued to the 3rd Respondent or not. We are unable to give such a restricted construction to the

words "affirm or reverse" in subsection 40(2) so as to produce an absurd result, which we must presume, the legislature never intended.

For the above reasons we remit this matter to the 1st Respondent to rehear the appeal made to him. The parties will bear their own costs.

AMERASINGHE, J. – I agree.

WIJETUNGA, J.– I agree.

Case sent back for re-hearing.