KRISHNA MINING CO. (CEYLON) LTD.
V.
JANATHA ESTATES DEVELOPMENT BOARD AND OTHERS

SUPREME COURT.
FERNANDO, J.,
DHEERARATNE ,J., AND
WIJETUNGA J.
S.C. APPLICATION NO. 515/92
2nd AND 3rd JULY, 1996.

Fundamental rights - Article 12(1) of the Constitution-Time Bar-Private sale of land vested in the Land Reform Commission - Failure to call for public tenders - Infringement of the right to equality.

The Petitioner company was engaged in mining and quarrying silica quartz on a land five acres in extent from Ambalamana Estate, having purchased the same from the Land Reform Commission, by private treaty. A request by him to purchase an eight acre block adjoining the said land was refused by the Minister of Plantation Industries as it had been decided to "tender the land by advertisement". However, shortly prior to that decision, the Minister had approved the sale by private treaty of an extent of 10 acres of land from Ambalamana Estate to the 5th Respondent Company, for silica quartz mining. Pursuant to such approval the 5th Respondent Company made a plan for 10 acres of land and entered into business commitments with Japanese buyers, pending the purchase of the land. The said land did not include any portion of the eight acres which the Petitioner Company had sought to purchase. The proposed sale to the 5th Respondent Company was thereafter suspended; but a Cabinet decision approved the sale pursuant to which a block of 10 acres was sold to the 5th Respondent Company, by private treaty. An extent of 4A 3R 15P out of the said 10 acres formed a part of the eight acre block which the Petitioner Company had wanted to buy.

Held :

(1) The application is not time-barred by reason of the failure of the Petitioner to challenge an imminent infringement of his right. The Petitioner was entitled to wait until there was an actual infringement. The sale to the 5th Respondent constituted such infringement; and the Petitioner challenged it within the prescribed period.

(2) The sale of the land to the 5th Respondent by private treaty, including an extent of land which the Petitioner wanted to buy is contrary to the

Cabinet decision and violative of the Petitioner's right to equality under Article 12(1) of the Constitution.

APPLICATION for relief for infringement of fundamental rights.

E.D.Wickramanayake with *S. Mahenthiran* and *Anil Tittawella* for Petitioner.

Saleem Marsoof, D.S.G. with *Miss. Demuni, S.C.* for 1st, 2nd, 3rd, 4th and 6th Respondents.

R.K.W. Goonesekera for 5th Respondent.

Cur. adv. vult.

12th September, 1996.

ORDER OF COURT [READ BY WIJETUNGA, J.]

The Petitioner Company purchased by private treaty two allotments of land five acres in extent out of Ambalamana Estate from the Land Reform Commission in 1985 and 1986, and was engaged in mining and quarrying silica quartz, having obtained the necessary statutory licences. Between December, 1987 and October, 1989, the Petitioner repeatedly asked for another eight acre block adjoining the land it already owned. This request was refused by the Minister of Plantation Industries who, by his letter dated 11.11.90 addressed personally to the Deputy Chairman of the Petitioner Company, stated that "there are several applicants for this land and I have decided to tender the land by advertisement. You may therefore request Krishna Mining Co. (Ceylon) Ltd., to respond to the Advertisement."

General Metals Ltd., the 5th Respondent, was also interested in silica quartz mining, and applied for land from Ambalamana Estate; first for 25 acres in 1986, and thereafter for 10 acres in 1989. By letter dated 19.9.89 (5R3), the 3rd Respondent, Secretary to the Ministry of State for Plantations, informed the Chairman of the 1st Respondent, the Janatha Estates Development Board, (JEDB) that "the Hon. Minister of Plantation Industries has approved the sale of 10 acres of Ambalamana Estate **including the abandoned Tea Factory** with access road of 30' width, to Mr. P.B.S. Dissanayaka and Mr. K.G.C. Wickramawardana of General Metals Ltd., No. 241, Sri Sangaraja Mawatha, Colombo 10, on the basis of a valuation by the Chief Valuer.

A copy of **the Sketch Plan of the 10 Acres** requested for is annexed." This was communicated by the Property Development Unit of the JEDB by letter dated 20.9.89 to the 5th Respondent who was asked to "get the above extent of land including the area on which the abandoned Tea Factory is situated providing an access road 30' wide, surveyed by a Licensed Surveyor at your expense and forward to us the Original Survey Plan along with 3 certified copies thereof." This land was surveyed, and a Survey Plan No. 86 dated 24.10.89 prepared by W.M.E. Uduwawala, Licensed Surveyor, was submitted by the 5th Respondent to the Property Development Unit of the JEDB, which in turn forwarded it on 26.10.89 to the Senior Asst. Valuer, Valuation Department, Kandy with a request for valuation. (It appears from a subsequent Cabinet Memorandum that allotment was then valued at Rs. 100,000/-).

In a very short time the 5th Respondent then entered into certain business commitments with Japanese buyers in the expectation that it would receive this land. However, on 20.11.89, the 5th Respondent was informed by the Property Development Unit of the JEDB that it had been instructed by the Ministry to stay action with regard to the proposed sale of the 10 acres, since the sale would be reviewed by the Ministry shortly, and that it would not pursue the matter until further instructions were received.

Thus, the position as at 30.6.91 (the date of the Cabinet Memorandum) was that, on the one hand, the Petitioner had purchased five acres of land for silica quartz mining and its request for another 8 acres had been refused. The 5th Respondent had not purchased any land, and the approval granted for the purchase of a 10 acre block, which had been surveyed and valued, had been suspended. Government policy was repeatedly stated to be that such land would not be alienated by private treaty and would be sold only by public tender.

There is no doubt that the 5th Respondent had thereby suffered an injustice, because the approval granted, presumably after due consideration, in September, 1989, was stayed just two months later. Conscious of that injustice, a Cabinet Memorandum dated 30.6.91 was presented by the Minister of Plantation Industries in which it was stated inter alia that -

". . . . . on the instructions of the JEDB, the General Metals Ltd., had got the 10 acres of land surveyed and valued at their own cost, as a pre-requisite for the sale . . . [subsequently] the then Hon. Minister decided in 1990 to call for tenders for the sale of Silica Quartz land in the Ambalamana Estate. In view of this decision, the JEDB had to stop the sale of 10 acres of land to the General Metals Ltd.

Therefore the General Metals Ltd. had made several appeals to the Ministry of Plantation Industries requesting to honour the written assurance given by the JEDB to sell 10 acres of land to them

. . . . .

. . . . . the following facts need consideration :

"(a) When Krishna Mining Co., Ltd., made an application during the same period in which the General Metals Ltd., made a request for a portion of land, the former Company had been allowed to purchase lands for Silica Quartz Mining while General Metals Ltd., had been denied this facility.

(b) The J.E.D.B. had given a written assurance in 1989 that 10 acres of land will be sold to the General Metals Ltd.

(c) On the instructions of the J.E.D.B., the General Metals Limited has got this land surveyed and valued at their expense.

(d) On the assurance given by the J.E.D.B. this company has contracted with an importer in Japan for the supply of silica and had incurred expenses for the importation of mining equipment at a cost of approximately Rs. 8 million." (emphasis added)

The Cabinet, on 21.8.91, granted approval -

"(i) to sell not exceeding 10 acres of silica Quartz Lands from Ambalamana Estate to General Metals Ltd., at a fresh valuation by the Chief Valuer. The mining and export of silica Quartz to be subject to the approval of the Ministry of Industries, Science and Technology; and

(ii) to dispose the balance silica Quartz Lands of the Ambalamana Estate by calling for public tenders." (emphasis added)

The Petitioner's complaint is that thereafter the 5th Respondent was allocated, not the original ten-acre block already approved but another ten-acre block adjacent to the Petitioner's land, which include a portion that the Petitioner had asked for. The Petitioner was informed by the J.E.D.B. by letter dated 17.7.92, that this allotment had been sold. The present application was filed on 17.8.92, within one month thereafter. It now transpires that the sale was by Deed No. 4631 attested by Prosper de Costa, Notary Public dated 20.7.92. The land transferred is depicted as Lots 1 to 3 in Plan 618, made by S.M. Abeyratne, Licensed Surveyor (5R34), which is undated, although it refers to three dates of survey, viz. 10.11.90, 25.4.91 and 17.5.92.

EQUAL TREATMENT

Learned counsel for the Petitioner contends that the transfer was in violation of Article 12(1) because Government policy in regard to alienation of land for silica Quartz mining was that public tenders would be called for; that when the Petitioner requested 8 acres out of such land, it was refused on the basis that tenders would be called for; and that thereafter to allow the 5th Respondent to purchase by private treaty the very block which the Petitioner had asked for, was a denial of equal treatment. Learned counsel, however, concedes that an exception could fairly and properly have been made in respect of the 10 acre allotment which had been approved for the 5th Respondent in September, 1989; but he argues that the Cabinet decision of 21.8.91 did make that exception, and only that exception, and did not authorize the sale by private treaty to the 5th Respondent of any other allotment, whether already identified or to be thereafter identified.

It is necessary to consider whether the 10 acre allotment depicted in Plan 86 is the same, or substantially the same, as the 10 acre allotment shown in Plan 618. Plan 86 was prepared at the instance of the 5th Respondent who forwarded it to the 1st Respondent, but it was not produced by the 1st or the 5th Respondent; nor the "Sketch Plan". The submission of learned counsel for the 5th Respondent in that regard was that the 5th Respondent had not insisted on a particular block of land.

This submission is negated by what the 5th Respondent stated in its petition to the Court of Appeal dated 13.11.91, praying for the issue of a Writ of Mandamus in the same connection, wherein it averred inter alia as follows:-

> "9. Thereafter the Petitioner Company had the land surveyed and by letter dated 26th October, 1989 addressed to the Manager of the Property Development Unit the Petitioner forwarded Survey Plan bearing No. 86 made by W.M.E. Uduwawala, Licensed Surveyor . . . . . .
>
> 10. By letter dated 27th October, 1989, the said Manager of the Property Development Unit inquired from the Managing Director of the Petitioner Company whether he was prepared to purchase **the said 10 acres** and the Managing Director of the Petitioner Company for and on behalf of the Petitioner Company by letter dated 1st November, 1989 replied stating that he was prepared to purchase **the said land** . . . . By letter dated 26th October, 1989 the said Manager of the Property Development Unit requested the Senior Assistant Valuer of the Valuation Department to value **the land allocated** to the Petitioner Company . . . . . " (Emphasis added).

There is no material to show that any other allotment had been identified for allocation to the 5th Respondent before the Cabinet decison of 21.8.91.

The Cabinet Memorandum of 30.6.91 refers to "the 10 acres of land surveyed and valued at their [the 5th Respondent's] own cost, as a pre-requisite for the sale." The only land which met that description was that depicted in Plan 86. No other land, even if under consideration for allocation to the 5th Respondent had been surveyed and valued. Further, the Cabinet Memorandum referred to, and the Cabinet decision required, a "fresh" valuation; that meant that the entity to be transferred had already been valued but that a second valuation was required. If the Cabinet had contemplated the sale of a new allotment, not yet identified, it would have required "a valuation", and not a **fresh** valuation.

The letter to the 5th Respondent from the Ministry of Plantation Industries dated 4.9.91 makes the position even more explicit when it states that "although the land has been earlier surveyed and valued, the Cabinet decision directs us to obtain a new valuation from the Chief Valuer."

Learned counsel for the 5th Respondent submitted that the Cabinet decision authorized the sale of 10 acres, leaving the selection of the land to be done at a future date. However, the Cabinet decision, considered together with the Memorandum dated 30.6.91, and the other available material does not permit that interpretation. The Memorandum highlighted a particular grievance or injustice, that a specific sale already approved, had been stayed as a result of the decision to insist on public tenders ; and the remedy was to make one exception in regard to the particular land in respect of which a commitment had previously been made.

The resulting position is that all sales of silica quartz land from Ambalamana Estate were required to be by public tender, with a single exception only, in the case of the land previously approved for allocation to the 5th Respondent and shown in Plan 86. Consequently, the 8 acre block requested by the Petitioner had to be offered for sale by public tender.

But the 10-acre block transferred to the 5th Respondent by Deed No. 4631 dated 20.7.92 depicted in Plan 618, seemed to be quite distinct from that shown in Plan 86; the "abandoned Tea Factory" did not appear in Plan 618; and the sale thus appeared to be contrary to what was decided by the Cabinet on 21.8.91. Such a sale was undoubtedly discriminatory, and in violation of the petitioner's fundamental right to equality before the law and the equal protection of the law, guaranteed by Article 12(1) of the Constitution.

However, it appeared equitable, if the 10 acre block of land in Plan 86 still remains unalienated, that the 5th Respondent should be allowed, if so advised, to purchase that allotment in terms of the Cabinet decision of 21.8.91. Accordingly at the conclusion of the oral argument, we asked learned Deputy Solictor General to clarify the position as to the land originally allocated to the 5th Respondent, the land actu-

ally transferred, and the land now available. The 1st to 4th respondents thereafter tendered a copy of Plan No. 86, and it was then agreed that the position was as follows:

(a) The land originally allocated, depicted in plan No. 86, consisted of five allotments, namely

Lot 1	-	2A	0R 20P	
Lot 2	-	1A	2R 02P	
Lot 3	-	1A	1R 20P	
Lot 4	-	4A	0R 00P	
Lot 5	-	1A	0R 00P	(including the factory)
		10A	0R 02P	

(b) The land actually transferred, depicted in Plan 618 did not include the factory and consisted of three allotments, namely.

Lot 1	-	4A	3R 15P
Lot 2	-	4A	1R 05P
Lot 3	-	0A	3R 20P
		10A	0R 00P

(c)The corpus covered by Lots 1, 2, and 3 in Plan 86 (aggregating to 5A 0R 02P) was almost the same as Lots 2 and 3 (5A 0R 25P) in Plan 618.

(d) Lots 4 and 5 in Plan No.86 had been transferred to a third party " and were no longer available for transfer to the 5th Respondent.

(e) Lot 1 in plan 618 was part of the 8-acre block which the Petitioner had wanted to buy, but which it had been decided (according to letter dated 11.11.90) to sell by public tender.

When it decided that land should only be sold by public tender, the only exception which the Cabinet made was in respect of lots 1 to 5 in Plan No. 86. It is true that this may have included a part of the 8-acre block which the Petitioner wished to buy, and which the

Petitioner was told would be sold by public tender, but it is not necessary to consider whether the 5th Respondent should have been denied that portion, because learned counsel for the Petitioner conceded that he was not objecting to the transfer of the land depicted in Plan 86. His challenge is therefore restricted to Lot 1 in Plan No. 618, (4A 3R 15P in extent). That Lot was not covered by the Cabinet decision, and its alienation to the 5th Respondent was in violation of the petitioner's right to equal treatment - namely an equal opportunity to purchase by public tender - and the transfer must be pro tanto set aside, and the consideration, pro tanto refunded.

PRELIMINARY OBJECTION

The Respondents took a preliminary objection that the application had been filed out of time. This objection had two limbs. Firstly, it was said that the Petitioner's complaint was in respect of a decision to allocate or sell the land depicted in Plan 618 to the 5th Respondent, and that the Petitioner had been aware of this in November, 1990, or at the latest in October, 1991. Secondly, it was said that if the sale to the 5th Respondent was an infringement, the Petitioner had been aware of that, as an imminent infringement long before 17.8.92.

A decision to allocate the land to the 5th Respondent should necessarily have been in writing, and communicated to the 5th Respondent. No such decision or communication has been alleged or proved. To sustain an objection of this nature that a decision was not challenged within one month, it is necessary for the Respondents to prove that there was such a decision and that the Petitioner had knowledge of it more than one month before making the application to this Court. In the absence of such proof, the mere fact that the Petitioner had some fear or anticipation of such a decision is insufficient.

As for the imminent infringement, the facts of this case show that a change of mind was always a possibility. Although the Petitioner must have realized that an infringement was possible, it could only have complained if it could have shown that it was also imminent. In the absence of any such official communication, it is not possible to hold that the Petitioner had knowledge that an infringe-

ment was then imminent. However, it is unnecessary to decide that question because the Petitioner, although entitled to challenge an imminent infringement, was nevertheless entitled to wait until there was an actual infringement. The facts show that the land was transferred on 20.7.92 and that three days earlier the Petitioner had been informed that it had already been sold. It was that sale which the Petitioner challenged, and he did so within the prescribed period of one month, and hence the preliminary objection fails.

DECISION

For the foregoing reasons, we grant the Petitioner a declaration that the 1st Respondent, by the sale of Lot 1 in Plan No. 618 to the 5th Respondent, violated the petitioner's fundamental rights guaranteed by Article 12(1) of the Constitution. We further hold and declare that the sale or alienation of that Lot effected by Deed No. 4631 dated 20.7.92, attested by Prosper de Costa, Notary Public is null and void, and that the 5th Respondent is entitled to a refund, **pro tanto**, of the purchase consideration. The 1st Respondent is directed, within six months, to put up the said lot 1 for sale by public tender, and the Petitioner and the 5th Respondent will also be entitled to bid. In view of the fact that the Petitioner had possession of that Lot for a considerable period of time before 1992, we do not consider it equitable to award the Petitioner compensation.

On 27.8.92, learned President's Counsel who then appeared for the 5th Respondent brought to the notice of Court that the land in respect of which the Petitioner claims rights had already been transferred by Deed No. 4631. He gave an undertaking that the 5th Respondent would submit to Court, on or before the last day of each month, a statement setting out the quantities of silica quartz mined from the portion of land purchased on that Deed and that the statement would be certified by the Directors of the 5th Respondent Company. In view of that undertaking, learned counsel for the Petitioner did not pursue his application for an interim order. The 5th Respondent has accordingly submitted such statements commencing from September, 1992.

In all the circumstances of this case, we do not consider it equitable either to direct the 5th Respondent to account to the JEDB for the silica quartz mined, or for the proceeds of sale, or to direct the JEDB to pay interest on the refund of the purchase price.

We award the Petitioner costs in a sum of Rs. 15,000/- payable by the 1st Respondent.

FERNANDO, J.

DHEERARATNE, J.

WIJETUNGA, J.

Relief granted.