STATE GRAPHITE CORPORATION

v.

K.S.P.D. FERNANDO AND ANOTHER

SUPREME COURT
SAMARAKOON, C.J., WEERARATNE, J., AND WIMALARATNE, J.
SC. APP. 87/81, C.A. 1182/80
SEPTEMBER 6, 7 AND 8, 1982

Mines and Minerals Law, No. 4 of 1973, s. 58 – – Date of vesting of property – Date of Gazette notification – Construction of deed.

The 2nd respondent was owner of Kahatagaha Mines and the appellant is a statutory Corporation. By Agreement dated 21.4.72 and attested by T. Sri

Ramanathan "the Corporate – shall take over the said mines, equipment and graphite on certain terms and conditions." Some of which were –

1. The Graphite Corporation will take over and the Company will hand over the mines.....
2. The Company will arrange to hand over and the Graphite Corporation will take over all uncured, partly cured and cured plumbago.
3. The Mining Company agrees to accept the terms and conditions which will be embodied in the proposed legislation which will cover the acquisition of Graphite Mines.....

The proposed legislation became the Mines and Mineral Law No. 4 of 1973, which was certified by the Speaker on 24.2.73. By vesting order dated 18.12.73 Kahatagaha Mines were vested in the Corporation.

The Court of Appeal framed the questions:

1) Did the mines property vest in the Corporation on 21.4.72 upon execution of the Agreement?

2) Was 21.4.72 the date of vesting of the property in terms of Section 58(B)(ii) of the Mines and Minerals Act No.4 of 1973?

The 2nd respondent asked for Writ of Mandamus on the ground that the appellant was unduly delaying payment of compensation.

Held -

1. On the construction of the Deed of 21.4.72 it was only an Agreement to transfer and title to the property passed only upon the Vesting Order dated 18.12.73 and not on date of Agreement.
2. No Writ of Mandamus is due as the time ripe for payment of compensation will arise only after order of this Court is pronounced.

Case referred to:

(1) *Maharaja Mahindra Chandra Nandi v. Raja Durga Prashad Singh A.I.R. 1917, P.C., 23.*

(2) *Regina v. National Joint Council for the Craft of Dental Technicians* 1 Q.B. 704, 708.

APPEAL from judgment of the Court of Appeal.

N. Sinnatamby with *Ajantha Cooray* for petitioner-appellant.

H. W. Jayewardene, Q.C. with *H.L. de Silva, S.A.*, and *L.C. Seneviratne* for 2nd respondent-respondent.

Cur. adv. vult.

October 12, 1982.

SAMARAKOON, C.J.

The appellant in this case is the State Graphite Corporation (now known as the State Mining and Minerals Corporation by virtue of an order published in Government Gazette No. 25/6 of 26th February,

1979.) The 2nd respondent was the owner of the property known as Kahatagaha Mines situated in Kurunegala which at some point of time became the property of the appellant. The 1st respondent, who is the Chief Valuer of the State awarded the 2nd respondent a sum of Rs. 2,923,640/- (award marked P12) as compensation for the property. The appellant disputed this valuation and applied to the Court of Appeal for a Writ of Certiorari to quash the award P12. The Court of Appeal refused this application. Hence this appeal to this Court with the leave of the Court of Appeal. The resolution of the dispute on valuation of the property depends largely on the exact date on which the Corporation became entitled in law to the property. The Corporation contends that its title accrued on 21st April 1972 upon the execution of agreement marked P2 and the valuation should therefore be based on the audited Balance Sheet dated 22.11.1971 (P6). The 2nd respondent counters that the property vested in the Corporation on the 18th December 1973 by virtue of a Vesting Order of that date made in terms of section 52(1) of the Mines and Minerals Law No.4 of 1972. In the result, he states, the valuation of the property should be based on the audited Balance Sheet dated 8.10.73 marked P11. To decide this dispute it is necessary to go back in time to the month of October 1971.

By letter dated October 1971 (marked B) the then Minister of Industries and Scientific Affairs wrote to Sir John Kotelawela, Managing Director of the 2nd respondent *inter alia* as follows:

> "As you are aware the Government has decided that ownership of all minerals should be vested in the State and in pursuance of this objective has also decided that the three graphite mines should be taken over and operated by the State."

It further stated that Bogala Mines had been requisitioned under Emergency Regulations and would soon be formally vested in the Corporation under the provisions of the Business Acquisition Act and that the Kolongaha Mines had been voluntarily transferred by the owners to the Corporation. The Minister indicated that he desired to have an early discussion towards this declared end. Sir John appears to have met and discussed the matter with the Minister on the 24th January 1972. Cordial and friendly relations seemed to have characterised the discussion and agreement was reached on certain matters which were incorporated in the Minister's letter to Sir John dated 31st January 1972 (Document A also marked P1). It states that the Minister agrees to the "transfer taking effect from 31st

March 1972". Other points of agreement were –

1. Representatives of the Corporation will commence checking items against the inventory as early as possible.
2. Engineers and Technicians of the Corporation will commence working in the Mine from then onwards to familiarise themselves with the work of the operations.
3. It will be useful if the 2nd Respondent would make some accommodation available to these Technicians and Officers who would be working in the Mines.

The Minister also suggested that exports to buyers abroad should be taken over early and therefore that all exports should be routed through the Corporation from the middle of February. These two Documents marked A and B were subsequently made part and parcel of the Notarial Agreement. That was the Agreement P2 entered into between the Corporation and the 2nd Respondent and attested by T. Sri Ramanathan, Notary Public on 21st April 1972. It recites that the Corporation "shall take over the said Mines, Equipment and Graphite" on certain terms and conditions. They are *inter alia* –

"1. The Graphite Corporation will take over and the Company will arrange to hand over the Mines morefully described in the Schedule to this Agreement as well as hand over to the Corporation the said equipment in the annexure 'C' as well as the cured and uncured plumbago lying at the said Mines premises at Kuruñegala and at the premises of the Company in Colombo.

2. The Company will also arrange to hand over and the graphite Corporation will take over all uncured, partly cured and cured plumbago not packed for export and lying at the Head Office Stores in Colombo as well as uncured plumbago in transit to the said Stores from the said Kahatagaha Mines and it is agreed the same shall be valued at the current market value and such value shall form part of the compensation payable in terms of the proposed legislation.

3. All plumbago packed and ready for despatch awaiting shipment shall be shipped to the foreign buyers and the market value thereof plus FEECs less expenses connected with export shall be paid to the Company as and when such proceeds are realised.

4. The mining Company shall furnish the Corporation with all information pertaining to contracts entered into by the

Company for the supply of plumbago to buyers in Ceylon and abroad, which said contracts will be assigned to the Corporation from the date thereof.

5. The mining Company agrees to accept the terms and conditions which will be embodied in the proposed legislation which will cover the acquisition of Graphite Mines provided that in the event of the proposed legislation not being enacted or unduly delayed, the payment of compensation will be in accordance with the provisions of the law obtaining at the time of the said acquisition applicable to the said acquisition.

6. All plumbago which is on the surface of the ground as well as all plumbago which is mined but not hoisted to the surface shall be valued at the current market value and such value shall form part of the compensation payable to the Company.

.....

.....

.....

10. Both parties shall try to settle any disputes relating to any matter contained in this Agreement or incidental thereto in good faith and in mutual trust, should the parties, however, fail to arrive at mutually satisfactory settlement then the same shall be referred to two Arbitrators, one to be appointed by each party."

The proposed legislation referred to in Clause 5 was presented to the House of Representatives in the form of a Bill and was, on 18th May 1972, ordered to be printed. The first Republican Constitution came into operation on the 22nd May 1972. The Mines and Minerals Law No.4 of 1973 based on the Bill was passed by the National State Assembly. It was certified by the Speaker on the 24th February 1973 and became law. By a Vesting Order (P5) dated 18.12.73, made in terms of section 52(i) of that Law by the Minister, Kahatagaha Mines was vested in the Corporation. The property was fully described in the Schedule to the Vesting Order. The Board of Directors of the Corporation acting in terms of section 64(1) of the said Law referred the determination of compensation for the vested property to the Chief Valuer of the State and he made his award P12. It is undated. He states that the valuation is made in accordance with the provisions of section 58 of the Law on the basis that legal title was vested in the Corporation on 18th December, 1973, by Vesting Order P5.

The first point of contest relates to the exact date of vesting of title in the Corporation. The Court of Appeal has framed the relevant questions thus –

"1. Did the mines property in question vest in the petitioner corporation on 21st April, 1972, upon the execution of P2?

2. Was 21st April, 1972, the date of vesting of the property in terms of section 58(B)(ii) of the Mines & Minerals Law?"

The answers to these questions depend mainly on the construction of the words used in Document P2 and its attendant Documents A and B. Counsel for the appellant points to the use of the word "transfer" in P1. A transfer was what was intended by the Minister in January 1972 and that is what was in fact done by P2 in April 1972 – so goes the argument. "In construing the terms of a Deed, the question is not what the parties may have intended, but what is the meaning of the words which they used" per Lord Parmoor in *Maharaja Mahindra Chandra Nandi vs. Raja Durga Prashad Singh* (1). I adopt the same canon of construction. The first ever reference to this transaction is in Document B written in October 1971 by the Minister to Sir John. It contains in it the words "vested", requisitioned" and "transferred". The word "vested" in the first paragraph in reference to "ownership" is a clear indication that title would pass to the State by statute. How else could title to minerals, wherever they may exist in the Island, be owned by the State? Ownership had to be of minerals traced as well as untraced. The latter kind could well exist anywhere in the Island and cannot be acquired by private treaty. The next use of the word "vested" is in the second paragraph of Document B and that expressly states that the vesting is to take place in terms of the Business Acquisition Act. It also mentions that Kolongaha Mines had been voluntarily transferred by its owners to the Corporation. This may be a transfer of possession pending vesting thereby obviating a requisition, or it may be a transfer of title. There is no clarification of this either in the document or in the evidence. It is probably the former because that is consonant with the declared intention of vesting title in the State not only of all minerals but also of the three major graphite mines. The manner of implementing this decision was left open for discussion. That discussion took place on the 24th January, 1972. Document P1 of 31st January, 1972, incorporates matters discussed and agreements reached. In it the Minister refers to the fact that there has been some "delay in the taking over" of the Kahatagaha Mines and indicates his agreement" to the transfer taking effect from the 31st March 1972." Counsel for the Corporation laid great stress on the

word "transfer" and contended that P1 read with P2 passed title in the mines to the Corporation. The words "taking over" and "transfer" in P1 both refer to the same transaction. That transaction is evidenced by Document P2. It is significant that in P2 the word "transfer" does not occur. It is not characterised as a "Deed of Transfer" or a "Deed of Sale". It expressly states that it is an "AGREEMENT" between the parties. Nowhere does it use the words "vendor" and "purchaser" or the words "sale" and "purchase". A habendum clause is non-existent. Counsel stated that Clause 1 of the conditions set out in P2 replaces the habendum clause and has achieved the same object of passing title. It states that the Corporation "will *take over* and the Company will *arrange to hand over*" the mines, minerals and equipment referred to therein. (The emphasis is mine.) The mines are described in the schedule and comprise immovable property. The term "hand over" is not necessarily a legal term. In the English language it means "succeed to possession or control of". That is just what it means in this clause and the Company agrees to make arrangements to give such possession and control. Such words cannot pass title. There are other features which militate against the assertion that it is a Document of title. P2 is stamped as an agreement and not as a Deed of Sale. Counsel for the Corporation argued that it could not be stamped on the price to be paid for the property as that was to be ascertained later according to Clause 5. If so then the law required it to be stamped on the market value. Clause 5 of P2 expressly refers to acquisition of Graphite Mines in the proposed legislation. Clauses 2, 8 and 9(b) provide for the payment "of compensation payable under the proposed legislation". "Acquisition" and "Compensation" are the very antithesis of "voluntary transfer" and "sale price". The former category flows from the unilateral exercise of State power while the latter flows from consent and mutual agreement. It is the practice in Sri Lanka for the vendee's Notary to attest the Deed of Transfer after examining title. P2 is attested by the Company's Notary and nowhere is there a warranty of title. One must bear in mind that the Notary who attested this Agreement was at the time a very senior practitioner with many years of experience of notarial work. Counsel for the Corporation argued that if it was only a transfer of possession then some kind of payment would have been stipulated for the exploitation of the mine by the Corporation until the date of vesting. This is a plausible argument but considering the fact that compensation was to be paid "in terms of the proposed legislation" and the fact that the Company

agreed to "accept the terms and conditions which will be embodied in the proposed legislation which will cover the acquisition of Graphite Mines" and also the provision for arbitration in case of dispute, this argument is not a tenable one. The Company may well have expected this aspect of the matter to be covered by the proposed legislation. Counsel for the Corporation submitted that Clause 5 of P2 merely indicated the mode of assessing the value payable and nothing more. I cannot agree. It bound the Company to abide by all the terms and conditions of the proposed legislation relating to acquisition of Graphite Mines. That legislation did see the light of day in the Mines and the Minerals Law No.4 of 1973. That law provided for acquisition by Vesting Order which was the declared intention of the Government as stated in Document B. A Vesting Order dated 18th December, 1973, under the hand of the Minister in terms of section 52(1) of the Law vesting the property of the Company with effect from 18.12.1973 was published in the Government Gazette (P5). Counsel stated that this was to clear the title acquired on P2, of encumbrances. It nowhere states so. On the contrary it vests in the Corporation the identical property described in the Schedule to P2. The Minister cannot by Vesting Order vest in the Corporation its own title. If it was meant to release encumbrances then such an exercise was an abuse of power and in fraud of the statute. P2 will not stand the test in an action *rei vindicatio*. It will fail miserably in contest in a partition action. The assessment of compensation was referred to the Chief Valuer by the Board of Directors of the Corporation acting in terms of the provisions of section 64(1) of the Law. If it was an arbitration in terms of P2 then there would have been a joint reference to arbitration upon agreed terms. The Chief Valuer proceeded to make the award upon the power vested in him by section 64(1) of the Law. He was a statutory arbitrator performing duties of a judicial character. That is the reason for this application for a Writ of Certiorari. If he was acting as a private arbitrator upon consent and mutual reference by the contending parties a Writ of Certiorari cannot lie and could not have been applied for at all. Such an arbitrator is a "private Judge" set up by parties to a dispute. Vide *Regina* vs. *National Joint Council for the Craft of Dental Technicians* (2). Both parties have acted on the basis that the property was vested on Vesting Order P5. I reject the contention that title passed on P2 and I hold that title passed to the Corporation upon the Vesting Order dated
14-I 18.12.1973(P5) and not on Agreement P2.

Questions 4(a) and (b) and Question 5 posed by the Court of Appeal are questions of fact and we ruled them out at the commencement of the hearing. The Court of Appeal has held that P11 is the genuine Balance Sheet for the period ending 31st March, 1972. It has rejected the Balance Sheet P8. The 2nd respondent will therefore be entitled to a sum based on the nett Book Value reflected therein. I therefore uphold the 1st respondent's award of compensation in a sum of Rs.3,732,094/74 cts.

The only other matter that this Court need rule on is the counter application of the 2nd respondent praying for a Writ of Mandamus to issue on the petitioner to comply with the provisions of section 64(3) and (4) of the Mines and Minerals Law. This application is based on the averments in para 31 of the petition of the 2nd respondent which reads as follows:

> "31. the property of the 2nd respodent Company was taken over by the Petitioner Corporation at the instance of the then Government on 1st April 1972 with a promise of prompt payment of compensation. The Petitioner Corporation continues to deliberately delay the payment of the above and avoids the performance of its legal and equitable obligation whilst taking the income from the Mines which were in the first instance voluntarily handed over to the Government on a promise of expeditious payment of compensation."

The 2nd respondent therefore prays for the issue of Writ of Mandamus directing the petitioner –

"(i) to communicate in writing to the 2nd respondent Company the determination of compensation made by the 1st respondent in compliance with section 64(3) of the Mines and Minerals Law No.4 of 1973, and

(ii) to forthwith publish the Notice as required under section 64(4) of the said Law and to promptly and duly pay to this respondent Company the compensation as assessed by the 1st respondent with interest."

Although the Documents disclose an undertaking to pay compensation according to the proposed Statute Law I cannot find in them a promise of prompt payment upon the award being made. The statute itself provides for further acts after the award. The provision that payment can only be made after the manner stipulated by the Minister in consultation with the Minister of Finance must necessarily militate

against prompt payment. Indeed no payment of any kind can be made until this Minister makes up his mind on the mode of payment. The allegation that the Corporation "continues to deliberately delay payment of the (compensation) above and avoids the payment of its legal and equitable obligation" is unfounded. The Corporation was exercising a legal right in seeking a remedy in the Court of Appeal and this application cannot in any event be characterised as a frivolous one. Till this application is finally decided the award of compensation is not a final one. Once the order of this Court is pronounced the time will be ripe for the performance of the duty cast by section 63(3). No duty arises till then. Payment of money with interest from date of accrual of compensation in terms of sections 61 and 62 will follow. I therefore set aside the Order for the issue of a Writ of Mandamus.

The finding that the appellant was lacking in *uberimma fides* and failed to disclose material facts is not justified and I would therefore formally set it aside. For the reasons hereinbefore stated I would dismiss the appeal with costs.

WEERARATNE, J. – I agree.

WIMALARATNE, J. – I agree.

Appeal dismissed but
Order to issue Mandamus set aside.