

11. 1939

No. 45 of 1938.

In the Privy Council.

ON APPEAL

FROM THE SUPREME COURT OF MAURITIUS.

BETWEEN

MRS. Ww. PAUL J. J. GUERARD (Suppliant) - *Appellant*

AND

THE COLONIAL GOVERNMENT OF
MAURITIUS (Defendant) - - - - *Respondent.*

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Case for the Respondent.

RECORD
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1. This is an appeal from a judgment dated the 2nd September 1937 of the Supreme Court of Mauritius non-suiting the Appellant as Suppliant in a Petition of Right presented by her against the Respondent. p. 31.

2. The claim of the Appellant was based upon the unauthorised conversion of certain Government debentures by the Receiver General of the Colony and, it being conceded that the Government cannot be made liable in tort for the acts of its servants, the principal question for decision in this appeal is whether an act done by the Receiver General in purported performance of his duties under Ordinance No. 14 of 1929 but in fact outside the scope of any actual or ostensible authority conferred on him by that Ordinance can be treated as amounting to a breach of contract by the Government. 20

3. By the Sugar Industry Loan (No. 3) Ordinance 1929 (No. 14 of 1929) the Governor was empowered on behalf of the Colony to raise upon debentures a loan of Rs. 3,300,000 for certain purposes. Every debenture was to be signed on behalf of the Colony by the Receiver General and was to be payable either to bearer or to any person in whose name it should be issued. It was to be reimbursed in thirty years or earlier and in the

Appendix
p. 2.

RESPONDENT'S CASE.

meantime was to bear interest at a rate not exceeding 5 per cent. per annum. Coupons for the payment of interest were to be attached to every debenture at the time of its issue and the interest was to be paid half-yearly in the Office of the Receiver General. Every debenture was to be registered before issue in Register Books to be kept for that purpose by the Receiver General. (A specimen form of debenture with coupon attached is printed at pp. 43 and 44 of the Record.)

Appendix
p. 3.

4. Article 6 of the Ordinance reads as follows :—

“ It shall be lawful for the Receiver General upon the application of the holder of a debenture payable to bearer to register such debenture in the name of the holder in the books of the Receiver General by means of an entry to be made in a register kept for that purpose. Such entry shall state the nature of the application, its date, the name of the holder and the number of the debenture. 10

“ Each entry shall be signed by the holder and by the Receiver General or Assistant Receiver General, and mention of the debenture having been registered shall be inscribed on the back thereof and signed as above.

“ The debenture thus registered shall be transferable only by means of an assignment to be entered in a register and to be signed by the transferor and the transferee, or by the holders of their power of attorney, and by the Receiver General or Assistant Receiver General : mention of the transfer shall be endorsed on the debenture and signed as above, and the transferee shall thereby become entitled to receive the principal moneys and interest, respectively, secured or represented by the debenture and the coupons attached thereto. 20

“ Provided that any debenture in a holder's name may be converted into a debenture payable to bearer. Such conversion shall be effected by means of an entry in the afore-mentioned manner.” 30

Record
p. 1.

5. The material allegations contained in the Appellant's Petition were in substance as follows :—

(A) That the Appellant was the registered holder of 37 debentures of the nominal value of Rs. 1,000 each issued under the Ordinance, bearing Nos. 464 to 469 and 472 to 502.

(B) That these debentures were registered in the name of the Appellant in the books of the Receiver General (styled “ the Treasurer General ” in the Petition), and that mention of such registration was inscribed on the back of each debenture pursuant to Article 6 of the Ordinance. 40

(C) That on the application of Mr. Bernard Herchenroder who had no authority to make such application the Receiver General acting in breach of the contract as embodied in the provisions of the Ordinance converted the Appellant's 37 debentures into debentures payable to bearer on the following dates :—

Debentures Nos. 478 to 502 on the 4th July 1934.

” ” 464 to 469 and 477 on the 25th September 1934.

” ” 472 to 476 on the 24th January 1935.

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(D) That availing himself of such conversion Bernard Herchenroder subsequently pledged or otherwise disposed of the debentures and appropriated the proceeds to himself.

(E) That Bernard Herchenroder had no right title or capacity to cause the said conversions to be effected and that the Colonial Government had no right to effect the said conversions without the express consent of the Appellant or some person duly authorised by her as prescribed by Article 6 of the Ordinance.

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(F) That had not the Receiver General converted the debentures to bearer it would have been impossible for Bernard Herchenroder to dispose of them.

(G) That the Colonial Government now refused to acknowledge its indebtedness to the Appellant and that since the conversions were effected the Appellant had not received the interest due on the debentures.

6. Paragraph 12 of the Appellant's Petition was in these terms :—

“ That by acting as aforesaid the Colonial Government has
 “ committed a breach of the contract entered into with your
 “ Petitioner; which said contract was a contract in respect of a
 “ loan to be reimbursed in thirty years under the conditions
 “ enumerated on the said debentures and in the Ordinance
 “ authorising such loan.”

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7. The Appellant claimed that 37 debentures of the nominal value of Rs. 1,000 each should be issued and delivered to her to replace the debentures which had been converted as above described, that her name should be restored to the Register as holder of 37 debentures of Rs. 1,000 each, and that interest on the debentures from the date of the respective conversions should be paid to her. Alternatively she claimed Rs. 44,000 being the alleged market value of the debentures plus the arrears of interest as compensation for the loss which she had suffered.

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8. The Petition was endorsed with the fiat of His Excellency the Governor with the proviso “ that the Crown may take any objection to

the form or to the subject matter of these proceedings including the objection that suits by Petition of Right do not lie in the Colony and that, at any rate, such suits do not lie in tort."

9. The Respondent did not take the objection that suits by Petition of Right do not lie in the Colony but contended in *limine litis* :—

p. 5.

(A) That the Colonial Government had committed no breach of contract with the Appellant.

(B) That even assuming for the sake of argument that all the facts disclosed and averments made in the Petition were true—which the Colonial Government in fact denied—those facts and averments would only disclose a "faute" or tort on the part of an Officer of the Treasury.

(C) That no action in tort lies against the Colonial Government.

It was therefore contended that the Appellant should be non-suited.

10. It was conceded by the Appellant's Counsel at the hearing that if her claim was a claim in tort only it could not succeed, but he contended that the facts complained of amounted to a breach of contract and that the question whether they also constituted a tort was immaterial. 20

p. 11.

11. On the 2nd September 1937 the Court delivered Judgment and non-suited the Appellant with costs.

12. The Judgment of the Full Bench was delivered by His Honour the Chief Judge which was concurred in by the other members of the Bench but separate reasons for his Judgment were filed later by His Honour Judge Louis Le Conte on the 14th September 1937.

p. 18.

p. 11.

13. In the Reasons of Judgment given by His Honour Edouard Nairac, K.C. Chief Judge he examined the provisions of the Ordinance No. 14 of 1929 under which the debentures were issued and rejected the Appellant's contention that these provisions must be taken to have contractual force as between the debenture-holder and the Colonial Government. He observed that the main object of the Ordinance was to empower the Governor for and on behalf of the Colony to raise a loan on debentures, and that the Ordinance prescribed the form and face value of the debentures, their numbering and registration and the attachment of coupons thereto, the rate of interest which they should bear and the time and place at which it should be paid, and the date for repayment of the principal. He considered that the only contract intended to be made between the Colonial Government and the lender was that contained 30

in the debenture itself and that any breach of the conditions set out in the debenture would be a breach of the borrower's obligations. He pointed out however that in addition to providing for the issue and form of the debentures the Ordinance also imposed a number of administrative duties upon the Government's representatives, such as the obligations to replace lost or destroyed debentures, to keep books for registering their consecutive numbers, to make contributions to a Sinking Fund out of the general revenues of the Colony, and to remit such contributions to the Crown Agents for investment. He regarded the duties of the Receiver General
10 under Article 6 of the Ordinance as falling within the same category. They were duties imposed on that Officer by law and not by contract between the borrower and the lender and their inobservance might well be a tort but was not a breach of the contract of loan between the Government and the debenture-holder.

14. His Honour Judge Louis Le Conte while concurring in this Judgment filed separate reasons of his considered judgment on the 14th p. 18. September 1937 in which he showed that in so far as the Receiver General's failure to comply with Article 6 of the Ordinance constituted a "faute" within the meaning of the Code Napoleon (which supplies the common
20 law of the Colony) it was essentially a *faute delictuelle* within the meaning of Article 1382 of the Code Civil. In support of this conclusion he cited a number of high authorities including a decision of the Cour de Cassation on almost identical facts and excerpts from the writings of well-known French jurists.

15. It is submitted that not only was the Appellant rightly non-suited for the reasons stated in the judgments of the Supreme Court, but that she ought equally to have been non-suited even on the assumption that the provisions of the Ordinance did form part of the contract between the Colonial Government and the debenture-holders. This contention is
30 founded upon the following considerations :—

It is submitted that on a true construction of Article 6 of the Ordinance Debentures registered in the name of a holder can only be converted into debentures payable to bearer by means of an entry made in the Register and signed by the holder himself and by mention of the debenture having been registered being inscribed on the back thereof and signed by the debenture-holder. On this construction the Receiver General never had any power or authority to convert the Appellant's debentures to bearer; his act cannot in law be regarded as the act of the Colonial Government at all and there is no contract, express or implied, that the
40 Government will indemnify a debenture-holder against the consequences of the Receiver General exceeding his authority. Moreover, any such implication would be in conflict with the general rule of law as stated in Article 1998 of the Code Civil.

16. Final Leave to appeal from the judgment of the 2nd September 1937 to His Majesty in Council was given by the Supreme Court to the Appellant on the 28th February 1938 but it is humbly submitted on behalf of the Respondent that the Judgment of the Supreme Court is right and should be affirmed for the following (among other)

REASONS.

- (1) BECAUSE it was conceded throughout on behalf of the Appellant that she could only succeed if she could show a breach of contract on the part of the Colonial Government. 10
- (2) BECAUSE the only contract between the Colonial Government and the debenture-holders was that expressed in the debentures themselves, and no breach of such contract was alleged by the Appellant.
- (3) BECAUSE Article 6 of the Ordinance (No. 14 of 1929) imposed upon the Colonial Government no contractual duty towards the debenture-holders.
- (4) BECAUSE even if Article 6 of the Ordinance did impose such a duty upon the Colonial Government it was only a duty to provide the facilities for transfer and conversion 20 of the debentures which are specified in that Article.
- (5) BECAUSE the Government committed no breach of that duty.
- (6) BECAUSE the act of the Receiver General was not a *faute contractuelle* within the meaning of the Code Napoleon.
- (7) BECAUSE according to the Code Napoleon the same facts cannot constitute both a *faute delictuelle* and a *faute contractuelle* and the facts of the present case if established would constitute a *faute delictuelle*. 30
- (8) BECAUSE the damages suffered by the Appellant arose solely from the act of Herchenroder in fraudulently disposing of the debentures.
- (9) BECAUSE even if any part of the damages arose from the act of the Receiver General they did so because he acted in excess of the authority conferred on him by the Ordinance.

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- (10) BECAUSE the application made by Bernard Herchenroder, whether made with the authority of the Appellant or not, was one which the Receiver General had no power under the Ordinance to entertain.
 - (11) BECAUSE in entertaining such application the Receiver General acted in breach of his duty to the Colonial Government and outside the scope of the authority conferred on him by the Ordinance.
 - (12) BECAUSE the act of the Receiver General was accordingly not in law the act of the Colonial Government at all.
 - (13) For the reasons given in the Judgment of His Honour the Chief Judge.
 - (14) For the additional reasons given in the Judgment of His Honour Judge Louis Le Conte.

T. J. O'CONNOR.

KENELM PREEDY.

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(Suppliant) *Appellant*

AND

THE COLONIAL GOVERNMENT

OF MAURITIUS (Defendant) *Respondent.*

Case for the Respondent.

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