

42/84

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N :

1. THE MARINE WORKERS UNION
2. PREMANANDA PONAMBALLUM
3. CLEMENT MOUTOU
4. MAURICE PARVIT Appellants

- and -

THE MAURITIUS MARINE AUTHORITY Respondent

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- and -

1. FEE SIAN YOUNG KIANG YOUNG
2. ROGER REQUIN Co-Respondents

AND

1. THE MAURITIUS MARINE AUTHORITY
EMPLOYEES UNION
2. PERCY DEREK LINGAYA
3. MOOSSA IBRAHIM
4. NARAINSAMY VALAYDEN Appellants

- and -

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THE MAURITIUS MARINE AUTHORITY Respondent

- and -

1. FEE SIAN YOUNG KIANG YOUNG
2. ROGER REQUIN Co-Respondents

CASE FOR THE RESPONDENT

RECORD

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1. This is an appeal from a judgment of the Supreme Court of Mauritius (Rault C.J., Glover J.) delivered on 21st December 1981 whereby it was held that the Appellants were not entitled to the relief sought to enforce an award of an arbitrator made on 2nd August 1980.

2. The first-named Appellants in each case, being the Marine Workers Union (hereinafter referred to as "the M.W.U.") and the Mauritius Marine Authority Employees Union (hereinafter referred to as "the M.M.A.E.U."), are trade unions whose members are

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RECORD

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employed by the Respondent (hereinafter referred to as "the Authority"). The other Appellants are, respectively, members of the M.W.U. and of the M.M.A.E.U. and are employees of the Authority. The Authority is a parastatal body created by an Act of the Parliament of Mauritius. The Co-Respondents are assessors from Mauritius who were appointed to assist a French arbitrator, Francis J. Lefebvre (hereinafter referred to as "the Arbitrator"), in resolving a dispute between the Authority and the M.M.A.E.U., the M.W.U. and another union, the Mauritius Waterside Workers Union (hereinafter referred to as "the M.W.W.U."). The implementation of the award made by the Arbitrator (hereinafter referred to as "the Arbitration Award") is the subject-matter of the proceedings which have given rise to this appeal. 10

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pp. 13 to 15
3. In May 1975 the Authority's employees started industrial action in the form of a "go-slow", after a dispute had arisen between the Authority and the trade unions representing the employees about the conditions of service at the Authority, including the wages and salaries paid to employees. On 29th June 1979 a meeting was held under the chairmanship of the Right Honourable Sir Seewoosagur Ramgoolam who was Prime Minister of Mauritius and Minister responsible for Ports; present at the meeting were, inter alia, representatives of the Authority and of the M.M.A.E.U. and the M.W.W.U. It was agreed that an arbitrator would be appointed on terms of reference to be agreed. The Chairman stressed the fact that both parties would have to abide by the decision of the arbitrator and indicated that work should resume normally at the Authority. The agreed terms of reference were set out in an agreement dated 13th July 1979 and signed on behalf of the Authority and on behalf of the Authority and on behalf of the M.M.A.E.U. and the M.W.W.U. Under the terms of the agreement an arbitrator and two assessors were to be appointed, inter alia, to undertake a job evaluation for the various posts in the Authority having regard to the special operational requirements of the service and taking into account internal relativities and all other related sectors in Mauritius with a view to reviewing the salary scales. introducing and/or reviewing all appropriate allowances. The unions and their members agreed to resume work normally and the parties agreed to abide by the award. 20

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On 1st April 1980 the M.W.U., which was a new trade union, was registered. On 4th July 1980 the Authority appointed the Arbitration Committee after consultation with the M.M.A.E.U., the M.W.U. and the M.W.W.U., in accordance with the agreement of 13th July 1979. 50

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4. In the course of the arbitration the declared policy of the Government of Mauritius of aligning

salary scales in parastatal bodies with those obtaining in the public service was explained to the Arbitrator; it was urged on behalf of the Authority that to do otherwise would have serious repercussions in the public and private sector. The Arbitrator overruled the said representations made on behalf of the Authority on the ground that the Ports Act 1975 required that the Authority should conduct its business according to commercial principles. On 2nd August 1980 the Arbitrator made the Arbitration Award which was concurred in by the two assessors. The Arbitration Award provided for substantial increases in salaries and allowances and would have had a dramatic effect on pay scales within other parastatal bodies; the implementation of the Arbitration Award would have involved the Authority in very considerable additional expenditure.

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Award 9:28

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5. On 12th December 1980 the Appellants applied to the Judge in Chambers to make the Arbitration Award executory. At the hearing on 20th March and 3rd April 1981 the Authority relied upon the fact that the Minister for Ports had, in the exercise of his powers under S.9(1) of the Ports Act 1975, directed the Authority not to implement the Arbitration Award. By the said statutory provision the Authority was bound to follow the direction of the Minister. S.9(1) of the Ports Act 1975 provides:

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pp.27 to 33

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"The Minister may, in relation to the exercise of the powers of the Authority under this Act, after consultation with the Authority, give such specific and general directions to the Authority, not inconsistent with the provisions of this Act, as he considers necessary in the public interest and the Authority shall comply with those directions."

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The Appellants claimed that the Minister for Ports was estopped from directing the Authority not to implement the Arbitration Award by reason of the representation made by the Minister at the meeting on 29th June 1979 that the award would be binding, that the Arbitrator was acting within his powers in disregarding the Authority's representations and that in consequence the intervention of the Minister should be struck down as being dishonest, unreasonable, arbitrary and fanciful, and that whenever the Authority acted under the authority of the Civil Law and the Code de Procedure, S.9 of the Ports Act 1975 was not applicable. The Judge in Chambers reserved judgment.

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6. On 8th April 1981, while judgment was pending, the Code of Civil Procedure (Amendment) Act came

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into force. The Act (hereinafter referred to as "the 1981 Act") repealed and replaced, inter alia, Article 1026-9 of the Code of Civil Procedure to provide as follows:

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"Le Ministère Public peut s'opposer à l'exécution de la sentence arbitrale, lorsqu'il estime que cette exécution est de nature à porter atteinte à l'intérêt public.

L'opposition doit être notifiée aux parties par acte extra-judiciaire se référant expressément aux dispositions du présent article. 10

Une copie de cette notification doit être déposée au greffe de la Cour Suprême.

L'opposition du Ministère Public constitue une fin de non-recevoir à toute demande en exequatur.

Si elle intervient avant l'instance en exequatur, l'opposition rend la demande irrecevable. Si elle intervient en cours d'instance, elle emporte de plein droit dessaisissement, soit du Juge en Chambre saisi de la demande en exequatur, soit de la Cour Suprême lorsque celle-ci avait été saisie d'un appel ou d'un recours en annulation. 20

Est réputée non écrite, toute stipulation contraire aux dispositions du présent article."

S.3 of the 1981 Act provides:

"The amendments made by this Act to the Code of Civil Procedure shall apply to any arbitral award made or given before the commencement of this Act, whether or not judicial proceedings have been instituted for the enforcement of the arbitral award." 20

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7. On 9th April 1981 in the exercise of his powers under the said new Article 1026-9 of the Code of Civil Procedure, the Ministère Public, as represented by the Attorney-General and Minister of Justice, served a Notice of Objection on the ground that the execution of the Arbitration Award made on 2nd August 1980 was contrary to the public interest. 40

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pp.35 to 39

8. In May 1961 affidavits were filed on behalf of the Appellants seeking to contest the validity of the 1981 Act and the Notice of Objection served thereunder, on the ground that the 1981 Act was unconstitutional and that the Notice of Objection

was ultra vires and unlawful. In view of the fact that questions as to the interpretation of the Constitution of Mauritius had been raised, by order dated 13th May 1981 the Judge in Chambers referred the case to the Supreme Court under Article 84 of the Constitution.

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10 9. The matter was heard by the Supreme Court on 20th and 22nd October 1981; judgment was delivered on 21st December 1981. In the course of argument all the parties agreed that the hearing before the Supreme Court should deal with all points at issue between the parties, concerning the enforceability of the Arbitration Award. Then the Supreme Court heard argument on two broad questions:

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pp.127 to 136
130:10

- 20 (1) Whether the Minister for Ports had power to direct the Authority not to implement the Arbitration Award;
- (2) Whether the 1981 Act, insofar as it introduced the new Article 1026-9 of the Code of Civil Procedure, was unconstitutional.

10. As to (1) above, the main question which were raised for consideration by the Supreme Court were as follows:

- (i) Whether the Minister for Ports, by reason of his conduct at the meeting on 29th June 1979 or otherwise, was debarred or estopped from doing anything to prevent the implementation of the Arbitration Award. 130:16
- 30 (ii) Whether S.9(1) of the Ports Act 1975 empowered the Minister of Ports to direct the Authority not to implement the Arbitration Award. 131:34
- 40 (iii) Whether the direction given under the said S.9(1) of the Ports Act 1975 infringed Article 8 of the Constitution, which provides that "No property of any description shall be compulsorily taken possession of" except when the conditions prescribed by Article 8(1) are satisfied. One of the said conditions is that provision be made by a law applicable to the taking of possession for prompt payment of adequate compensation. 132:18
- (iv) Whether the direction given by the Minister for Ports under the said S.9(1) of the Ports Act 1975 was ultra vires and unlawful, in that it was dishonest, unreasonable, arbitrary and fanciful. 132:22

11. As to (2) above, the main questions which were

raised for consideration by the Supreme Court were as follows:

- 133:20 (i) Whether the 1981 Act infringed any express or implied provision of the Constitution that the judiciary be free from legislative and executive control.
- (ii) Whether the 1981 Act infringed the said Article 8 of the Constitution.
- 135:35 (iii) Whether the Notice of Objection given by the Ministere Public, as represented by the Attorney-General and Minister of Justice, was ultra vires and unlawful in that the giving of the said Notice was not pursuant to a proper exercise of the discretion of the Ministere Public. 10
12. The Supreme Court decided in favour of the Authority on questions (1)(i) to (iv) above, in the following manner:
- 131:11 (i) Insofar as the conduct of the Minister for Ports at the meeting on 29th June 1979 amounted to an undertaking that he would accept the terms of the Arbitration Award, such understating was conditional upon the Arbitrator acting within the limits of the terms of reference agreed by the parties. No unconditional undertaking had been given and paragraph 1 of the terms of reference made it clear that the Conditions of Service at the Authority should bear a relation to the "autres secteurs qui lui sont lies". The proposed conditions of service at the Authority in certain cases bore no relation to conditions in the public service. 20 30
- 132:1 (ii) S9(1) of the Ports Act 1975 empowered the Minister for Ports to intervene either to ratify or to annul a contract entered into by the Authority and, in the circumstances of this case, to direct the Authority not to implement any award made after the Authority had entered into a "convention d'arbitrage". 40
- 132:18 (iii) The Appellants were not deprived of any "property" which belonged to them; the Appellants had no vested rights under the Arbitration Award as long as it was open to the Minister for Ports to give directions against its implementation.
- 132:22 (iv) The Arbitration Award presented the Minister for Ports with a real and urgent problem. In some cases there were substantial disparities between the salaries of public 50

service employees and the suggested salaries for employees of the Authority. Such disparities would have justified the Minister for Ports in apprehending that the Arbitration Award would provoke an explosion of claims in related sectors and there was sufficient public interest involved to justify the decision of the Minister for Ports to give the direction not to implement the Arbitration Award.

10 13. The said decision of the Supreme Court was sufficient to resolve the case before it. However the Supreme Court went on to decide questions (2)(i) to (iii) above in favour of the Authority in the following manner:

(i) Although it was not disputed that the 1981 Act was passed for the specific purpose of nullifying the Arbitration Award, the amendment made by the 1981 Act to the Code of Civil Procedure did not constitute a "legislative plan" or a "legislative judgment" and it possessed sufficient generality of application as to be constitutional. The Supreme Court also pointed out that the new Article 1026-9 of the Code of Civil Procedure applied in limited and specific circumstances, namely when an arbitration award had been made and public interest required the Ministere Public to oppose its execution; that the right of access to the Courts was specifically guaranteed under Article 1026-10; and that the Ministere Public's decision as to whether public interest was affected was not unfettered. 133:20

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(ii) See (iii) under paragraph 12 above.

(iii) The Notice of Objection given by the Ministere Public was inter vires and lawful for the same reasons that the direction given by the Minister for Ports was intra vires and lawful. 135:35

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14. The Authority respectfully submits that the Minister for Ports had the power to direct the Authority not to implement the Arbitration Award for the reasons given by the Supreme Court and summarised at paragraph 12 above. As to the said questions (1)(i) and (iii) the Authority will further contend:

(i) that the conduct of the Prime Minister and Minister for Ports on 29th June 1979 and thereafter did not constitute a binding undertaking or agreement that the Minister for

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Ports would accede to the implementation of the Arbitration Award; and that the Government cannot bind itself in advance to renounce the right to take action required by the public interest;

(iii) that the direction given by the Minister for Ports did not involve "the compulsory taking possession of" any property of the Appellants; and that the Appellants had no vested rights under the Arbitration Award prior to the making of an order for the execution of the Arbitration Award.

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15. The Authority further respectfully submits that the 1981 Act was not unconstitutional and that the Notice of Objection was intra vires and lawful for the reasons given by the Supreme Court and summarised at paragraph 13 above.

16. The Authority therefore respectfully submits that this appeal should be dismissed for the following (among other)

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R E A S O N S

- (1) BECAUSE the Minister for Ports had the power under S9(1) of the Ports Act 1975 to direct the Mauritius Marine Authority not to implement the Arbitration Award made on 2nd August 1980.
- (2) BECAUSE the Code of Civil Procedure (Amendment) Act 1981 does not infringe any provision of the Constitution of Mauritius.
- (3) BECAUSE the Notice of Objection given on 9th April 1981 by the Ministere Public, as represented by the Attorney-General and Minister of Justice, was intra vires and lawful.

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MARK STRACHAN

IN THE PRIVY COUNCIL

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CASE FOR THE RESPONDENT

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