

IN THE PRIVY COUNCIL

No. 10 of 1975

O N A P P E A L
FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N :

- 1. HENRI LINCOLN
- 2. ANEER ABDULLAH and
- 3. KRISENANDA RAMSAMY Appellants

- and -

- 1. The Govenor-General of Mauritius, SIR RAMA OSMAN
- 10 2. The Prime Minister of Mauritius, SIR SEEWOOSAGUR RAMGOOLAM and
- 3. The Speaker of the Legislative Assembly, SIR HARILLAL VACE JEE,

Respondents

C A S E FOR THE APPELLANTS

Record

- 20 1. This is an appeal from both the interlocutory and final judgments of the Supreme Court of Mauritius, dated 31st January and 14th May 1974 respectively, whereby the said Court, composed in each instance of Sir Maurice Latour-Adrien C.J., The Hon W.H. Garrioch, S.P.J. and The Hon Droopnath Ramphul J. decided as follows:
 - Record p.22
 - Record p. 31

(1) IN THE INTERLOCUTORY JUDGMENT, that no

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decision would be made by the said Court on any of the petitions made or issues raised by the appellants until that Court had pronounced upon the validity or otherwise of the Constitution of Mauritius (Amendment) Act, No. 40 of 1973 (hereinafter called "the impugned Act"); and

(2) IN THE FINAL JUDGMENT, that the impugned Act was not wholly invalid, and that the Appellants were not entitled to a declaration that section 5 thereof was invalid. 10

The following issues fall to be decided in this Appeal;

(a) Whether Her Majesty in Council may, in the case of an appeal against the interlocutory judgment of a Court by leave thereof, correct an error of law on a procedural irregularity arising from misapplication of law appearing in judgment of the same Court in the same case contrary to the petition of the same Appellant and upon which the final judgment of the said court is predicated, at least in part; 20

Constitution of Mauritius (Amendment) Act No. 4 of 1973

(b) Whether if question (a) be answered in the affirmative, the Act (which was introduced before the Legislative Assembly of Mauritius and received the assent of the Governor-General, while the instant case was being considered by the Supreme Court of Mauritius) has, on its proper construction, such effect as to preclude or properly restrain the said Court from hearing argument on the validity and effect of the Emergency Powers (Dates of Election) Regulations, No. 2 1973 and of anything purporting to be made under such Regulations; 30

Government Notice No. 102 of 1973

(c) Whether, the said Regulations are invalid by reason of their incompatibility with section 35 (3) of the Constitution of Mauritius 40

(d) Whether Section 1 of the Constitution of Mauritius, which provides that "Mauritius shall be a sovereign democratic state", impresses upon the State of Mauritius qualities of sovereignty and democracy that cannot be abridged, even by means of a

statute passed in accordance with section 47 of the same Constitution, at least in the case in which such statute does not purport to amend Section 1 thereof

- 10 (e) Whether, if question (c) be answered in the affirmative, the impugned Act would, if valid, abridge the quality of democracy impressed upon the State of Mauritius by section 1 of the said Constitution, and is for that reason invalid

THE CONSTITUTIONAL STATUS OF MAURITIUS

3. By virtue of Section 1 of the Constitution of Mauritius (hereinafter called "the Constitution") Mauritius is and has been since March 1968 an independent sovereign state within Her Majesty's dominions. Chapter 1 of the Constitution headed "the State and the Constitution" contains two sections. Section 1 provides: "Mauritius shall be a sovereign democratic state." Section 2 provides: "this Constitution is the supreme law of Mauritius and if any other law is inconsistent with this Constitution that other law shall, to the extent of the inconsistency, be void." By sections 31 and 45 of the Constitution the Legislative power is vested in a Parliament consisting of Her Majesty and a Legislative Assembly. The Legislative Assembly according to the Constitution as originally enacted, is to be elected at regular intervals from candidates who are obliged to declare, in advance of their election, the social, racial or religious communities to which they belong (sections 31 (2) and Schedule 1). The Constitution of Mauritius (Amendment) Act 1969, No. 39 of 1969 provides for the prolonged existence of the first Parliament as if it were constituted on 31st July 1971, and the impugned Act (the validity and effect of which are question in the instant proceedings) PROVIDES for the filling, other than by election, of occasional vacancies that may occur in the Legislative Assembly.

4. For legislative purposes Her Majesty is represented in Mauritius by a Governor-General who appoints from among members of the Legislative Assembly a Prime Minister. In the discharge of his Constitutional functions the Governor-General acts in accordance with

Constitution sections 28 and 58

Record

Constitution
Section 59

the advice of a Cabinet consisting of the Prime Minister, Attorney-General and members of the Legislative Assembly chosen by the Prime Minister.

Proclamation
No 17 of 1971

5. In December 1971 the Governor-General issued two proclamations, in accordance with sections 18 and 19 of the Constitution. The proclamation issued under Section 18, which makes it lawful for the Legislative Assembly to pass laws inconsistent with the provisions of Section 5 and 16 of the Constitution, was renewed periodically by the Legislative Assembly until December 1974. The proclamation issued under Section 19 of the Constitution declaring a "state of emergency" is still in force, since (as the Supreme Court has held,) it remains in force until specifically revoked. Both proclamations were occasioned by strikes that took place in the late autumn of 1971 in the port and transport industries; the strikes ceased shortly after the proclamations were made and have not been repeated.

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Proclamation
No.15 of 1971

Notee v. Rex
1969/ M.R. 34 1
A. Mahoorasingh
v. Governor-General
Exhibit "B"
Record p. 75 at 79

6. The judicature of Mauritius consists of a Supreme Court (including a Court of Civil Appeal and a Court of Criminal Appeal) and sub-ordinate courts. Subject to exceptions immaterial to this case, the Supreme Court has original jurisdiction in cases in which it is alleged that there has been a contravention of any provision of the Constitution and that the Appellant's interests are being or are likely to be affected thereby. An appeal to Her Majesty in Council lies as of right against final decisions of the Court of Appeal of Supreme Court of Mauritius in any civil or criminal proceedings on questions as to the interpretation of the Constitution and in cases involving the enforcement of the Constitutional provisions governing protection of fundamental rights and freedoms. An appeal lies to Her Majesty in Council by leave of the Court of Appeal or the Supreme Court of Mauritius against any decision thereof involving a question which, in the opinion of that Court, ought to be submitted to Her Majesty in Council by reason of its great, general or public importance, or otherwise.

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Constitution
Section 81(1)
(a) and 81(1)
(c)

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This appeal is brought by leave of the Supreme Court of Mauritius, given on 4th March 1975.

Constitution
section 82(2)
No. 13 of 1975

THE FACTS

10 7. On 20th July 1972 the seat of an elected member of the Mauritian Legislative Assembly for Curepipe-Midlands fell vacant by reason of the resignation of the incumbent member, Mr. Gaetan de Chazal. At that time section 35(3) of the Constitution provided that the writ for an election to fill the vacancy should, unless Parliament were sooner dissolved, be issued within ninety days of the occurrence of the vacancy; and section 41(2) of the Representation of the People Ordinance 1958 (as enacted by Section 4 of Act No. 49 of 1969) provided that the Governor-General, acting in accordance with the advice of the Prime Minister, should appoint a day of election not less than five, nor more than twenty days after the date on which the writ was issued. On 20 October 9th 1972 the Governor-General, in reliance on section 3 of the Emergency Powers Ordinance 1968, made the Emergency Powers (Legislative Assembly Elections) Regulations 1972 which provided that, notwithstanding section 41(2) of the Representation of the People Ordinance 1958, the Governor-General might, on the advice of the Prime Minister, fix any day to be the polling day for the purpose of filling a vacancy in the Assembly. Thereafter he made an order appointing 4th June 1973 as the day of election for filling the vacancy. The said Regulations were not referred to the Electoral Supervisory Commission or the Electoral Commissioner, as was required by section 41(3) of the Constitution, which provides that there should be referred to the said Commission and Commissioner within the time set out therein, every proposed Bill or Regulation relating to the election of Members of the Legislative Assembly.

Ordinance No 14
of 1958

The Representation of the People (Amendment Act, 1969

Government Notice No 119 of 1972

Regulations made under the Emergency Powers Ordinance, No 5 of 1968

50 8. One, L.J.F. Vallet, a leader of a political party in Mauritius, then made known to the Prime Minister and Governor-General his intention to apply to the Supreme Court on 30th October 1972 for an order of mandamus directing Sir Seewoosagur Ramgoolam, the Prime Minister, to advise the Governor General to alter the date fixed for the by-election, on the ground that the said Regulations were invalid by reason of their incompatibility with section 41(3) of the

Record

Constitution.

Ordinance No
14 of 1958

Representation
of the People
(Amendment) Act
No. 24 of 1972

Record, Exhibit
"A", P. 53

Ordinance No.
14 of 1958

9. On October 22nd 1972, a Sunday, a draft of a Bill purporting to amend, with retrospective effect to 1st October 1972, section 41(2) of the Representation of the People Ordinance 1958, by removing the maximum time-limit of twenty days for appointing a day of election was referred to the Electoral Supervisory Commission and Electoral Commissioner. The Commission and the Commissioner reported within three days that they had no comments to offer; and the Bill, after passing all of its Parliamentary stages at one and the same sitting, entered into force on November 3rd 1972.

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10. By a judgment dated 31st January 1973, sub.nom., Vallet v. Ramgoolam and another, the Supreme Court of Mauritius declared the said Regulations to be null and void, by reason of their incompatibility with section 41(3) of the Constitution. The same Court in the same action found, however, no reason for avoiding the impugned Act amending the Representation of the People Ordinance, and accordingly it refused to grant the order of mandamus as requested. The Supreme Court did not adjudicate on the question whether the law offended against the Spirit of the Constitution.

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11. Thereafter there occurred three other vacancies in the Legislative Assembly, including one for the constituency of Belle Rose- Quatre Bornes, which seat fell vacant on 1st January 1973. On or about 27th March 1973 the Governor-General, acting under the provisions of the Representation of the People Ordinance (as amended by Act No. 24 of 1972), fixed the dates for the issuance of the Writs for the said by-elections to fill the four vacancies as follows:-

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Curepipe-Midlands	4th June 1973	40
Triplet Pamplemousses	4th June 1973	
Riviere des Anguilles Souillac	6th July 1973	
Belle Rose-Quatre Bornes	10th September 1973	

By an action, sub.nom. A.Mathoorasingh v. The Governor General of Mauritius, a registered

10 elector from the constituency of Belle Rose-
Quatre Bornes petitioned the Supreme Court
for an order declaring that the order fixing
the date of election on 10th September 1973
was void, in that it failed to conform with a
standard of reasonableness which, the
Petitioner alleged, was set by the Constitution
at that time. On 18th May 1973 there was
made by the Governor-General, and on 21st May
1973 (three days before the hearing of the
case) there was published in a supplement to
The Gazette the Emergency Powers (Dates of
Election) Regulation 1973 which purported to
be made in accordance with the Emergency
Powers Ordinance 1968 and fixed the date for
issuance of Writs for all by-elections to
fill the four vacancies on 10th September 1973
and the polling date to be 19th November 1973.
20 The Petitioner moved to amend his petition
to take account of the new date for the by-
elections in respect of the four vacancies,
but the Supreme Court granted the amendment
only in respect of the seat of Belle Rose-
Quatre Bornes which had become vacant in January
1973. The Court in its judgment in that case
decided that the Executive is not "acting
against the Constitution when it provides
for the filling of a vacancy within one year
30 during a period of public emergency"
(emphasis added) The vacancy for the
constituency Curepipe Midlands dates from
20th July 1972: see para 7 supra)

G.N. 54
of 1973

12. The said elections were not held in
November 1973 or at all, but instead the
Governor-General of Mauritius in September
1973 made new regulations fixing 18th February
1974 as the revised polling date. No such
by-elections have yet been held.

40 Application to the Supreme Court

13. By a petition dated 27th September 1973
the appellants averred that they are citizens
of Mauritius qualified as voters and in the case
of the first Appellant qualified to be a
candidate in by-elections to fill vacancies
in two of the four said constituencies. By
same petitions the Appellants averred that
the Prime Minister of Mauritius (the second
Respondent in this action) was deliberately
and in bad faith postponing the said by-
elections because the Government of Mauritius
50 wished to amend the Constitution of Mauritius

Record

without having four new elected members taking part in the debate on that question on the Legislative Assembly. The Prime Minister, in the Respondents' plea, dated 20th October 1973, denied that he had any intention of amending the Constitution and averred that he had no knowledge of the intention of other Ministers on the subject. On 5th November the Supreme Court heard argument, the Solicitor General appearing on behalf of the Respondents, and on that day it reserved judgment. On 7th November 1973 notice of a Bill to amend the Constitution of Mauritius was made public and given a certificate of urgency. On 9th November 1973 that Bill passed all its stages in the Legislative Assembly, the non-elected Speaker joining in voting in its favour, and became the impugned Act, the validity and effect whereof is challenged in these proceedings

14. On 31st January 1974 the Supreme Court delivered its interlocutory judgment herein. By that judgment it decided that any question that might arise with regard to the validity or effect of the Emergency Powers (Dates of Election) Regulations (no.2) 1973 and of anything done under them had become subordinate to the question of validity of the impugned Act and resolved that no issue would be decided in the present case until the parties had been heard on the validity of the impugned Act. On 14th May 1974 the said Court delivered its final judgment herein in which it decided, inter alia, that the impugned Act is not invalid.

SUBMISSIONS

15. The Appellants do not seek to challenge in these proceedings the decision of the Supreme Court of Mauritius to the effect that the Appellants are not entitled, in the proceedings as presently constituted, to a declaration that section 5 of the impugned Act is invalid. The Appellants will, however, contend:

- (1) that Her Majesty in Council may in these proceedings correct an error of law or procedural irregularity arising from

misapplication of law in the interlocutory judgment of the Supreme Court of Mauritius herein; and

- 10 (2) that the said interlocutory judgment contains an error of law or procedural irregularity arising from such an error, and ought to be corrected by Her Majesty in Council, in that the Supreme Court of Mauritius by that judgment concluded that with the passing of the impugned Act any question that might arise with regard to the validity and effect of the Emergency Powers (Dates of Election) Regulations (no.2) 1973 had become subordinate to the main question whether the impugned Act was valid or not; further or alternatively
- 20 (3) that the Emergency Powers (Date of Election) Regulations (no.2) 1973, are and at all material times were void by reason of their incompatibility with the Constitution of Mauritius;
- 30 (4) that section of the Constitution of Mauritius impresses upon the State of Mauritius qualities of sovereignty and democracy that cannot be abridged, even by means of a law passed in accordance with section 47 of the same Constitution, at least in the case in which such law does not purport to amend section 1 thereof; and
- (5) that the impugned Act is and ought to be declared invalid in that it would, if valid, abridge the quality of democracy impressed upon the State of Mauritius by section 1 of the said Constitution
- Constitution of Mauritius (Amendment) Act, No 40 of 1973
- Government Notice No 102 of 1973
- Constitution of Mauritius (Amendment) Act No 40 of 1973
- Government Notice No 102 of 1973
- Constitution of Mauritius (Amendment) Act No 40 of 1973

40 The Interlocutory Judgment

16. (a) In the case of an Appeal brought to Her Majesty in Council by leave of an inferior court, the grant of leave by the court from which the appeal is brought is governed by the terms of the instrument regulating appeals from that court; Halsbury's Laws of England, 4th ed, Vol. 10. para 784. The Appellants will content that the Supreme Court of Mauritius

has by the terms of the instrument relating to appeals therefrom, the power to grant leave to appeal to Her Majesty in Council against an interlocutory judgment of the said court, and that by its order granting final leave to appeal to Her Majesty dated 4th March 1975 the said Court must be taken to have exercised that power.

17. Section 81(2) of the Constitution of Mauritius, in pursuance of which this appeal is brought, provides that appeals shall lie to Her Majesty in Council from "decisions" of the Supreme Court, by leave thereof. The term "decision" is not defined in the said Constitution, but the appellants will contend that it is sufficiently broad to encompass a determination made by way of interlocutory judgment. In support of this proposition the Appellants will refer to Re Dover and Kent County Court [1891] 1 Q.B. 725 and to section 81 (4) of the said Constitution which uses the expression "final decision" in a manner such as to contrast that expression with the use of the mere word "decision" in section 81(2) thereof. The Appellants will contend that upon the pronouncement by the Court of a final judgment in a particular case any interlocutory judgment therein merges with the final judgment, with the result that an appeal against the final decision embraces an appeal against the interlocutory decision. In support of that proposition the Appellants will refer to Maharajah Moheshur Sing v. The Bengal Government (Calc.1859), 7 Moo I.A. at p.302 and Forbes v. Ammeeronisisa Begum (Calc. 1885) 10 Moo I.A. at p.359 Accordingly the Appellants will contend that the Order of the Supreme Court of Mauritius, dated 4th March 1975, although referring only to the final judgment thereof in this case, embraces also the interlocutory judgment herein

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18. Further, or alternatively the Appellants will rely upon the following passage from Norman Bentwich's The Practice of the Privy Council in Judicial Matters, 3rd ed. (1937) at p.213

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"The appeal from the final decision enables the Court to correct any interlocutory order which it may deem erroneous".

Construction of the Statute

Constitution
of Mauritius
(Amendment)
Act, No 40 of
1973

10 19. (b) The Appellants will next contend that
the impugned Act does not, upon its proper
construction, have such effect as to warrant
the decision of the Supreme Court of Mauritius
in the interlocutory judgment herein, whereby
that Court held that any question raised
in these proceedings regarding the Emergency
Powers (Dates of Election) Regulations, no.2
of 1973 was subordinate to the question of the
validity of the impugned Act, and directed
that no argument would be heard upon the
former question pending disposition of the
latter. The said decision appears to proceed
from the premise that the impugned Act amends
or repeals the said Regulations either (i)
retrospectively so as to affect proceedings
current at the time of its enactment; or (ii)
20 prospectively in such manner as to render
hypothetical any question of the validity or
affect of the said Regulations, even though
that question might have been raised in
proceedings instituted before the passing of the
impugned Act and in relation to the acts done
before that date.

30 20. Section 5 of the Act may be taken to
repeal by implication Regulation 2 of the
said Regulations (which set the date for
by-elections in the four constituencies set
out therein) In particular, the said section
had the effect that certain seats in the
Legislative Assembly of Mauritius (including
the seats for three of the said four
constituencies) should be filled by the
means set out in section 3 of the Act. This
section, although affecting vacancies which
had occurred before the commencement of the
Act, does not purport to deprive of their
40 remedies litigants who had been aggrieved by reason
of any defect in the said Regulations or by
reason of anything done in pursuance thereof
during the period in which they operated. In
the premises it is not to be construed so as
to have that effect.

21. "It is a fundamental rule of English law
that no statute shall be construed so as to have
retrospective operation unless such a
construction appears very clearly in the terms

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of the Act or arises by necessary and distinct implication": Maxwell on the Interpretation of Statutes, 12th ed. p. 215. This rule "involves another and subordinate rule, to the effect that a statute is not to be construed so as to have greater retrospective operation than its language renders necessary": Lawi v. Renad [1892] 3 Ch.402 per Lindley, L.J. See also Colonial Sugar Refining Co. v. Irving [1905] A.C. 369 at 372 and Waddington v. Miah [1974] 1 W.L.R. 683. The Appellants will submit that the Act does not have such retrospective effect as to affect the present proceedings, which were current at the time of its enactment. Where it is desired to affect current proceedings by statute, the intention to do so must appear clearly from the terms of the enactment, as was the case with section 1(2) of the War Damage Act 1965.

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Constitution of Mauritius (Amendment) Act No 40 of 1973

22. The Appellants will further contend that section 5 of the impugned Act is not to be construed as having such prospective effect as to deny to litigants in pending actions remedies for past infractions. "In general, where the substantive law is altered during the pendency of an action, the rights of the parties are decided according to the law as it existed when the action was begun, unless the new statute shows a clear intention to vary such rights": Maxwell on the Interpretation of Statutes 12th Ed. p. 220-221. This principle was applied in Thistleton v. Frewer (1862) 31 L.J. Ex 230 (on the interpretation of section 32 of the Medical Act 1858) and in Re 14 Grafton Street, London W1; De Havilland (Antiques) Ltd. V. Centrovincial Estates (Mayfair) Ltd [1971] Ch. 935 (on the interpretation of section 11 of the Law of Property Act 1969.) With the passing of the impugned Act the Appellants' claim for a declaration that the said Regulations were null and void (at the time when the action was began) did not become hypothetical. The Appellants contended, and will contend that by means of those Regulations they were unlawfully, but temporarily deprived of their rights to vote and stand for election in certain by-elections in Mauritius; that a declaration was at the time of the beginning of the proceedings the most

Constitution of Mauritius (Amendment) Act No 40 of 1973

most suitable or an appropriate remedy; and that the said remedy did not cease to be suitable or appropriate by reason of the enactment of a measure which, if valid, lawfully but permanently deprived the Appellants of the said rights.

Validity of the Regulations

10 23. (c) The Appellants will contend that the
Emergency Powers (Dates of Election) Regulations,
No. 2 of 1973, are, and at the time of
the initiation of those proceedings were
invalid, and ought to be declared invalid by
Her Majesty in Council, in that they purported
to fix the dates for elections to fill
vacancies in the Legislative Assembly at the
times after the expiration of a period set by
the Constitution of Mauritius. The Appellants
will contend that the said period is and was
20 the period of ninety days (within which the
writ must be issued in accordance with Section
35(c) of the said Constitution) plus the
period between the expiration of those ninety
days and the date on which the Governor-General
must fix the day for election, in accordance
with section 3 of the Emergency Powers
Ordinance 1968. The Appellants will contend
that in fixing the said date the Governor-
30 General was obliged to select a date not
unreasonably remote from the date of
expiration of the said ninety days

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Notice No
102 of 1973

Section 1 of the Constitution of Mauritius

40 24. (d) Section 1 of the Constitution
of Mauritius provides that "Mauritius shall
be a sovereign democratic state". The
Appellants will contend that this section
has a dispositive, and not merely a
declaratory effect. In support of that
proposition the Appellants will pray in
aid firstly, the wording of the section
(particularly the verb) and secondly, the
interpretation applied by the Supreme
Court of India to a comparable provision
in the Indian Constitution.

25. The preamble to the Indian Constitution,
like the first section of the Constitution

Record

Mauritius, provides that the State shall be sovereign and democratic, but contains no definition of those terms. Early commentators on the preamble to the Indian Constitution expressed the view that it did not have such dispositive character as to render any other provision in that Constitution immune from change (see Basu, Commentaries on the Indian Constitution, Vol 1. p. 12) That view has, however, been emphatically rejected by the Indian Supreme Court in His Holiness Kesavananda Bharati Sripadagalavaru v. State of Kerala /1973/ Supp S.C.R., on which the Appellants will rely. In that case the Petitioner claimed that certain provisions in the Kerala Land Reforms Act 1963 as amended by the Kerala Land Reforms (Amendment) Act 1969 were invalid by reason of their inconsistency with articles 14, 19 (1) (f), 25, 26 and 31 of that Constitution. During the pendency of the petition the Kerala Land Reforms (Amendment) Act 1971 was passed and received assent. The petitioner applied to vary the petition. The Indian Supreme Court in another case then upheld a decision whereby sections of the same Act were declared unconstitutional. There then entered into force the Constitution (Twenty fifth Amendment) Act and the Constitution (Twenty ninth amendment) Act, the latter of which purported to add the impugned Act to a list of Acts set out in the ninth schedule to the Constitution, which Acts "shall not be declared void" (Constitution, art 3 (b)) The Petitioner therefore maintained that the Constitutional amendment was itself unconstitutional. In upholding his contention, the Supreme Court, in whole or in part, held (1) that the Constitutional prohibition of "laws" infringing fundamental rights extends to laws amending the Constitution; (2) that the provision in article 368 of the Indian Constitution for the amendment of that instrument does not enable Parliament to abrogate or take away fundamental rights or to completely change the fundamental features of the Constitution so as to destroy its identity (see the judgments of Sikri, C.J., at p. 216 Hedge and Mutherjee J.J., at pp.318 and 322 and Ray J., at p. 382); and (3) that the preamble has effect such that Parliament has no

Act 1 of 1964
(no.35 of 1969)

(no. 25 of 1971)

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power to abrogate or emasculate the fundamental features of the Constitution such as the sovereignty of India and the democratic character of its polity" (see Hedge and Mukherjee J.J., at p. 322)

10 26. The Indian Supreme Court's decision in that case was not without precedent. In particular the proposition that a Constitutional amendment may be invalid to the extent that it infringes the provisions governing fundamental rights is supportable by reference to Golkarett v State of Punjab (1968) 2 S.C.R. 762 and Gopalar v. State of Madras (1950) S.C.R. 88, on which the Appellant's will also rely.

20 27. In reliance upon the foregoing the Appellants will contend that section 1 of the Constitution of Mauritius impresses upon the State of Mauritius a quality of democracy to which any Mauritian legislation must conform, unless such legislation itself amends section 1. No other section of the Constitution of Mauritius provides expressly for the amendment (if amendment is constitutionally possible) of section 1, and the Appellants will therefore contend firstly, that section 1 is not susceptible of amendment, secondly and in the alternative the Appellants will contend that if section 1 is susceptible of amendment, in accordance with the procedure set out in section 47 of the Constitution of Mauritius, the impugned Act, although passed in accordance with the said procedure, does not on its proper construction amend section 1, in as much as it does not even purport to do so.

The Undemocratic Character of the Impugned Act

Constitution of Mauritius (Amendment) Act, No 40 of 1973

40 28. (d) The Appellants will contend that the Impugned Act does not conform with the standard or quality of democracy set out in section 1. The impugned Act contravenes the principle of democracy - firstly, by providing for appointment to the Legislative Assembly of persons who have failed to be elected thereto; secondly, by removing from an electorate, temporarily divested of its opportunity to change the composition of the Legislative Assembly in a general election, the opportunity to change its composition in a by-election; and thirdly, by upsetting the composition of the Legislative Assembly in such a manner as to render significantly less effective the Constitutional rules governing the voting requirements for further

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changes in that Constitution (see S.A. De Smith, "Mauritius" Constitutionalism in a Plural Society 31 M.L.R. (1968) 601 at p. 621)

29. By reason of the premises, the Appellants humbly submit that the determinations of the Supreme Court of Mauritius dismissing the Appellants' Petition were wrong, and that this Appeal should be allowed for the following, among other REASONS: 10

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(1) BECAUSE THE Constitution of Mauritius (Amendment) Act No. 40 of 1973 does not, upon its proper construction, have such retrospective effect as to preclude or properly restrain the said Court from hearing argument upon the validity and effect of the Emergency Powers (Dates of Election) Regulations, no 2 1973 and anything purporting to be done under them; 20

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(2) BECAUSE the Emergency Powers (Dates of Election) Regulations no. 2 1973 are and at all material times were void by reason of their incompatibility with the Constitution of Mauritius.

(3) BECAUSE (alternatively) section 1 of the Constitution of Mauritius impresses upon the State of Mauritius qualities of sovereignty and democracy that cannot be abridged, even by means of a law which has been passed in accordance with the procedure set out in section 47 of that Constitution but does not purport to amend section 1 thereof; and 30

(4) BECAUSE the Constitution of Mauritius (Amendment) Act No. 40 of 1973 would, if valid, abridge the quality of democracy impressed upon the State of Mauritius by section 1 of the said Constitution, and is for that reason invalid; 40

(5) BECAUSE the Supreme Court of Mauritius was wrong in its judgment and ought

to be reversed

LOUIS BLOM-COOPER

FRANCE VALLET

RICHARD PLENDER

IN THE PRIVY COUNCIL No.10 of 1975

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FROM THE SUPREME COURT OF MAURITIUS

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