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18/1954

In the Privy Council

No. 25 of 1953.

ON APPEAL FROM THE COURT OF APPEAL OF MALTA

37692

BETWEEN

GIORGIO BORG OLIVIER, PRIME MINISTER OF MALTA, representing the Government of Malta, ANTONIO CAMILLERI, Collector of Customs, and EDGAR CUSCHIERI, Treasurer to the Government of Malta ... ... (*Defendants*) APPELLANTS

AND

JOHN COLEIRO, on behalf of the firm, COLEIRO BROTHERS LIMITED ... ... (*Plaintiff*) RESPONDENT.

CASE ON BEHALF OF THE RESPONDENT

RECORD

1.—This is an appeal from the judgment of the Court of Appeal of Malta reversing the judgment of the Civil Court First Hall, on a claim by the Respondent for a declaration that Act No. XIV of 1950 (An Act of the Legislative Assembly of Malta) is null and of no effect, and certain other reliefs. By the said judgment the Court of Appeal of Malta declared that the Respondent's claim was not barred by Section 39 of the Malta (Constitution) Letters Patent 1947, and referred the record back to the Civil Court, First Hall for hearing. p. 28 p. 14 p. 40

Final leave to appeal to Her Majesty in Council was granted to the Appellants by the Court of Appeal of Malta by decree dated 19th June, 1953. p. 48

2.—By Section 2 of the Revenue (Safeguard) Act (Chapter 99) it is provided that whenever notice is given by a Minister to the Clerk of the

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Legislative Assembly of a bill having for its object the imposition of a new Customs duty or the increase of an existing Customs duty, such new duty or increase of duty shall be levied and collected by the Collector of Customs as from the day on which a Proclamation has been issued to the effect that notice as aforesaid has been given. By Section 3 it is provided that any amounts collected in respect of any such new duty or increase of duty shall be held in deposit to be passed to revenue when the bill is finally approved, or returned to the depositor, wholly or in part, if the bill is finally rejected or the proposed duty decreased or if the bill is not passed within four months from the first sitting of the Legislative Assembly after the notice referred to in the last preceding section is given.

3.—On 26th May, 1950, Proclamation Number III of 1950 was issued to the effect that notice had been given on that day by the Minister of Finance of a Bill entitled " An Act to amend the Import and Export Duties Ordinance (Chapter 122) " and that a copy of such Bill had been filed in the office of the Clerk of the Legislative Assembly.

4.—Pursuant to this Proclamation and the Revenue (Safeguard) Act the Collector of Customs collected duties at increased rates and between 25th May, 1950, and 24th September, 1950, the Respondent's Company deposited with the Collector of Customs £15,201 0s. 6d. in accordance with the said Act and Proclamation.

5.—The Bill to amend the Import and Export Duties Ordinance was not passed within four months from the first sitting of the Legislative Assembly after the notice of the 26th May, 1950, the Legislative Assembly having been dissolved. The Bill consequently lapsed, and thereupon the said £15,201 0s. 6d. became repayable to the firm represented by the Respondent. Orally and by letter dated 28th September, 1950, the Respondent claimed repayment of the said sum, but it was not repaid and the Respondent received no reply to his requests.

Exhibit X, p. 55

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6.—On 12th October, 1950, the Respondent on behalf of the firm Coleiro Brothers Limited filed a writ of summons against the Collector of Customs, the Minister of Industry, the Minister of Finance and the Treasurer to the Government as representatives of the Government of Malta, claiming repayment of the said £15,201 0s. 6d. with interest. The title of the said action is " John Coleiro nomine *v.* Frank Agino nomine et," and the said action is hereinafter referred to as the Main action.

7.—On 18th October, 1950, the Legislative purported to enact Act Number XIV of 1950, the Customs Duties (Appropriation) Act, 1950. The said Act by subsection 1 of Section 2 provided that notwithstanding the provisions of Section 3 of the Revenue (Safeguard) Act providing for the refund to the depositor of deposits referred to therein if the Bill imposing

new customs duties or raising the rates of duty was not passed in four months the amounts of Customs duties levied and collected by the Collector of Customs between 25th May, 1950, and 24th September, 1950, both dates inclusive, in pursuance of Proclamation Number III made by the Governor on 25th May, 1950, and of the provisions of Section 2 of the said Act, should to all intents and purposes whatsoever be conclusively deemed to have been lawfully levied and collected and such amounts should be and were irrevocably vested in and appropriated to the Government and should be paid by the collector of Customs into the Consolidated Revenue Fund.

By sub-section 2 of the said section it was further provided that sub-section 1 of the said section should have effect notwithstanding any claim or judicial proceedings made or instituted prior to the commencement of the Act by any depositor or by any person claiming through or under any depositor and no costs or fees should be adjudged against the Government arising out of or in connection with any such claim or proceedings.

8.—The Main Action was instituted before the purported enactment of Act 14 of 1950, but after its purported enactment the Defendants (representing the Government of Malta) put in a defence raising inter alia the defence that the Respondent's claim in that action was barred by Act p. 57
number 14 of 1950. To this the Respondent replied by way of counterplea at the hearing of 11th November, 1950, that every provision of the said Act was null and void, and the Defendants conceded that it was open to the Respondent to make that plea. After that the further hearing of the main action was adjourned from time to time for various reasons which the Court of Appeal held to be legitimate. Finally however p. 37
the Court by its decision of 5th October, 1951, suspended further hearing p. 59
of the Main Action and gave to the Respondent a period of one month in which to institute an action impugning the said Act and giving the parties leave to restore the Main Action after one month should such action not be brought or, in the event of it being brought, after the determination thereof.

9.—Pursuant to this Order the present proceedings were instituted (the Writ of Summons being filed on 29th October, 1951), whereby the p. 1
Respondent prayed that a declaration be given that Act number XIV of 1950 was null and of no effect and alternatively if the said Act was valid that the deposits made by the firm represented by the Respondent were not affected by the said Act for the reasons stated therein.

10.—In their statement of defence in the present action the p. 5
Appellants pleaded inter alia that the claim for a declaration of the nullity of the said Act was barred under Section 39 of the Malta (Constitution) Letters Patent, 1947.

11.—The said section runs as follows :—

" The Validity of any law made under section 22 of these
" Letters Patent or of any provision of any such law shall not be

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" questioned in any legal proceedings commenced after the " expiration of one year from the date on which the law comes " into operation except on the ground that the law or provision " as the case may be deals with a matter with respect to which " the Assembly has no power to make laws."

p. 7 12.—In his note of submissions the Respondent submitted that the validity of Act number XIV of 1950 had been questioned in the Main Action and the Defendants in that action had conceded that that issue could be determined then; to this the Court had agreed but had held that the issue ought to be dealt with in a separate action because of its delicate nature; the Respondent submitted that the Appellants in the present action were bound by that decision, and further that the present action should be considered as being one and the same thing as the Main Action, and therefore that proceedings to impugn the validity of the said Act were commenced before the lapse of one year from its coming into operation.

p. 9 13.—The Appellants submitted that the present action could not be regarded as one and the same thing as the Main Action because the parties and the causes of action raised therein were different. The Appellants further submitted that Section 39 of the Malta (Constitution) Letters Patent, 1947, required a formal and direct impugnment of a law in proceedings brought for that purpose, and that the Respondents challenge to the validity of the Act in the first action was incidental only. They also took the point that the order of the Court giving the Respondent one month to institute further proceedings could not operate to extend the time limited by Section 39.

14.—The Trial Judge held that the Main Action could not be considered as one and the same thing as the present action and accordingly he upheld the Appellants first plea and dismissed the Respondents first claim and adjourned the case for further hearing on the other claims to 21st November, 1952.

p. 20 15.—The Respondent appealed to the Court of Appeal of Malta who gave Judgment on 6th February, 1953, allowing the appeal. The Court of Appeal were against the Respondent on two subsidiary points. That is they held that the period of one year mentioned in Section 39 was a fixed period which could not be affected by any order of the Court, and further held that the Appellants were not precluded by the Judgment of 5th October, 1951, from relying on the plea of Section 39. The Court of Appeal were however in the Respondents favour on the main issue. They said that the words " to question " were not words of art in Maltese law and were not indeed words normally found in Maltese Statutes and as the effect of Section 39 was to limit the subjects rights of access to the Courts the words should not be given any extended or unnatural meaning.

The word " question " meant no more than " to impugn " and they considered that the validity of a statute was questioned when one party to proceedings questioned or disputed its validity. There was nothing in Maltese procedure which made it necessary for the question to be raised by a Plaintiff as a substantive plea ; he could equally well raise it by way of a counter plea to destroy the force of a defence based on the statute although they said that in this case the Court had a discretion to suspend the hearing of the action and to require the validity of the statute to be decided in a fresh proceeding. They were abundantly satisfied that the validity of the statute was questioned in the Main Action by way of counterplea that is that when the Defendants raised Act 14 by way of Defence the Plaintiff pleaded that that Act was invalid. They were so satisfied not merely by the terms of the Judgment of 5th October, 1951, but by reference to the Court records of interlocutory proceedings which are referred to in the Judgments of the Court of Appeal but not printed in the Record. The Court of Appeal did not accept the argument that the present proceedings could be regarded as separate and distinct from the Main Action. The parties were in fact the same (Colerio Brothers Limited and the Crown) and the fact that the persons chosen to represent the Corwn in these proceedings were not the same as in the Main Action was immaterial. Nor did the Court of Appeal agree that the proceedings were entirely fresh proceedings : they were instituted on a direction of the Court as a convenient way of trying an issue raised in the Main Action and were merely the form whereby the point raised in the Main Action was to be brought before the Court for decision. The Court of Appeal therefore allowed the appeal and remitted the case to the Court of first instance for a decision on the merits.

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16.—On 16th March, 1953, the Court of Appeal made a conditional order granting special leave to appeal to Her Majesty in Council, and on 19th June, 1953, gave final leave.

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17.—The Respondents submit

(A) That the validity of Act 14 was questioned in the Main Action which was commenced with the time limited by Section 39.

(B) That the parties in the Main Action and these proceedings are the same, viz., Coleiro Brothers Limited by their representative and the Crown by its representatives.

(C) That this Action is merely a form of procedure directed by the Court for the purpose of trying one of the issues raised in the Main Action and is a continuation thereof.

(D) That the validity of Act 14 is still being questioned in the Main Action and that these proceedings are (so far as they concern the validity of Act 14) a mere method of ascertaining and informing the Court as to the legal position requisite for determining the questions raised in the Main Action.

(E) That as the Crown did not appeal from the Judgment of 5th October, 1951, given in the Main Action (whereby it was directed that the issue as to the validity of Act 14 was to be determined by a separate action to be commenced in one month) they are precluded and estopped from contending that that issue can be properly decided for the purposes of the Main Action by proceedings commenced in one month in accordance with that order.

18.—The Respondent humbly submits that the Appellants Appeal should be dismissed and that the Judgment of the Court of Appeal of Malta should be affirmed for the following among other reasons :—

REASONS

1. BECAUSE the validity of Act 14 was questioned in the Main Action which was commenced within the period limited by Section 39 of the Malta (Constitution) Letters Patent, 1947.

2. BECAUSE the parties to these proceedings and the Main Action are the same, viz., Coleiro Brothers Limited by their Representative and the Crown by its representatives.

3. BECAUSE these proceedings are merely a form of procedure directed by the Court for the purpose of trying one of the issues raised in the Main Action and is a continuation thereof.

4. BECAUSE the validity of Act 14 is still being questioned in the Main Action and these proceedings are a mere method of ascertaining and informing the Court as to the legal position requisite for determining the questions raised in the Main Action.

5. BECAUSE the Judgment of the Court of Appeal was right and for the reasons therein stated.

6. BECAUSE the Appellants are estopped and precluded by the Judgment or Order of 5th October, 1951, in the Main Action from asserting that the issue as to the validity of Act 14 (requisite to the determination of the claims of the Respondents against the Crown made in the Main Action) may not be properly determined in the manner provided for by the said order that is by these proceedings.

T. G. ROCHE

In the Privy Council.

No. 25 of 1953.

ON APPEAL FROM THE COURT OF APPEAL OF MALTA.

BETWEEN

OLIVIER and OTHERS . (*Defendants*) APPELLANTS

AND

COLEIRO on behalf of the firm, COLEIRO BROTHERS LIMITED ... (*Plaintiff*) RESPONDENT.

CASE ON BEHALF OF THE RESPONDENT

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