THE STATE GRAPHITE CORPORATION (STATE MINING AND MINERAL DEVELOPMENT CORPORATION)

v

K. S. D. P. FERNANDO AND ANOTHER

COURT OF APPEAL
SOZA, J AND H. A. G. DE SILVA, J.
C. A. APPLICATION NO.1182/80
JULY 6, 7, 10, 13, 14, 15, 17, 20 and 21, 1981.

Certiorari - Compensation - net book value - s.58(b) (ii) of the Mines and Minerals Law No. 4 of 1973 - vest - power of Court of Appeal to receive fresh evidence in writ proceedings.

The word 'vest' can vary in meaning according to the context in which it is used but it ordinarily signifies the passing of absolute and indefeasible title. The passing of possession does not amount to vesting in the context of the Mines and Minerals Law No. 4 of 1973. The expression Vesting Order as defined in the Mines and Mineral Law No. 4 of 1973 has an enlarged meaning. It signifies the passing of absolute and indefeasible title free of all encumbrances.

When a revaluation of fixed assets is made after a very long period of years there is no breach of accountancy practice.

Although the Court of Appeal is vested with power to admit fresh evidence when hearing an appeal no similar power has been conferred on it when it exercises its writ jurisdiction (Articles 139(2) and 140 of the Constitution). The grant and issue of writs is governed by English law. English law does not permit the reception of fresh evidence to show error on the face of the record for the writ of *certiorari*. It is only to establish a jurisdictional defect that fresh evidence may be permitted.

The writ of *certiorari* being a discretionary remedy will not be granted where the party applying lacks *uberrima fides* and fails to disclose material facts. Nor will the writ be granted where Rule 46 of the Supreme Court Rules 1978 in regard to annexing of documents material to the case is not complied with, nor also where there is delay for which there is no valid excuse.

It is open to a respondent to an application for a writ of *certiorari* to counterclaim a writ of mandamus as the counterclaim is of the same right, kind and quality.

Cases referred to:

(1) Courtauld v. Legh [1869] L R 4 EX.126, 130.
(2) Lewis v. Cattle (1938) 2 K. B. 454, 457.
(3) Re National Savings Bank Association [1866] L. R. 1 Ch. App. 547, 550.
(4) Richardson v. Robertson [1862] L. T. 75, 78.
(5) The Fruit and Vegetable Merchants Union v. The Delhi Improvement Trust AIR 1957 SC 344, 350

(6) Wijesekera v. Assistant Government Agent, Matara (1943) 44 NLR 535.
(7) Abdul Thassim v. Edmund Rodrigo (1947) 48 NLR 121
(8) Nakkuda Ali v. Jayaratne (1950) 51 NLR 457, 460
(9) Case reported in (1873) Grenier's Reports Part (III) 122, 125.

(10) *Perera v. Jayewardena (1947) 49 NLR 1, 9.*
(11) *Ex parte Campbell. In re Cathcard (1870) 5 Ch. 703, 706*
(12) *The King v. Nat Bell Liquors Ltd. [1922] 2AC 128, 159*
(13) *The King v. Northumberland Compensation Appeal Tribunal [1951] 1 KB.711*
(14) *The King v. Secretary of State for the Environment and another, ex parte Powis [1981] 1 All ER 788, 797, 798*
(15) *Ashbridge Investments Ltd. v. Minister of Housing and Local Government [1965] 3 All ER 371, 374.*
(16) *R v West Sussex Quarter Sessions [1973] 3 All ER 289, 298, 301*
(17) *Alphonso Appuhamy v. Hettiarachchi (1973) 77 NLR 131*
(18) *Gunasekera v. Weerakoon (1970) 73 NLR 262*

C. Thiagalingam Q. C. with N. Sinnathamby and Ajantha Cooray for petitioner.

H. W. Jayewardene Q. C. with H. L. de Silva, L. C. Seneviratne and Miss P. Seneviratne for 2nd Respondent.

Cur adv vult

October 8, 1981

SOZA J.

The State Graphite Corporation now known as the State Mining and Mineral Development Corporation has filed this petition praying for an order in the nature of a writ of *certiorari* quashing the order P12 made by the 1st respondent who is the Chief Valuer of the Valuation Department fixing compensation at Rs. 2,923,640/- for the mines property called Kahatagaha Mines of the 2nd respondent Company now vested in it.

The complaint of the petitioner is that although Section 58(b)(ii) of the Mines and Minerals Law No. 4 of 1973 states that the amount of compensation shall be the net book value of the property as shown in the last audited balance-sheet prior to the date of its vesting in the Corporation less any sum which the Chief Valuer considers reasonable for depreciation of the property since the date of preparation of such audited balance-sheet, the 1st respondent adopting a fraudulently prepared balance-sheet determined compensation at Rs. 2,923,640/-. According to the petitioner the net book value of the property as shown in the last audited balance-sheet is only a sum of Rs. 271,789/60 and represents what should have been awarded. The quantum of compensation depends on the date of vesting. The petitioner's position is that the property in question vested in the petitioner with effect from 1. 4. 1972. Hence the relevant audited balance-sheet is the one prepared by the 2nd respondent's auditors under date 21st October 1971 (P6). The 1st respondent however went on the basis that the last audited balance-sheet prior to the date of vesting which he fixed at 18. 12. 1973 was the one prepared on 8. 10. 1973 (P11) which in turn is based on the

audited balance-sheet of 5.12.1972. The identity of the balance-sheet of 5.12.1972 is also in dispute. The petitioner contends that the correct balance-sheet of 5.12.1972 is P8 where the net book value is given as Rs. 271,789/60 while the 2nd respondent contends it is P7 where the net book value is given on revaluation as Rs. 3,654,550/-.

The date of vesting is important because Section 58(a)(ii) provides that compensation will be determined in accordance with the net book value of the property as shown in the last audited balance-sheet prior to the date of its vesting in the Corporation. Hence it is necessary to determine when the mines of the 2nd respondent vested in the Corporation. This is a question on which the parties are at variance. According to the 2nd respondent, the date of vesting is the date on which the vesting order was made by the Minister of Industries and Scientific Affairs, namely, 18th December 1973. This vesting order was published in the Government Gazette Extraordinary No. 90/3 of 19th December 1973. Learned Counsel for the petitioner however argues that this is not the correct date of vesting. The property was really vested on the execution by the 2nd respondent of Deed No. 2077 of 21.4.1972 attested by T. Sri Ramanathan N. P. marked P2. On this deed P2 title passed to the petitioner with effect from 1.4.1972. This contention involves consideration of the terms of P2 and its annexes A and B. Is P2 what it purports to be, an agreement or in truth a transfer? The annexes A and B are letters written by the Minister of Industries and Scientific Affairs to Sir John Kotelawela the Chairman of the 2nd respondent Company. These documents A and B written in as part and parcel of the deed P2, it is argued, made this deed a transfer.

I will examine letter B written in October 1971. The exact date of this letter does not appear on the face of this letter. The letter informs Sir John that the Government has decided that the ownership of all minerals should be vested in the State and accordingly it had been decided that the three major Graphite mines be taken over and operated by the State. The mines at Bogala were to be formally vested in the State Graphite Corporation. The owners of Kolongaha Mines had of their own volition transferred their interests to the State Graphite Corporation. The Minister invites Sir John for early discussions as to the manner in which the Government's decision can be implemented in respect of Kahatagaha Mines.

In the letter marked A of the date 31st January 1972 the Minister of Industries and Scientific Affairs states that there has been delay in the taking over of the Kahatagaha Mines and any further delay would not be desirable. It is also stated that the

Minister would agree to the transfer of the Kahatagaha Graphite Mines taking effect from 31st March 1972. The letter then sets out the steps which the Minister suggests should be taken to ensure a smooth take-over. These steps appear to have been already agreed on at discussions. Great stress was placed by learned Senior Counsel for the petitioner on the statement in letter A which reads as follows:

> "I have re-considered the matter and would agree to the transfer taking effect from 31st March 1972."

There is admittedly in this case a vesting order but the argument advanced is that the property had already vested before that on the execution of P2 and the vesting order merely had the effect of making the title absolute and indefeasible and free from encumbrances.

Learned Senior Counsel for the petitioner Corporation argued that the words 'vested' and 'vesting' as used in Section 58 of the Mines and Minerals Law No. 4 of 1973 mean no more than "transferred" and "transfer" but the expression "vesting order" used in Section 52 bears the meaning given in sub-section 3 of the section, namely, an order having the effect of giving absolute title free from all encumbrances as from the date of the order.

According to the canons of interpretation of similar words in an enactment it is a sound rule of construction to give the same meaning to the same words occurring in different parts of an enactment — see *Courtauld v. Legh*[1] and *Lewis v. Cattle.*[2] No doubt if sufficient reasons can be assigned it will be proper to construe a word in one part of an Act in a different sense from that which it bears in another part of the same act — see *Re National Savings Bank Association.*[3] So far as the word "vest" is concerned Lord Cranworth in the case of *Richardson v. Robertson*[4] explained that in its etymological signification the word means vesting in possession but by long usage it now ordinarily connotes the passing of absolute and indefeasible title. The word 'vest' is a word of variable import. As Sinha J. delivering the judgment of the Supreme Court of India said in the case of *The Fruit & Vegetable Merchants Union v. The Delhi Improvement Trust*[5]:

> ". . . . the term 'vesting' has a variety of meaning which has to be gathered from the context in which it has been used. It may mean full ownership, or only possession for a particular purpose, or clothing the authority with power to deal with the property as the agent of another person or authority."

Therefore while the meaning of the word "vest" can vary

according to the context in which it is used, it ordinarily signifies, the passing of absolute and indefeasible title. In the statute no doubt there is a definition of the expression "vesting order." This definition does no more than enlarge the ordinary meaning of the expression by including the wiping out of encumbrances. If the Corporation is already the owner of the property, a later vesting order merely to wipe out encumbrances would be superfluous and open to be misused to evade even obligations incurred by the Corporation itself. There is nothing in the context in which the words 'vested,' 'vesting' are used in Section 58 of the Mines and Minerals Law No. 4 of 1973 to justify attributing to them a sense different from that given to the expression "vesting order" in Section 52 by the Statute. The purpose of the vesting order is to vest the property.

To say that P2 transferred title to the property and so vested it in the Corporation in a limited sense would be to misinterpret the terms of the document itself. The deed P2 contains clauses laying down guidelines for a smooth taking of possession of the mines, equipment and graphite of the 2nd respondent subject to the terms and conditions set out in eleven clauses. At the time P2 was executed the Mines and Minerals Law No. 4 of 1973 was not yet passed. Legislation to cover the acquisition of graphite mines was in the offing. Clause 5 of P2 provides that compensation should be payable in accordance with the new legislation. But if the proposed legislation was unduly delayed or not enacted compensation would be payable in accordance with the law applicable at the time of the acquisition. This clause speaks of acquisition not transfer. Acquisition was then in contemplation and not yet effected. In the letter B the Minister agrees to the transfer taking effect from 31st March 1972. If P2 was to serve as a transfer of title, one would have expected a clause to this effect in the deed. All that P2 with its annexes accomplishes is the passing of possession with effect from 31. 3. 1972 and subject to specified arrangements. In my view P2 is what is purports to be, an agreement. Title passed only on the passing of the vesting order of 18.12.1973 published in the Government Gazette No. 9/3 of 19. 12. 1973. The date of vesting must be regarded as 18. 12. 1973. Accordingly the net book value of the property as shown in the last audited balance-sheet prior to the date of its vesting must be ascertained with reference to the date 18. 12. 1973.

On the basis of my conclusion that the date of vesting is 18. 12. 1973 the last audited balance-sheet prior to it is P11. But the petitioner contends that P11 having as its source P7 a document tainted with fraud and illegality, suffers from the same infirmities. Let us go to P7 the authenticated version of which has been marked 2R3. It is not in dispute that the net book value as shown in the last audited balance-sheet prior to 5. 12. 1972 is

Rs. 271,789/60 - see P6 of 22.11.1971. P7 however did not carry the same net book value because there had been a revaluation. The contention of the petitioner is that the balance-sheet of 5.12.1972 is really P8. The Members of the Directorate of the 2nd respondent were aware of the formula for compensation that was going to be provided in the impending legislation in regard to mines as the bill was out by 18.5.1972 (see P3). With the object of unjustly enriching themselves they got the mines property revalued and the new figure was surreptitiously introduced into a revised balance-sheet under the fictitious date 5.12.1972. The result of this fraudulent effort is P7 and its signed version 2 R3.

To decide on whether these accusations are justified it is necessary to go into the question of how the revaluation came about. In October 1971 the Chairman of the Board of Directors of the 2nd respondent Company received letter B annexed to P2. This communication should have made it clear to him that in accordance with new Government policy the mines at Kahatagaha would be acquired. On receiving this intimation an emergency meeting of the Board of Directors of the 2nd respondent Company was held on 11.11.1971 at which an informal discussion took place where it was suggested that a valuation report of the property and assets of the Company be obtained. For this purpose Dudley Fernando Accountant of Munaweera & Co. who were responsible for the accounting and auditing of the books of the 2nd respondent suggested that Mr. Nadarajah a Valuation Surveyor be engaged. We next see the Directors appointing a Committee of three at the meeting held on 29.11.1971 to go into the matters of valuing the mines, compensation and employment of labour and to submit a draft agreement with the Government. The members of the Committee were M. Nadarajah, Dudley Fernando and T. Sri Ramanathan, Proctor S. C. & N. P. A copy of the minutes of this meeting was tendered to Court during the argument.

Pursuant to the decision worked out at the informal discussions and with the approval of the Board of Directors M. Nadarajah visited the mines and prepared an inventory and a condition report and revalued the mines and the equipment. Nadarajah's valuation report marked 2R2 was produced at the proceedings before the Chief Valuer. Both Nadarajah and Dudley Fernando gave evidence before him and were subjected to a detailed cross-examination. One fact emerges from the evidence of these two witnesses. The decision to revalue was taken long before the Bill which later was enacted as the Mines and Minerals Law was available to the public. The formula for the payment of compensation set out in Section 58 of the Mines and Minerals Law could not possibly have been known at that time. On the other hand it is quite understandable

that the Directors of the Company felt that the net book value had stood too long in their books and a revaluation was called for.

According to the norms of accounting practice revaluation is permissible but should not be resorted to frequently. This is because the balance-sheet is essentially a historical document and does not as a general rule purport to reflect the net worth or realisable value of such items as goodwill, land, buildings, plant and machinery. If revaluation is done at frequent intervals the information given, as the Cohen Report points out, will be deceptive since the value of such assets while the company is a going concern will in most cases have no relation to their value if the undertaking fails – see **Charlesworth on Company Law*** and **Gower: Principles of Modern Company Law.**** In heading A of Part (1) of the First Schedule of the English Companies Act 1947 directions are given on how the balance-sheet should be prepared. These directions are followed in the accounting practice obtaining in Sri Lanka too. The computation of the fixed assets is based on cost or, if it stands in the company's books at a valuation, the amount of the valuation - see rule 2(1)(a) and (b).

In the instant case there was the prospect of the mines being acquired as a going concern on negotiated terms as the letter A annexed to P2 indicates. Hence the Directors of the Company committed no breach of accountancy practice when they arranged for a revaluation of their fixed assets after, as it would appear, a very long period of years. In fact as may be inferred from the balance-sheet for 1951 marked 2R9 (a) no revaluation had been done at least after 1950. It cannot therefore be said that there was any impropriety in arranging to have the fixed assets valued at the market value which is the usual standard for compensation used in acquisitions by the State. In fact to have allowed the old historical value of the fixed assets to stand would have been hardly fair by the members of the 2nd respondent Company. Further even if there was no acquisition afoot it would have even been unbusiness-like to allow the historical value to stand for over twenty years. In any event the action can on no stretch of the facts be regarded as improper or fraudulent.

Once the revaluation was done, the Chairman of the Board of Directors expected the new figure to be quoted as the net book value in the balance-sheet for 1972. The evidence is that Dudley Fernando took a draft of the balance-sheet dated 5. 12. 72 to the Chairman of the 2nd respondent Company inadvertently retaining the old net book value. This visit was shortly after 5.12.1972 and the Chairman in his own inimitable style rebuked him for this omission. Dudley Fernando lost no time in amending the balance-sheet by bringing in the revalued figure and the resultant surplus was shown as a capital reserve and the accounts were adjusted

accordingly. After the amending too the old date on the draft was retained, namely, 5.12.1972.

Bateman in his monogram on **Company Accounting*** explains the procedure thus.

> "Where it is considered advisable to revalue fixed assets and a surplus arises following such a valuation, the accounting practice is to show the net surplus as a capital reserve, i.e., as an amount not regarded as free for distribution."

So the adjustments of the figures carried out by Dudley Fernando were in accordance with sound accounting practice.

When the dispute between the parties was being inquired into by the Chief Valuer, the legal officer of the petitioner Corporation had asked for a copy of the balance-sheet for 1972 from the 2nd respondent's lawyers and they had issued him a copy of the first draft of 5. 12. 1972. This has been marked as P8 and carries the old net book value of Rs. 271,780/60. The amended balance-sheet incorporating the figure after revaluation has been produced marked P7. The same balance-sheet authenticated with the appropriate signatures has been marked 2R3.

Learned Senior Counsel for the petitioner was very critical of the documents P7 and 2R3 and contended that they have been fabricated. The genuine balance-sheet according to him was P8. On the other hand the 2nd respondent asserts that P8 is only a draft. It was not signed by the Directors as 2R3 was. P8 had been handed to the petitioner's legal officer by a mistake when he called for a copy of the balance-sheet and now the petitioner is trying to make capital of this mistake.

An examination of the Report of the Directors dated 15.12.1972 (2R7) prepared for presentation at the 43rd Ordinary General Meeting of the Shareholders to be held on 28.2.1973 is very illuminating. There is here an entry which reads as follows:

> "A Capital Reserve of Rs. 4,057,760/40 was created by re-valuing the Mines Property and the land and buildings which originally stood at Rs. 271,789/60 and Rs. 75,000/- respectively."

On 15.12.1972 there had been a Director's meeting and paragraph 3(a) of the minutes of this meeting reads as follows:

> "The Directors Report which is appended below was unanimously adopted for presentation at the 43rd Ordinary General Meeting of the shareholders."

Appended to these minutes is the report referred to in the minutes and that is in terms identical to 2R7.

It was argued that this Report of which 2R7 is a reproduction has been smuggled in. It is pointed out that while the minutes are signed by the Chairman of the Board of Directors the Report is not. Only the Secretary has signed the report. The Minutes Book was available to us during the argument. It is a bound book with machine numbered pagination. If what appears appended to the minutes of the 15th December 1972 is not the genuine report it should have been written in later. Year after year a copy of the annual report of the Directors is appended to the relevant minutes and appears in the minutes book. There is nothing to indicate any tampering with the book. The entering up of the minutes meeting by meeting has proceeded from page to page in unbroken sequence. After the meeting of the 15th December 1972 there have been meetings of the Board on 20.1.1973, 22.1.1973 and 6.2.1973. At the meeting of 6.2.1973 the minutes of the previous meetings including those of the meeting of 15.12.1972 were read and confirmed. The minutes of the meeting of 15.12.1972 including the impugned report end at page 534. The minutes of the meeting of 20.1.1973 begin at page 535 and end at page 539. The minutes of the meeting of 22.1.1973 begin at page 537 and end at page 539. All these minutes have been signed by the Chairman on 6.2.73. The minutes of the meeting of 6.2.1973 begin at page 539 and end at page 541. I am unable to find anything in the minutes book from which any inference that the report appended to the minutes of the meeting of 15.12.1972 has been interpolated, can be made.

The minutes of the 43rd Ordinary General Meeting of the 2nd respondent Company held on 28.2.1973 have been marked 2R8. In 2R8 there is a minute that Sir John Kotelawela (Chairman) of the 2nd respondent Company proposed the acceptance of the Directors' Report and Accounts of the Company for the year ended 31.3.1972 and it was unanimously carried. If the Directors' Report 2R7 which undoubtedly was the one accepted at the meeting bore entries which had been smuggled in, one will not expect a person of the standing of Sir John Kotelawela to propose its acceptance. Quite evidently P7 and 2R3 were prepared after 5.12.1972 although they bear that date. They were however, it is obvious, prepared before 15.12.1972. P7 and 2R3 were the balance-sheet for the year ended 31.3.1972 as amended when Dudley Fernando was reminded of the revaluation although the date of the draft P8 was preserved. The Directors' Report 2R7 which includes the balance-sheet for the year ended 31.3.1972 is identical with the report appended to the minutes of the meeting of 15.12.1972. There can be no doubt that the balance-sheet 2R3 which is duly signed by the Chairman and two Directors

was accepted by the shareholders in general meeting. P8 is not signed by the Directors and was not put before the shareholders.

Further although the balance-sheet P8 which is claimed to be a xeroxed copy of the balance-sheet supplied to the petitioner by 2nd respondent's lawyers is certified as a true copy, the auditors' certificate has not been signed. On the other hand the auditors' certificate in P7 and 2R3 has been duly signed. In the state of the material before the Chief Valuer he was quite justified in regarding P8 as only a draft and P7 and 2R3 as the genuine balance-sheet for the year ended 31st March 1972. On 8.10.1973 a balance-sheet for the year ended 31.3.1973 was prepared and has been marked P11. This was the last audited balance-sheet before the date of vesting. This carries the revalued figure first used in 2R3 which had been adopted by the shareholders. The Chief Valuer therefore quite rightly used the net book value given in P11 as the basis for compensation.

Before I leave this point one other matter deserves mention. During the course of the hearing before us learned Senior Counsel for the petitioner repeatedly challenged the 2nd respondent Company to produce their books. The question arises how far it is open to this Court to allow material which was not before the Chief Valuer to be brought up in these *certiorari* proceedings.

The jurisdiction to issue according to law, writs of *certiorari*, prohibition, procedendo, mandamus and *quo warranto* has been conferred on the Court of Appeal by Article 140 of the Constitution of 1978. This Article reproduces in substance Section 42 of the now repealed Courts Ordinance. The appellate jurisdiction of this Court is conferred on it by Article 139(1) of the same Constitution and Article 139(2) gives the Court of Appeal the discretion to admit fresh evidence when hearing an appeal. No similar power however is conferred on the Court of Appeal when it exercises its writ jurisdiction.

The next question is whether there is any other rule governing the reception of fresh evidence in *certiorari* proceedings. To decide this question it is necessary to determine what law governs the grant and issue of writs like *certiorari*. De Kretser J in the case of *Wijesekera v. Assistant Government Agent, Matara*[6] held that the words "according to law" appearing in Section 42 of the Courts Ordinance meant according to English Law. The writs would issue in the circumstances and under the conditions known to English law and the subjects of the jurisdiction would be the same. Howard C. J. in the Divisional Bench case of *Abdul Thassim v. Edmund Rodrigo*[7] followed this decision and held that the words "according to law" appearing in Section 42 of the Courts Ordinance meant 'according to English Law' as these writs were

unknown to the Roman-Dutch Law. In the Privy Council case of *Makkuda Ali v. Jayaratne*[8] Lord Radcliffe delivering the judgment of the Board said:

> "There is nothing in the Roman-Dutch or the Law of Ceylon that corresponds to the 'writs of Mandamus, *quo warranto, certiorari,* procedendo and prohibition.' It seems obvious, therefore, that the jurisdiction of the Supreme Court to grant and issue mandates in the nature of such writs is derived exclusively from Section 42 and was conferred originally upon that Court by the legislative predecessor of that section.' (emphasis mine).

The ancestry of Section 42 of the Courts Ordinance No. 1 of 1889 must be traced to Section 36 of the Charter of 18.2.1833 which empowered the Supreme Court on circuit at any civil sessions "to grant and issue mandates in the nature of writs of mandamus, procedendo and prohibition against any District Court within the limits of such circuit." It will be seen that the range of the jurisdiction under the Charter of 1833 is much more limited than that conferred on the Supreme Court by the Courts Ordinance. The subjects of the Court's mandates are the District Courts of the circuit and the writs could issue only in civil cases. This writ jurisdiction in identical terms was extended to cover Courts of Requests when these were first set up by Ordinance No. 10 of 1843 – *vide* Section 21 of this Ordinance. The writ of *certiorari* is a notable omission from the Charter of 1833. Possibly this is because the ancient writ of *certiorari* was about this time developing in England into an impediment to substantial justice. In fact a number of statutes expressly prohibited this recourse from inferior jurisdictions. When Sir John Jervis introduced his Summary Jurisdiction Act in 1848 one of his reforms was to limit the form of *certiorari* in its application to magisterial jurisdiction.

Whatever the reason for the omission of the writ of *certiorari* from the Charter of 1833, when the Administration of Justice Ordinance, 1868 became law the writ of *certiorari* was included in the writ jurisdiction of the Supreme Court. Section 22 of this Ordinance can be regarded as the legislative predecessor of Section 42 of the Courts Ordinance No. 1 of 1889 although the writ of *quo warranto* was not included. Section 22 empowered the Supreme Court to issue writs of mandamus, *certiorari,* procedendo and prohibition "according to law." The words "according to law" in this section were interpreted by Creasy C. J. in an anonymous case[9] to mean 'according to English Law' which was the only law to which these writs were known. When by Section 42 of the Courts Ordinance the Supreme Court was given power and authority to issue the writs of *mandamus, quo warranto, certiorari.*

procedendo and prohibition against any District Judge, Commissioner or other person or tribunal "according to law" it must be presumed that the Legislature re-enacted these words in the meaning already given by the Supreme Court, namely, "according to English Law" – see the cases of *Perera v. Jayewardene*[10] and *Ex parte Campbell. In re Cathcard.*[11] When the Courts Ordinance was repealed the Administration of Justice Law No. 44 of 1973 had Section 12(1) vesting jurisdiction in the Supreme Court in terms almost identical with the old Section 42 to issue these writs. Almost the same words were embodied in article 140 of the Constitution of 1978 operative today after the Administration of Justice Law was repealed. The subjects of the jurisdiction today are judges of any Court of first instance or tribunal or other institution or any other person. The words "according to law" in Section 42 of the Courts Ordinance have as I already mentioned been interpreted by the Supreme Court. The Legislature must be presumed to have intended the same interpretation to be applicable to these words in Article 140. In the Privy Council decision in *Mokkuda Ali's case* (supra) the Board added at pages 460, 461:

> "Moreover there can be no alternative to the view that when Section 42 gives power to issue these mandates 'according to law' it is the relevant rules of English common law that must be resorted to in order to ascertain in what circumstances and under what conditions the Court may be moved for issue of a prerogative writ. These rules then must themselves guide the practice of the Supreme Court in Ceylon."

We have it therefore on the highest authority that this Court will exercise the jurisdiction conferred upon it by Article 140 of the Constitution of 1978 to grant and issue these high prerogative writs in accordance with English Law. The question of the admission of fresh evidence in *certiorari* proceedings must therefore be decided in accordance with English Law.

The very nature of the grounds on which *certiorari* is granted precludes the admission of fresh evidence outside the record. The error of law must be on the face of the record. In fact in England after the passage of the Summary Jurisdiction Act 1848 Magistrates no longer had to make "speaking orders." What the Act did was not to stint the jurisdiction of the Queen's Bench to grant the writ but rather to disarm its exercise. Although the law of *certiorari* itself was not altered, yet it could not be invoked with as much success as before. The reason why fresh evidence was not permitted is apparent from the explanation Lord Sumner gave for the decline of *certiorari* after the Summary Jurisdiction Act 1848 in the case of *The King v. Nat Bell Liquors Ltd.*.[12]

"The effect was not to make that which had been error, error no longer, but to remove nearly all opportunity for its detection. The face of the record 'spoke' no longer: it was the inscrutable face of the sphinx."

Certiorari however is a hardy perennial. It survived as a remedy to quash orders for error of law on the face of the record and where there is want or excess of jurisdiction, failure to observe the principles of natural justice and the comparatively rare fraud. The writ was revitalised and its application amplified in the case of *The King v. Northumberland Compensation Appeal Tribunal.*[13]

The law in England regarding the admissibility of fresh evidence in *certiorari* proceedings was well summarised by Dunn L. J. when he delivered the judgment of the Court of Appeal in *The King v Secretary of State for the Environment and another, ex parte Powis:*[14]

"What are the principles on which fresh evidence should be admitted on judicial review ? They are : (1) that the Court can receive evidence to show what material was before the minister or inferior tribunal (see per Lord Denning MR in *Ashbridge Investments Ltd. v. Minister of Housing and Local Government)*[15] (2) where the jurisdiction of the minister or inferior tribunal depends on a question of fact, or where the question is whether essential procedural requirements were observed, the Court may receive and consider additional evidence to determine the jurisdictional fact or procedural error (see de Smith's Judicial Review of Administrative Action 4th Edn. 1980, pp. 140-141 and cases there cited): (3) where the proceedings are tainted by misconduct on the part of the minister or member of the inferior tribunal or the parties before it. Examples of such misconduct are bias by the decision-making body, or fraud or perjury by a party. In each case fresh evidence is admissible to prove the particular misconduct alleged (see *Rv West Sussex Quarter Sessions).*[16]

There was discussion at the bar as to the situation where a party deliberately suppressed material facts with the intention of misleading the minister. If that were the situation then it would be for the court to consider whether the conduct of that party could be described as fraudulent so as to permit the admission of fresh evidence."

No doubt where it is contended that there are grounds for holding that a decision has been given without jurisdiction, this can only be made apparent on new evidence brought *ad hoc* before the superior Court. How otherwise could it ever appear within the four corners of the record that the inferior court was

unqualified or biased or interested in the subject matter? But to show error in the conclusion of the inferior court by adducing fresh evidence in the superior court is not to review the decision: It is to retry the case. There can be no trial in the superior Court f disputed facts — Garner: Administrative Law 4th Ed. 1974 p. 182, 183.

In the instant case the question of the non-production of the books was not raised during the protracted proceedings before the Chief Valuer. Rival balance sheets were produced but no challenge was made as before us to produce the books. The books do not form part of the record and do not pertain to any jurisdictional defect. Rather they relate to the belated attempt to establish error on the face of the record. It is not alleged in the pleadings that the non-production of the books amounts to fraudulent action by the 2nd respondent. Hence it is not open to this Court to direct that the books be produced. It may be added that one does not expect an accountant to stake his professional reputation by certifying that the entries in P7, 2R3 and P11 accord with the entries in the books of account of the 2nd respondent company when in truth they do not. It is significant that there is no such signed certificate in P8. Hence the 2nd respondent was within its rights in not accepting the challenge to produce the books.

I will now turn to the contention of the 2nd respondent that as *certiorari* is a discretionary remedy it should not be granted where the party that seeks it lacks *uberrima fides* and fails to disclose material facts. The allegation revolves round the fact that the petitioner has contented itself with disclosing to this Court in the papers filed by it only scanty extracts of the evidence of M. Nadarajah which was before the Chief Valuer. The portion of the evidence especially of Nadarajah the Valuer relevant to the question of revaluation and the minutes of the meetings of the Directors of the 2nd respondent Company which would have placed the incidents connected with the revaluation of the Mines in their true context were not disclosed to this Court. In fact we have examined this evidence now along with the minutes of the meetings of the Directorate of the 2nd respondent Company relating to the revaluation marked before the Chief Valuer and find that there is considerable substance in the allegation that there has been non-disclosure by the petitioner of material facts. The petitioner has argued on the one hand that there has been gross impropriety amounting to fraud in the revaluation and on the other that the 2nd respondent was trying to enrich itself unjustly. When the relevant parts of the record are scrutinised it becomes evident that the charge of impropriety let alone fraud is as baseless as the allegation of unjust enrichment is unfounded. Indeed the counter allegation that it is the petitioner that is seeking to enrich itself unjustly at the expense of the 2nd respon-

dent seems nearer the truth. As Pathirana J held in the case of *Alphonso Appuhamy v. Hettiarachchi*[17] if a party who moves for a prerogative writ fails to disclose material evidence and so is wanting in *uberrima fides,* the Court will not grant him relief. As the petitioner has failed to disclose facts material to its application the Court will not in any event grant and issue the writ it prays for – see also De Smith: Judicial Review of Administrative Action (1980) 4th Ed. p. 576.

Further under Rule 46 of the Supreme Court Rules 1978 an application for a writ of *certiorari* must be by petition with affidavit in support of the averments in the petition and should be accompanied by originals of documents material to the case or duly certified copies thereof, in the form of exhibits. Rule 50 provides for amendment of the papers filed and filing additional papers on orders of Court. In this case there has been no proper compliance with Rule 46 and hence the application must be refused on this ground too.

Lastly there is the question of delay. It is well settled that where there is delay the Court will not exercise its discretion to grant a prerogative writ like *certiorari* – see *Gunasekera v. Weerakoon.*[18] But in the instant case the petitioner has explained that the obtaining of copies of essential documents like balance-sheets had taken time. This is a valid excuse considering that the petitioner filed his petition on 15.9.1980 in under four months from the date on which the Chief Valuer made known his determination. It may be noted that in England the time limit is six months for *certiorari* – see Order 53 Rule 2(2) of the Rules of the Supreme Court, 1965. I do not think that the delay to file the present application should tell against the petitioner if he is otherwise entitled to the writ.

For the reasons given by me I held that there is no ground which will warrant the Court quashing the order P12 of the Chief Valuer.

I will now take up the question whether the 2nd respondent can in these same proceedings seek the grant and issue of a writ of mandamus to compel the petitioner to comply with sections 64(3) and 64(4) of the Mines and Mineral Law.

In English law counterclaims are recognised just as much as claims in reconvention in our law. No previous instance was cited to us where a party to writ proceedings counterclaimed a writ himself. The right of a petitioner to seek more than one prerogative remedy in the same proceedings has however never been questioned. Yet, in proceedings for prerogative writs only remedies of the same right, kind and quality can be combined.

Thus an application for *certiorari* cannot be combined with an action for damages – see Garner: **Administrative Law 4th** Ed. (1974) p. 183 footnote 8. Nor can a declaratory judgment or damages be sought with a writ of mandamus – see Zamir: **The Declaratory Judgment** (1962) pp. 180, 181. The prerogative writs are extraordinary remedies and cannot be combined with suits for ordinary remedies like declarations and injunctions – see Zamir (ibid) p. 96. The high prerogative writs of *certiorari,* prohibition and mandamus for restraining abuse or misuse of power and for compelling the proper performance of public duties are of the same right, kind and quality and can therefore be combined. Often in the same proceedings *certiorari* will lie to quash an order for error of law on the face of the record and mandamus will be granted to enforce the proper performance of a public duty imposed by the law. In principle I see no valid objection to the procedure where a respondent counterclaims a mandamus in *certiorari* proceedings to quash an order in his favour. For such a counterclaim will be a remedy of the same right, kind and quality as the remedy claimed in the proceedings initiated by the petitioner. It will be convenient and obviate duplication of proceedings and it will not cause any embarrassment to the main suit. I should add that in ordinary suits one would not insist on the counterclaim being of the same right, kind and quality.

The writ of mandamus is available to command any person to carry out a public duty imposed upon him either by statute or common law. It lies to enforce a duty of a public nature. Duties enjoined by statute are nearly always of a public nature. The 2nd respondent has called upon the petitioner to perform its duty under Section 64(3) and 64(4) of the Mines and Minerals Law but the response of the petitioner was to file the present application for *certiorari.* The 2nd respondent has a legal right to the performance by the petitioner corporation of a legal duty. There is thus a clear case for the intervention of this court by way of a writ of mandamus. Hence the writ of *mandamus* as prayed for by the 2nd respondent must issue.

Accordingly I make order refusing petitioner's application and at the same time grant and issue the writ of mandamus as prayed for by the 2nd respondent in paragraph (2) of the prayer to its petition of 9. 2. 1981. The petitioner will pay the 2nd respondent the costs of the proceedings before us.

DE SILVA J.

I agree.

Application for *certiorari* refused.
Counterclaim for writ of mandamus allowed.