

11, 1939



# In the Privy Council.

No. 45 of 1938.

## ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

BETWEEN

MRS. Ww. PAUL J. J. GUERARD ... .. *Appellant,*

AND

THE COLONIAL GOVERNMENT OF MAURITIUS *Respondents.*

### CASE FOR THE APPELLANT.

1. This is an appeal from a judgment and order of the Supreme Court of Mauritius dated the 2nd September 1937 non-suiting the Appellant on her Petition of Right dated the 18th March 1937. By her said Petition the Appellant claimed that 37 debentures, each of the nominal value of Rupees 1,000, of the Mauritius Sugar Industry Loan of 1929 issued by the Respondents under the provisions of Ordinance No. 14 of 1929 be delivered to her to replace certain debentures of which the Appellant was formerly the registered holder and which without her knowledge or consent were converted to debentures payable to Bearer and pledged or otherwise disposed of in fraud of her, and that her name be restored to the register kept by the Treasurer-General of the said Colony as holder of 37 debentures each of Rupees 1,000, and that interest on the said debentures as at and from the date of the respective conversions be paid to her, and in the alternative the Appellant claimed by way of damages Rupees 44,000 being the market value of the said 37 debentures together with interest thereon from the date of the respective conversions.

Record.  
p. 31.  
p. 1.

2. By their defence the Respondents put in issue the facts alleged in the said Petition save that they admitted that the Appellant was the registered holder of the said debentures until the respective dates on which they were converted to debentures payable to Bearer and demurred to the whole of the said Petition on the ground, among others, that the facts disclosed and the averments made in the said Petition only disclosed a "faute" or tort on the part of an Officer of the Treasury and that no action in tort lies against the Colonial Government of Mauritius. The validity

p. 5.  
pp. 1-4.  
p. 6.  
p. 5.  
pp. 1-4.  
pp. 11 & 12.

APPELLANT'S CASE.

Record. of this ground of demurrer was the sole matter in issue before the Supreme Court of Mauritius, and no other matter was argued or decided. The sole question raised by this appeal is whether the Appellant's claim in her said Petition is a claim founded upon a breach of contract on the part of the Respondents or upon a "faute" or tort. It was and is conceded by the Appellant that if the claim made by the said Petition is founded solely on tort, a Petition of Right does not lie.

p. 20.

pp. 1-4. **3.** The facts disclosed in the said Petition are as follows. The Appellant  
 p. 1. was the registered holder of 37 debentures, each of Rupees 1,000 nominal  
 value, of the Mauritius Sugar Industry Loan of 1929 issued by the 10  
 p. 2. Respondents under the provisions of Ordinance No. 14 of 1929. The said  
 debentures were registered in the book of the Treasurer-General of the  
 Colony in the Appellant's name and pursuant to Article 6 of the said  
 Ordinance on the back of each debenture mention of such registration was  
 p. 2. inscribed. On the 4th July 1934, on the application of one Bernard  
 Herchenroder who purported to act on a power of attorney given by the  
 Appellant, debentures Nos. 478-502 inclusive registered in the Appellant's  
 name were converted to debentures payable to Bearer. On a similar  
 application of the said Herchenroder on the 25th September 1934 debentures  
 Nos. 464-469 inclusive and 477 also registered in the Appellant's name 20  
 were converted to debentures payable to Bearer. On a similar and further  
 application of the said Herchenroder on the 24th January 1935 debentures  
 Nos. 472-476 inclusive also registered in the Appellant's name were converted  
 to debentures payable to Bearer. Herchenroder, who had no authority  
 from the Appellant to make any of the said applications, on the 4th July  
 1935 pledged 15 of the said debentures immediately after they had been  
 converted to debentures payable to Bearer and subsequently disposed of  
 p. 3. the remainder of the Appellant's 37 registered debentures and appropriated  
 to himself the proceeds. Since the dates of the respective conversions of  
 the said registered debentures to debentures payable to Bearer the Appel- 30  
 lant has received no interest on the said debentures. At the time of their  
 conversion as aforesaid the said debentures were worth on the Exchange  
 p. 2. Market Rupees 1,200 each. The said debentures were the only evidence  
 which the Appellant held as proof of the Respondent's indebtedness to her.

pp. 1-4. **4.** The averments made in the said Petition are as follows. It is  
 p. 3. averred that the said debentures could not have been disposed of  
 by Herchenroder had not the Treasurer converted the Appellant's  
 said registered debentures to debentures payable to Bearer and that  
 Herchenroder had no right, title or capacity to cause the said conversions  
 to be effected, and that the Respondents had no right to effect the said 40  
 conversions without the express consent of the Appellant or some person  
 duly authorised by her, as prescribed by Article 6 of the said Ordinance  
 No. 14 of 1929.

Joint  
 Appendix.

**5.** Article 6 of Ordinance No. 14 of 1929 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

10 “ 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. 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 coupons attached thereto or by the debenture. 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 aforementioned manner.”

6. Article 7 of the said Ordinance reads as follows :—

20 “ Any debenture may be given in pledge in any civil and com-  
 “ mercial transaction. Such pledging shall be sufficiently proved by  
 “ a transfer inscribed in a register kept for that purpose by the Receiver-  
 “ General setting forth that the pledgee holds the said debenture not  
 “ as the owner thereof but in pledge of a debt, the amount of which  
 “ shall be shown; the said transfer shall be signed by the pledger  
 “ and the pledgee, or by the holders of their power of attorney, and by  
 “ the Receiver-General or Assistant Receiver-General, and mention of  
 “ such pledging shall be endorsed on the debenture. Such pledging  
 30 “ shall, to all intents and purposes, be valid as regards the parties  
 “ to the contract and all third parties, articles 2074 and 2075 of the  
 “ Civil Code to the contrary notwithstanding.”

Joint  
Appendix.

7. The debentures issued by the Respondents were in the following form :—

Record.  
p. 43.

**MAURITIUS**  
**“ THE SUGAR INDUSTRY LOAN ”**  
 1949-1959  
 Authorised by Ordinance No. 14 of 1929.

40 The Governor of Mauritius is authorised by “ The Sugar Industry  
 Loan Ordinance No. 14 of 1929 ” to cause this debenture to be issued,  
 and the General Revenues and Assets of the Colony secure, in accord-  
 ance with the provisions of the above Ordinance, the payment of the  
 capital sum of this debenture with the interest accruing thereon, and  
 due provision for the redemption of the debenture is prescribed by the  
 said Ordinance.

Record. Series.....No.....Rs.....

The undersigned, the Receiver-General of Mauritius, for and on behalf of the said Colony, does hereby acknowledge that the Colony of Mauritius is indebted unto or the bearer of the present debenture in the sum of Rupees..... repayable in thirty years, provided that it shall be lawful for the Governor, after twenty years, to order that such debenture, as shall be drawn by lot in such manner as the Governor in Executive Council shall determine, be reimbursed on such day as the Governor shall fix and cause to be notified in the Gazette. From and after the day appointed for the repayment of any so drawn debenture, all interest on principal moneys secured by the said Debenture shall cease ; and upon payment of the principal moneys secured by any debenture, such debenture with all the coupons thereto attached shall be delivered to the Receiver-General.

The General Revenues and Assets of the Colony are pledged as security under the provisions of The Sugar Industry Loan Ordinance No. 14 of 1929.

The said sum shall bear interest at the rate of five per cent. per annum payable on the 10th of March and 10th of September, the first payment to be made on the 10th March 1930.

Given under my hand, at the Treasury, Port Louis, this 10th day of September 1929.

.....  
Receiver-General.

p. 44. Sixty coupons were attached to each of the said debentures.

pp. 9 & 10. 8. The said cause on demurrer was heard before the Supreme Court of Mauritius on the 17th and 19th August 1937 before their Honours E. Nairac, K.C., Chief Judge, L. Le Conte and J. G. Espitalier Noel, Puisne Judges, when it was contended, and it is now contended, on behalf of the Appellant that a debenture is a contract of loan, that the terms and conditions of the contract of loan evidenced by the debentures in question are derived from the provisions of the Ordinance No. 14 of 1929 under which the issue of the debentures was made, that the transfers complained of having been effected without the authority of the Appellant and on an insufficient power of attorney, the default of the Government Official concerned constituted a breach of the contract of loan between the Respondents and the Appellant, and that if the facts complained of constituted a breach of contract of loan, it was immaterial that they might also constitute a "faute" or tort.

pp. 10, 21 & 22. 9. On the part of the Respondents it was contended that the only contractual obligations resulting from debentures issued under the authority of Ordinance No. 14 of 1929 are those enumerated in the said debentures and in the notice published in the Government Gazette of the 10th August 1929, and that it was under the authority of and not under the provisions of the said Ordinance that the said debentures were issued, and that the

facts complained of were tortious and did not constitute a breach of the contract of loan. Record.

10. On the 2nd September 1937 the judgment of the Full Bench was delivered by His Honour E. Nairac, K.C., Chief Judge. In his reasons for judgment, the Chief Judge held that the contract between the Appellant and the Respondents is evidenced by the debenture issued to the lender, and that any breach of the conditions binding the borrower, as set out in the debenture in accordance with the law, was a breach of the borrower's obligations : that the main object of Ordinance No. 14 of 1929 was and is to authorise the Governor to borrow money on behalf of the Colony by means of debentures secured upon the General Revenues and signed on behalf of the Colony by the Treasurer ; that the terms and conditions of the Appellant's contract with the Respondents were not derived from the provisions of the Ordinance, and that the default of the Government Official who on the strength of an insufficient power of attorney converted the Appellant's registered debentures to debentures payable to Bearer was not a breach of the contract of loan between the Appellant and the Respondents, but was merely a tortious inobservance of certain rules which had by law to be observed by the borrower when consenting to a transfer, pledge or conversion of his liability ; and that the demurrer therefore succeeded. His Honour Judge Espitalier Noel concurred in the judgment of the Chief Judge without giving any separate reasons. His Honour Judge Le Conte also concurred, and on the 14th September 1937 gave his reasons for judgment.

p. 11.  
pp. 11-17.  
p. 14.  
p. 13.  
pp. 15 & 16.  
p. 16.  
p. 17.  
p. 17.  
p. 17.  
pp. 18-30.

11. In his reasons for judgment His Honour Judge Le Conte held that in addition to the reasons on which the Chief Judge and His Honour Judge Espitalier Noel had founded their judgment, the demurrer succeeded on the ground that the facts disclosed in the Appellant's Petition established a "faute delictuelle" on the part of the Government Official in question and not a "faute contractuelle," and that, although according to circumstances the same acts may constitute a tort or breach of contract, different legal consequences follow in each case, and that under the Code Napoleon (which is the common law in matters of contract and tort in the Colony of Mauritius) the responsibility for torts arising out of contract and for torts arising independently of contract is distinct. The learned Judge cited with approval as an accurate statement of law a note of Professor Josserand to be found in D.P. 1929.1.108 as follows :—

p. 30.  
p. 25.  
p. 28.

40 " Les responsabilités contractuelle et délictuelle ont des champs d'application distincts : on ne conçoit pas qu'elles puissent coïncider, concourir ou se cumuler pour une même situation juridique et pour un même rapport donnés ; car on ne saurait être à la fois tiers et contractant ; on est l'un ou l'autre, non pas l'un et l'autre : dans les limites où elle fait sentir son action et qui ont été tracées par le libre accord des parties, la convention refoule la loi, conformément à la loi elle-même."

and held that the fault in this case was a "faute delictuelle" and not a p. 30.

Record. “faute contractuelle” and that in respect of a “faute delictuelle” the remedy by Petition of Right was not available to the Appellant.

p. 39. 12. Final leave to appeal to His Majesty in Council from the said judgment was granted by the Supreme Court of Mauritius on the 28th February 1938.

p. 31. 13. The Appellant humbly submits that the judgment and order of the Supreme Court of Mauritius should be reversed and that in lieu thereof a declaration made that the Appellant’s aforesaid Petition of Right be further heard and justice done thereon for the following among other

## REASONS.

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- (1) Because the obligations imposed by Ordinance No. 14 of 1929 and particularly by Articles 6 and 7 thereof are part of the contract of loan between the Appellant and the Respondents evidenced by the said debentures.
- (2) Because the Respondents had no right or power to remove the name of the Appellant from the register as the holder of the said registered debentures except upon an application duly made and satisfying the requirements of the said Ordinance.
- (3) Because by removing the Appellant’s name from the register and refusing to recognise her as the holder of the debentures registered in her name in the circumstances set forth in the Petition of Right the Respondents have repudiated their debt to the Appellant and have thereby committed a breach of their contract with her.
- (4) Because the facts set forth in the Petition of Right constitute a breach of contract or “faute contractuelle” on the part of the Respondents.
- (5) Because if the facts set forth in the Petition of Right constitute a breach of contract it is irrelevant to consider whether or not those same facts constitute a “faute delictuelle” or tort.
- (6) Because the judgment and order appealed from were erroneous and ought to be reversed.

CHARLES L. HENDERSON.



# In the Privy Council.

No. 45 of 1938.

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BETWEEN

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*Appellant,*

AND

THE COLONIAL GOVERNMENT OF  
MAURITIUS

*Respondents.*

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CASE FOR THE APPELLANT.

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