

42/184

IN THE PRIVY COUNCIL

No. 29 of 1983

ON APPEAL
FROM THE SUPREME COURT OF MAURITIUS
(CONSOLIDATED APPEALS)

BETWEEN:

THE SOCIETE UNITED DOCKS

Appellants

and

THE GOVERNMENT OF MAURITIUS

Respondent

AND

(1) DESMARAIS BROTHERS LIMITED

(2) TAYLOR AND SMITH LIMITED

(3) D'HOTMAN AND SONS LIMITED

Appellants

and

THE GOVERNMENT OF MAURITIUS

Respondent

CASE FOR THE RESPONDENT

Record

1. These are appeals from a judgment of the Supreme Court of Mauritius (Moollan C.J., Glover J.) delivered on 11th November 1982 dismissing the claims for

declaratory relief and compensation brought by the Appellants against the Respondent.

2. The Appellants in the first case, The Societe United Docks, are a partnership formed in 1973 comprising two dock companies, New Mauritius Dock Company Limited and Albion Dock Company Limited. These Appellants are referred to hereinafter as "the dock companies". The dock companies have been principally concerned with the storage and handling of sugar and for many years contracted their services exclusively to the Mauritius Sugar Syndicate ("the Syndicate").

The syndicate is authorised to represent the sugar industry (planters and millers) and is responsible for marketing the sugar and distributing the proceeds to the producers. All the producers of sugar in Mauritius are members of the Syndicate. The Appellants in the second case, Desmarais Brothers Limited, Taylor And Smith Limited and D'Hotman And Sons Limited are stevedoring companies which have been primarily concerned

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with loading sugar on board ships. They also have contracted their services for many years exclusively to the Syndicate. These Appellants are referred to hereinafter as "the stevedoring companies".

3. By the Mauritius Sugar Terminal Corporation Act, No. 6 of 1979 ("the 1979 Act") the Mauritius Sugar Terminal Corporation ("the Corporation") was set up to manage and operate a bulk sugar terminal. The 1979 Act provided that no person other than the Corporation or a body authorized by the Minister should store or load on any ship sugar manufactured in Mauritius and that contravention of that provision constituted a criminal offence. The issues raised on this appeal are whether the creation of a monopoly in favour of the Corporation and any other authorized bodies with regard to the storage and loading of sugar involved infringements of the Constitutional rights of the dock companies and the stevedoring companies. The relevant provisions of the Constitution are:

" CHAPTER II - PROTECTION OF FUNDAMENTAL
RIGHTS AND FREEDOMS OF THE
INDIVIDUAL

S.3. Fundamental rights and freedoms of the individual

It is hereby recognised and declared that in Mauritius there have existed and shall continue to exist without discrimination by reason of race, place or origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest each and all of the following human rights and fundamental freedoms -

- (a) the right of the individual to life, liberty, security of the person and the protection of the law;
- (b) freedom of conscience, of expression, of assembly and association and freedom to establish schools; and
- (c) the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation,

and the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitation of that protection as are contained in those provisions, being limitations designed to ensure that the enjoyment of those rights and freedoms by any individual does not prejudice the rights and freedoms of others or the public interest.

.....

S.8. Protection from deprivation of property

(1) No property of any description shall be compulsorily taken possession of and no interest in or right over property of any description shall be compulsorily acquired, except where

.....

(c) provision is made by a law applicable to that taking of possession or acquisition -

(i) for the prompt payment of adequate compensation

.....

S.17. Enforcement of protective provisions

(1) Where any person alleges that any of sections 3 to 16 has been, is being or is likely to be contravened in relation to him, then, without prejudice to any other action with respect to the same matter that is lawfully available, that person may apply to the Supreme Court for redress.

(2) The Supreme Court shall have original jurisdiction to hear and determine any application made by any person in pursuance of subsection (1), and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing, or securing the enforcement of, any of sections 3 to 16 to the protection of which the person concerned is entitled:

Provided that the Supreme Court shall not exercise its powers under this subsection if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law.

(3) The Supreme Court shall have such powers in addition to those conferred by this section as may be prescribed for the purpose of enabling that court more effectively to exercise the jurisdiction conferred upon it by this section.

(4) The Chief Justice may make rules with respect to the practice and procedure of the Supreme Court in relation to the jurisdiction and powers conferred upon it by or under this section (including rules with respect to the time within which applications to that court may be made)."

4. The history of the businesses of the dock companies and the stevedoring companies and the circumstances in which the change to bulk handling of sugar came about may be summarised as follows:

(1) Sugar produced at the factories by the millers was bagged there and then loaded (first on trains and, from the early 1960's, on lorries) and taken to the docks. The law required the millers to include in their

66 1.41 to
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contracts with the planters an undertaking to cause the sugar to be taken to the docks. At the docks dockers normally unloaded the lorries, stacked the bags in sheds for storage and thereafter carried the bags from the sheds and stacked them in lighters; sometimes the bags were transferred directly from the lorries to the lighters. Docks tugs towed the lighters alongside ship where another class of dock employee, lumpers, placed the bags in slings worked by rope. The dock companies are still concerned with comparatively small amounts of sugar for local consumption and special sugar for export. The duties of the stevedores were to get the slings containing the bags from the lighters onto the ship and to place the sugar in the ship's hold. Originally the bags themselves were placed in the hold but later the bags were slit and the sugar was emptied into the hold. The foregoing processes involved substantial manual work on the part of the dockers and the stevedores, although the process of stacking the bags in the sheds was to some extent mechanised.

- (2) In the 1980's the dock companies started to make plans for a move to bulk operations. The plans envisaged the dock companies working in partnership with the stevedoring companies. The sugar industry had to be persuaded to the need for change and the financial implications of the scheme and the Respondent had to be persuaded to accept the inevitable substantial loss of employment involved in the change and to amend the law which enjoined millers to convey sugar to the docks. 69 1. 12
to
69 1.44
- (3) In about 1970 those involved in the sugar industry, through the Syndicate, decided that they would themselves set up, own and manage bulk handling facilities. 69. 1.44
to
70 1.8
- (4) Finally the Respondent decided to set up a parastatal body, the Corporation, to operate the bulk sugar terminal. At first the Respondent had intended to be a minority partner and legislation was passed to raise a levy on the profits of the sugar industry 70 1.34
to
71 1.30

to finance the project. Later, in 1979, the Respondent decided to set up the Corporation with a majority shareholding and controlling interest, giving the sugar industry a minority interest. The 1979 Act did not provide for the payment of compensation to the dock companies or to the stevedoring companies. Under the bulk system the millers no longer bag the sugar which is funnelled into special lorries. At the terminal the sugar is, if necessary, stored in bulk and passes into the ship's hold by means of a mechanical conveyor belt. The process involves minimal use of manual labour and is considerably more efficient than the former system described under sub-paragraph 4(1) above. The Corporation commenced its operations in July 1980.

68 1.37
to
69 1.11

5. At the time when the sugar industry was intending to set up and run the bulk handling facilities (referred to in paragraph 4(3) above) there was correspondence between the Syndicate and the stevedoring companies relating to compensation. By letter dated 26th February 1971 the Syndicate stated:

Doc. T.1.

".... if a decision is taken regarding the implementation of the new system of loading, the Syndicate agrees to the principle of compensating all parties involved".

Later, by letter dated 18th September 1980 from the Syndicate to the stevedoring companies, it was stated:

Doc. T.8.

"..... the Syndicate cannot be held responsible for the payment of any compensation for loss of sugar business or of existing provisions to your employees.

You will recall that when the whole bulk project was taken away from the aegis of the Syndicate and eventually became the responsibility of the Bulk Sugar Corporation specific arrangements were agreed with you whereby legal compensation to all employees made redundant because of the advent of bulk would be met by the Syndicate. It was never envisaged at that time that the Syndicate could be held responsible for payment of compensation for loss of sugar business or any other charges."

6. The dock companies and the stevedoring companies applied under S.17 of the Constitution for a judgment declaring that their Constitutional rights under S.3 and S.8 of the Constitution had been infringed and seeking compensation in the sum of Rs 10,800,000 in the case of the dock companies and Rs 10,714,285 in the case of the stevedoring companies. 1 to 5 and 13 to 17
7. The Respondent made a preliminary objection before the Supreme Court and contended that on the facts alleged by the dock companies and the stevedoring companies there had been no violation of their constitutional rights. Other preliminary objections had been raised but were not pursued before the Supreme Court. 22
- On 7th December 1981 the Supreme Court (Rault C.J. and Glover J.) overruled the preliminary objection. Rault C.J. held that S.3 of the Constitution conferred rights independent of and additional to the rights conferred by S.8 and that, on the facts asserted in the claims, a remedy might be available both under S.3 and S.8. 25-64 25-50

Glover J. felt it unnecessary to determine whether S.3 50-64
operated independently of S.8 and stated that it was
not possible at that stage to hold that the plaintiffs
disclosed no cause of action as evidence would have to
be heard about the nature of the old businesses and the
new one, the true vocation and objects of the Syndicate
and the details of the negotiations between the various
bodies concerned.

8. A joint judgment in the main actions was 65-74
delivered by the Supreme Court on 11th November 1982.
The Supreme Court held that it had no hesitation in 73 1.3
saying that on the evidence before it the Respondent
had not procured the taking over or taking of
possession of the property or businesses of the dock
companies or the stevedoring companies; the operation
of the bulk terminal was of an entirely different
nature from the operations which the companies had
carried out.

Section 3 of the Constitution

9. S.3 of the Constitution does not confer enforceable rights and freedoms independent of and additional to those rights and freedoms which are set out in the subsequent sections of Chapter II of the Constitution.

10. S.3 refers in terms of great breadth and generality to fundamental rights and freedoms which exist and have existed in Mauritius, but the section itself recognises that those broadly expressed rights and freedoms are subject to limitations (namely, "respect for the rights and freedoms of others and for the public interest") and that the balance between the said general rights and freedoms and the said limitations is struck in the subsequent sections of Chapter II ("the provisions of this Chapter shall have effect for the purpose of affording protection to those rights and freedoms subject to such limitation of that protection as are contained in those provisions").

S.3 is in substantially the same terms as S.5 of the Constitution of Malta which was considered in Olivier v Buttigieg (1967) A.C. 115 at p. 128-9. Lord Morris of Borth -Y- Gest adverted to the express limitations on the broadly stated rights and freedoms and observed that "The section appears to proceed by way of explanation of the scheme of the succeeding sections". In Att.-Gen. v Antigua Times (1976) A.C.16, in considering S.1 of the Antigua Constitution (which is in almost identical words to S.5 of the Constitution of Mauritius) Lord Fraser of Tullybelton indicated that Lord Morris' analysis of S.5 of the Constitution of Malta was equally applicable to S.1 of the Constitution of Antigua.

11. In the foregoing (and other) respects the Constitution of Mauritius is to be distinguished from the Constitution of Trinidad and Tobago (considered in Maharaj v Att. - Gen. of Trinidad and Tobago (No. 2) (1979) A.C. 385 and Thornhill v Att - Gen. of Trinidad and Tobago (1981) A.C.61.), the Constitution of Malaysia

(considered in Govt. of Malaysia v. Selangor Pilot Association (1978) A.C. 337) and the Constitution of India (considered in State of West Bengal v Subodh Gopal Bose (1954) S.C.R. 587, Dwarkadas Shrinivas of Bombay v Sholapur Spanning and Weaving Co. Ltd. (1954) S.C.R. 674 and Saghir Ahmad v State of Uttar Pradesh (1955) 1 S.C.R. 707).

12. If, contrary to the above contentions, S.3 of the Constitution creates distinct and enforceable rights, the Respondent will, with regard to the allegation of infringement of such rights, rely on the matters set out in paragraphs 13 to 15 hereinafter.

13. In the light of the breadth and generality of the rights referred to in S.3 it is necessary to examine the law at the commencement of the Constitution to determine the extent of any limitations on such rights (Lord Diplock in Thornhill v Att - Gen. of Trinidad and Tobago, supra, at p.70 and see Rault C.J.'s judgment on the preliminary objection). It is

respectfully asserted that in 1968 the common law did not provide an unfettered right to claim damages in respect of deprivation of property without compensation. In France Fenwick & Co.Ltd. v The King (1927) 1 K.B. 458 Wright J. said that he would assume that the Crown had no right at common law to take a subjects property for reasons of state without paying compensation and then said:

"I think, however, that the rule can only apply (if it does apply) to a case where property is actually taken possession of, or used by the Government, or where, by the order of a competent authority, it is placed at the disposal of the Government. A more negative prohibition, though it involves interference with an owners enjoyment of property, does not, I think, merely because it is obeyed, carry with it at common law any rights to compensation. A subject cannot at common law claim compensation merely because he obeys a lawful order of the State."

14. The provisions of S.3(c) refer to rights of "the individual". In the context of S.3(c) "the individual" refers only to human beings and should not be construed as to embrace corporate bodies, such as the dock companies and the stevedoring companies, or partnerships ("societes") such as the Appellants in the first case. The provisions of S.3(c) are examples of the "human rights" referred to in the section and the provision itself refers to "protection for the privacy of his home". In context therefore the term "the individual" is not apt to cover corporate or unincorporated bodies of persons and should be given its usual, natural meaning. In contradistinction to S.3, the rights conferred by S.8 are not limited to rights of "the individual".

15. The dock companies and the stevedoring companies were not deprived of "property" within the meaning of S.3. The Respondent will rely on the matters set out in paragraphs 16 to 18 hereinafter.

Section 8 of the Constitution

16. Section 8 of the Constitution does not deprive the Respondent of its entitlement to use regulatory powers and does not guarantee the right to carry on a business. By comparison the Indian Constitution expressly protects the right of all citizens to carry on any occupation, trade or business (Article 19(1)(g)). Section 8 only prevents the Government, directly or indirectly, from compulsorily taking possession of or compulsorily acquiring "property of any description". As a result of the 1979 Act the docks companies and the stevedoring companies lost the right to store or load on ship sugar manufactured in Mauritius unless they were authorised to do so by the Minister. That right does not constitute "property" (Viscount Dilhorne in Govt. of Malaysia v Selangor Pilot Association, supra, at p. 346).

17. The dock companies and the stevedoring companies have contended that their goodwill constituted "property"

within the meaning of S.8.

However:

- (i) the sole 'customer' of the docks companies and the stevedoring companies was the Syndicate;
and
- (ii) such goodwill as the companies had was in effect lost and/or of no value from the time when the Syndicate decided to operate the bulk sugar terminal.

18. It has also been contended that the claims by the docks companies and the stevedoring companies for compensation pursuant to the "promise" of the Syndicate constituted "property" within the meaning of S.8. The Respondent will contend that the evidence in respect of such promise was imprecise and inconclusive, that no enforceable right or binding obligation was created and that in any event no such promise was made to the dock companies.

19. In any event the Respondent (through the Corporation) did not take possession of or acquire, whether compulsorily or at all, the businesses of the dock companies or the stevedoring companies nor any of the assets of those businesses which are alleged to constitute "property". For these purposes the distinction between "taking possession of" and "acquiring", on the one hand, and "deprivation", on the other hand, is important (see Viscount Dilhorne in Govt of Malaysia v Selangor Pilot Association, supra, at pp. 347-8).

The Corporation did not take possession of or acquire the businesses. The Supreme Court correctly held that the bulk terminal scheme operated by the Corporation is entirely different from the system previously operated by the dock companies and the stevedoring companies. Similarly, neither such goodwill as the companies had nor any claim for compensation against the Syndicate was taken possession of or acquired by the Corporation.

20. The Respondent therefore respectfully submits that

these appeals should be dismissed for the following
(among other)

REASONS

- (1) BECAUSE S.3 of the Constitution does not confer any enforceable right independent of and additional to the rights provided in the subsequent sections of Chapter II of the Constitution.
- (2) BECAUSE S.3 of the Constitution does not declare or confer an unrestricted right not to be deprived of property without compensation and in 1968 at common law no right existed not to be deprived of property by the State without compensation.
- (3) BECAUSE the Appellants are not "individuals" within the meaning of S.3 of the Constitution.
- (4) BECAUSE the passing of the 1979 Act did not deprive the Appellants of "property" within the meaning of S.3 of the Constitution.
- (5) BECAUSE by the 1979 Act, the Respondent did not directly or indirectly compulsorily take possession

of or acquire any property of the Appellants within meaning of S.8 of the Constitution.

GEORGE NEWMAN

MARK STRACHAN

No. 29 of 1983

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ON APPEAL FROM THE SUPREME COURT
OF MAURITIUS (CONSOLIDATED
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B E T W E E N :

THE SOCIETE UNITED DOCKS

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(1) DESMARAIS BROTHERS LTD
(2) TAYLOR AND SMITH LTD
(3) D'HOTMAN AND SONS LTD

and

THE GOVERNMENT OF MAURITIUS

CASE FOR THE RESPONDENT

CHARLES RUSSELL & Co
of London