

No. 12 of 1978

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE SUPREME COURT OF
JUDICATURE OF TRINIDAD AND TOBAGO

B E T W E E N :

RAMESH DIPRAJ KUMAR MOOTOO

Appellant
(Applicant)

- and -

THE ATTORNEY GENERAL OF
TRINIDAD AND TOBAGO

Respondent
(Respondent)

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CASE FOR THE APPELLANT

Record

1. This is an Appeal by final leave of the Court of Appeal of Trinidad and Tobago from a judgment and order of that Court (Hyatali C.J., Phillips and Corbin J.J.A.) dated the 26th day of March 1976 allowing with costs an appeal from the judgment and order of the High Court (Braithwaite J.) which had allowed with costs a motion for redress pursuant to section 6 of the Constitution of Trinidad and Tobago for alleged infringements by the Legislature of Trinidad and Tobago of the fundamental rights and freedoms guaranteed the appellant by the provisions of Chapter 1 of the Constitution of Trinidad and Tobago (1962) herein called "the Constitution" and in particular section 1(a) thereof.

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2. On the 4th June 1970 the Legislature of Trinidad and Tobago enacted the Unemployment Levy Act no. 16 of 1970. Section 5 of the Act provided for the imposition of an unemployment levy upon the chargeable income of persons. Sections 3 and 4 provided for the assessment and collection of the levy by the Board of Inland Revenue. Section 17 provided that money collected in pursuance of the levy was to be paid into an

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p.25 lines 1-10	unemployment fund which in terms section 14 was to be administered by the Minister responsible for Finance. Section 15 provided that separate accounts were to be kept by the Comptroller of Accounts in respect of the fund. The expression "unemployment levy" was defined by section 2 of the Act as a levy for the purpose of the relief of unemployment and the training of unemployed persons. Section 19 of the Act gave power to the Governor-General to make regulations for giving effect to the Act and in particular -	10
p.25 lines 11-14		
p. 20 lines 9-13		
p. 25 lines 27-36	(a) for the management and control of the fund; (b) for prescribing the accounts, books and forms to be used; (c) as to the projects and other matters concerning which advances from the fund may be made; (d) for prescribing anything by this Act required to be prescribed.	20
p.2	3. The Act was impugned by the Appellant who was a person charged with payment of the levy on the ground that its provisions violated the guarantee entrenched in section 1(a) of Chapter 1 of the Constitution which protected the enjoyment of property and the right not to be deprived thereof except by due process of law. The Appellant sought relief by way of notice of motion pursuant to section 6 of the Constitution on the grounds that the Act was ultra vires the Constitution being in conflict with it in diverse respects. The Appellant also alleged that the act constituted an unwarranted invasion of the democratic rights of citizens of Trinidad and Tobago and that its enactment could not be reasonably justified in a society that has a proper respect for the rights and freedoms of the individual. The Respondent resisted the motion on the ground that the provisions of the Act were a valid exercise of the taxing power vested in the Legislature. The Respondent filed three affidavits in opposition to the motion but objection was taken by the Appellant to their admissibility at the hearing in the High Court.	30
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4. The motion was heard by the High Court (Braithwaite J.) who delivered judgment on the 13th December 1974 declaring the Act ultra vires the Constitution, null void and of no effect and further declaring that the Appellant was not liable for any sum levied under the Act. The High Court, after ruling that the Respondent's affidavits were inadmissible, considered firstly whether the Act provided for the taking of property without due process of law and held that it did because the Act effected a taking and did not comply with the provisions of section 5 of the Constitution which allowed the abridgement of the Constitutional guarantees by special enactment. The High Court also considered the question whether the imposition was a tax and held that it was not because it could not be established from the provisions of the Act that the levy was for public purposes the definition of the expression "unemployment levy" being inadequate or insufficient to disclose the real use to which the unemployment fund was to be put in the absence of regulations which the Governor-General had power to make but had not made. Further the High Court held that the Governor-General was by section 19 of the Act delegated power which could only be exercised by the Legislature itself. Further the power given to the Governor-General by section 19(c) of the Act to determine projects binding the Minister in the disposition of the Unemployment Fund without recourse to an Act of Parliament itself collided with section 85(3) of the Constitution and was not severable from the Act. Further, Braithwaite J. specifically held that because the Act did not declare in what circumstances an unemployed individual was entitled to relief or for selection for training it was impossible for the court to conclude that the Act was intended to enure for the public benefit.
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5. The Respondent appealed to the Court of Appeal of Trinidad and Tobago on the 15th January 1975 against the judgment of the High Court. The substantial grounds of appeal were that the affidavits of the Respondent were wrongly held to have been inadmissible, that the Act did not deprive persons of property without due process of law, that the Court erred in holding that the levy was not for public purposes
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- pp.18-46
- p.47
pp.29-32
- pp.32-38
- p. 38
lines 11-18
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- pp.43-44
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lines 31-36
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or for the benefit of the common weal and was arbitrary and oppressive, that the statute could not be held to be unconstitutional because of a collision with section 85 of the Constitution, that section 19 of the Act was severable and that section 19(c) did not collide with section 85 of the Constitution the High Court having erred in holding that section 19(c) provided for a delegation of authority reserved to Parliament and further erred in failing to give effect to section 14 of the Act in construing section 19.

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6. The decision of the Court of Appeal (Hyatali C.J., Phillips and Corbin J.J.A.) was delivered on the 26th March 1976 allowing the appeal with costs and reversing the order of the High Court. The

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main judgment was delivered by Hyatali C.J. who observed firstly that in relation to the affidavits the Respondent had confined his challenge to the admission of the affidavit of Lancelot Busby. The Chief Justice upheld the challenge. He held that

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Busby's affidavit was admissible with its annexures because historical facts leading to the enactment were admissible to ascertain the evils which the statute was intended to remedy and because a court may recur to the history of the times when an Act was passed this being frequently necessary to ascertain the reason as well as the meaning of particular provisions of it. Further, the Court was entitled to take judicial notice of

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lines 31-38

circumstances of common knowledge which existed at the time the impugned legislation was passed to negative bad faith on the part of Parliament in enacting it. The Chief Justice referred to the definition of "unemployment levy" in section 2 of the Act, section 14(3), section 19 and to the presumption of constitutionality in relation to a statute and to authorities in support of the presumption. The Chief Justice also referred to cases in support of the principle that a

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Legislature must be taken to know the needs of its people and to determine what is reasonable for the protection of their interests. The Chief Justice understood the High Court to have held (1) that

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any law depriving the individual of property even if it imposed taxation had to be passed in accordance with section 5 of the Constitution, (2) that the Act deprived citizens of their property which survived after taxation and was arbitrary and oppressive and offended the concept of due process of law, (3) that relief of unemployment was a

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10 public purpose if the nature of the relief is such that benefits are paid directly to ascertained unemployed individuals, (4) that the mere use of the expression "the relief of unemployment and the training of unemployed persons" in section 2 of the Act was not enough to make the purpose of the levy a public purpose, (5) that it was undesirable for a draftsman to legislate under the guise of definition although this was not fatal, (6) that by section 19(c) Parliament delegated authority to the Governor-General contrary to section 85 (3) of the Constitution and (7) that the Act did not disclose an intent to benefit the public weal since the purposes of the levy were neither defined nor definable.

20 7. In relation to the rulings of the High Court as he understood them the Chief Justice held that taxing measures did not require to be passed in accordance with section 5 of the Constitution. The fundamental question was whether the levy was a tax and in this question the Chief Justice held the levy had the elements of a tax, namely it was imposed by the state, it was compelled and its imposition was for public purposes. He held that the definition of the expression "unemployment levy" was sufficient to show that it was for public purposes despite the undesirability of enacting under the guise of definition a practice which infringed a valuable rule of drafting. He further held that the provision of work as well as payment of benefits and generally all measures directed to the reduction or elimination of unemployment were embraced in the expression "relief of unemployment" and it was not proper for the High Court to address itself to abuse of expenditure of the levy collected under the Act in determining its constitutionality. In the result the Chief Justice held that the imposition was a tax.

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lines 14-28

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lines 25-33

40 8. The Chief Justice then considered sections 14 and 19 of the Act and the question whether there was a collision with section 85 of the Constitution. He held that section 19(c) could not be interpreted to mean that the Governor-General was empowered to authorise the issue of moneys from the Unemployment Fund. Further he held that Parliament did not delegate to the Governor-General the sole or indeed any authority to declare the purposes of the levy these having

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been declared by section 2 of the Act itself. The Chief Justice further held that section 14(3) of the Act could not be interpreted to mean that the Minister could issue moneys from the Fund only for purposes set out in regulations made by the Governor-General. He held that the expression "any of the purposes thereby provided" in section 14(3) of the Act was capable of more than one meaning. The expression "thereby" was referable to both the Act and the Regulations or to Regulations alone and "purposes" in the expression "any of the purposes" was referable to the purposes set out in section 2 and such sub-purposes as may be specified in the Regulations or was referable to projects and other matters referred to in section 19(c). He interpreted section 14(3) to mean that the Minister was authorised subject to the Act and regulations to make advances from the fund for any of the projects and matters for which advances from the fund may be made. While it was a matter of criticism that Regulations under section 19(c) were never made the omission did not affect the validity of the Act.

9. The Chief Justice specifically rejected arguments that the provisions of the Act relating to expenditure from the Fund were unconstitutional because the Governor-General was authorised to act as a separate legislature to authorise the issue of moneys from the Fund. He rejected the contention that the combined effect of sections 14 (3) and 19(c) was to make provisions which collided with section 85(3) of the Act. He did not accept the submission that an Appropriation Act of the kind necessary to authorise expenditure from the Consolidated Fund was necessary to authorise the issue of moneys from the Unemployment Fund.

10. Phillips J.A. in his judgment referred to the reasoning of the High Court and held that the first question to be considered was whether the Act was a valid exercise of the taxing power. The crucial question was whether the Act disclosed public purposes for which the levy was imposed in order to put the levy into the category of a tax. The attack by the applicant was based on the contention that no sufficient declaration of public purposes was made because of the provisions of section 19 which provided for the Governor-General to make regulations for giving effect to the Act and in particular section 19(c) which provided for the

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actual projects to be stipulated by the regulations. The further contention was that the definition described the ultimate object of the expenditure while the purposes were to be set out in Regulations. Phillips J.A. thought that the word "thereby" in section 14(3) referred to both the Act and the Regulations. He further referred to the presumption of constitutionality and held that the Governor-General was authorised to but was under no legal duty to make regulations. He held that the expression "projects and other matters" referred to in section 19(c) of the Act was not conclusive of the question whether public purposes were declared by the Act and it was not necessary to consider whether sections 1(b) or (d) of the Constitution which provided the guarantees of equality before the law and the protection of the law and the right of the individual to equality of treatment from any public authority in the exercise of its functions could have been infringed by the Regulations, whether or not the purposes of a taxing statute could be defined by Regulations and whether the withdrawals of the moneys from the fund which were authorised by section 14(3) would have been contrary to section 85(3) of the Constitution. Further the appellant was entitled to rely upon the definition in section 2 and the presumption of constitutionality. He rejected the view that the relief of unemployment was confined to the making of payments to unemployed persons and thought that the provision of employment by the State was properly described as the relief of unemployment as was the training of unemployed persons. He relied upon Attorney General v Antigua Times (1975) 3 AER 81 to support the application of the presumption of constitutionality to the case. The imposition was a tax and did not contravene sections 1 and 2 of the Constitution.

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11. Corbin J.A. in his judgment held that the Act was a taxing statute and was constitutional. He criticised the practice of enacting provisions in an interpretation section but was of the opinion that the public purpose of the imposition was clear. He thought the intention of the legislature was to provide jobs for the unemployed having regard to the conditions existing when the legislation was enacted. The Court was not concerned with any apprehension or question

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concerning mal-administration of the Fund. These were matters for the electorate.

12. It is submitted that the object of the Unemployment Levy Act was to provide for the creation of a public fund separate from the Consolidated Fund to be spent by a Minister without approval of the expenditure by Parliament. The projects and matters upon which the Minister was authorised to expend the moneys (a procedure described in sections 14(3) and 19(c) of the Act as the making of advances) were to be set out in regulations which the Act contemplated were to be made in terms of section 19(c) by the Governor-General but these were never made. The question which fell to be determined was whether the Act was in these circumstances a valid exercise of the taxing power or whether it was an imposition to support unconstitutional expenditure so that the imposition became a taking or deprivation of property within section 1(a) of the Constitution in the absence of compliance with section 5 of the Constitution.

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13. Braithwaite J. considered these questions and held that the Act deprived individuals of their property without due process of law within the meaning of section 1(a) of the Constitution. He held that the imposition was not a tax because the nature and quality of the relief which the unemployed were to be afforded could not be determined with certainty. He held that the description of the unemployment levy as a levy for the relief of unemployment and the training of unemployed persons was not sufficient to indicate that the levy was for public purposes and that the nature and quality of the relief had to be spelt out if the imposition was to be held to be one for public purposes. Braithwaite J. also held that it was unconstitutional and a violation of section 85 (3) of the Constitution for the Governor-General to declare by regulations projects and matters upon which the Minister could expend money from the Unemployment Fund without recourse to Parliament. He further held that the Act could not in any event properly delegate to the Governor-General the legislative function to declare such projects and matters. He also held that section 19(c) of the Act which gave the Governor-General power to make the regulations concerning the

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projects and matters was in collision with section 85(3) of the Constitution which required an Act of Parliament to authorise the issue of moneys from a public fund other than the Consolidated Fund prior to the withdrawal of those moneys.

10 14. It is submitted that it was prior to the commencement of the Constitution and while Trinidad and Tobago was a colony within Her Majesty's dominions a fundamental principle of constitutional law of the State that no moneys could be withdrawn from public funds except where there was a statutory charge on the fund or Parliament had by an appropriate financial provision authorised a particular appropriation for a particular purpose and that the object of section 85(3) of the Constitution was to ensure that the Parliament of Trinidad and Tobago exercised its legislative power granted by section 36 of the Constitution in accordance with that principle. Because of the combined effect of sections 19(c) and 14(3) of the Constitution to which there was an implied reference in the opinion of Braithwaite J. the Minister was authorised to expend without parliamentary control or approval the Unemployment Fund or any part of it upon projects and matters declared by regulations made by the Governor-General. It is further submitted that the expenditure in the absence of regulations is unconstitutional and that all sums expended from the Unemployment Fund have been illegally expended. No withdrawal has been preceded by appropriate Parliamentary sanction in the form of a Finance Act or similar legislation. It is further submitted that Braithwaite J. was correct when he held that section 19(c) was in conflict with section 85(3) of the Constitution. That section was designed to permit the Minister acting under section 14(3) to withdraw moneys on matters declared in pursuance of it without recourse to Parliament. Braithwaite J. was also correct when he held that no imposition for such purposes could be properly passed unless the Act imposing it complied with the provisions of section 5 of the Constitution because a taking of property for the purpose of expenditure which is unconstitutional or illegal is an infringement of section 1(a) of the Constitution of Trinidad and Tobago.

15. In holding that the levy was a tax for the reason that in section 2 of the Act it was described

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as a levy for the relief of unemployment and the training of unemployed persons the members of the Court of Appeal did not consider the relation between section 2 and section 19(c) of the Act. It is submitted that in reversing Braithwaite J. on this point the Court of Appeal fell into error for the reason that the definition in section 2 of the Act did no more than describe the objects to be achieved by expenditure from the Fund on projects and matters which were to be set out in Regulations so that in the absence of regulations made under section 19(c) it could not be held that the imposition was made for public purposes. Further, it is submitted that Braithwaite J. was correct in holding that the relief of unemployment is a public purpose provided that benefits from the Fund are paid or granted directly to ascertained unemployed individuals and the Court of Appeal was also wrong in reversing him on this point. It is also submitted that Braithwaite J. was also correct when in reliance upon authorities in the United States and in particular *State v Osawkee* 14 Kans. 418 (1875) *Loan Association v Topeka* 20 Wall 655 (1874) and *North Dakota v Nelson County* (1 N. Dak. 88 (1890)) he held that an imposition may lose its public purpose where persons other than the unemployed may benefit from it.

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16. In his consideration of the question whether the Act was unconstitutional because there was a collision with section 85(3) of the Constitution, Hyatali C.J. examined sections 2, 14 and 19 of the Act together and held that the Minister was authorised by the Act itself to withdraw moneys from the Unemployment Fund and that he was able to do so even though no regulations were made under section 19(c). The Minister in his opinion could withdraw moneys for the purposes set out in the definition of unemployment levy in section 2 of the Act. The reasoning of Phillips J.A. on this point led him to the same conclusion. Corbin J.A. who held that the imposition was a tax did not deal with the question whether there was a collision with section 85(3) of the Constitution.

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17. The members of the Court of Appeal in their respective judgments relied upon the presumption of constitutionality to hold that the imposition was for public purposes and therefore a tax. Hyatali C.J. also relied upon the presumption to support his conclusion that the expenditure of the

fund by the Minister without regulations having been made was justified in view of the definition of the expression "unemployment levy" in section 2 of the Act. Phillips J.A. also relied upon the presumption in determining the meaning of section 14(3) of the Act to hold that the expression "thereby" in that sub-section referred to the Act and to the Regulations. He further held that the Act imposed no duty upon the Governor-General to
10 make regulations. He found it unnecessary to decide whether regulations, if made, would have had to comply with the fundamental rights guaranteed in the Constitution relating to equality before the law and the right to equality of treatment from any public authority in the exercise of its functions to which all unemployed persons were entitled and whether the purposes of a taxing statute could be defined by regulations. He held that there was no
20 collision with section 85(3) of the Constitution because the withdrawal of funds was expressly authorised by section 14(3) of the Act.

18. It is submitted that the Parliament of Trinidad and Tobago had no power under the Constitution to create by statutory imposition a Fund the use of which was not regulated by law. Further, the assumption that the Governor-General was not obliged to make regulations and the fact that none were ever made concerning the projects and matters upon which the Fund was to be expended left an
30 uncontrolled discretion to the Minister to spend money from the Fund provided some employment opportunity was created thereby and it is submitted that this was not in contemplation of Parliament when the Act was passed. Further, the question whether the Parliament of Trinidad and Tobago could authorise an imposition for purposes of an expenditure by a Minister which was unconstitutional or illegal because such an imposition is a taking or deprivation of property without due process of
40 law was never dealt with by the Court of Appeal. If the opinion of the Court of Appeal is understood to be that such unconstitutional or illegal expenditure is a matter for Parliament or the electorate and does not affect the validity of the impost then it is submitted that this view of the constitutional law of Trinidad and Tobago is wrong and that the Court of Appeal could not properly reverse the High Court which by implication held otherwise.

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19. The appellant therefore prays that this appeal be allowed, that the judgment of the Court of Appeal be reversed and that the judgment of the High Court be restored with costs in the Privy Council and in the Courts below for the following among other

R E A S O N S

- (1) BECAUSE the imposition created by the Unemployment Levy Act 1970 did not contain all the elements of a tax and was not a proper or valid exercise of the power of the Parliament of Trinidad and Tobago to raise money by taxation; 10
- (2) BECAUSE section 1(a) of the Constitution of Trinidad and Tobago which guarantees protection against the taking or deprivation of property without due process of law was infringed by the Act;
- (3) BECAUSE the imposition was for the purposes of expenditure by a Minister without the prior approval of Parliament such expenditure being unconstitutional and/or illegal in terms of section 85(3) of the Constitution; 20
- (4) BECAUSE no Regulations declaring the projects and matters upon which the Fund was to be expended were ever made and expenditure from the Fund since 1970 has been unauthorised by law;
- (5) BECAUSE such Regulations even if made would have been unconstitutional illegal void and of no effect because of an invalid delegation by Parliament of its own legislative power; 30
- (6) BECAUSE it was the intention of Parliament that the purposes of expenditure from the Unemployment Fund were to be declared in pursuance of powers granted to the Governor-General by section 19 and not by the definition in section 2 which was intended to be descriptive of the matters which the Governor-General was authorised to provide; 40
- (7) BECAUSE section 14(3) of the Act could not be operated by the Minister in any event without Regulations made under section 19(c) of the Act;

- (8) BECAUSE the scheme of the Act was to enable a taking of property for unauthorised and unspecified purposes without the Act having been passed in compliance with section 5 of the Constitution of Trinidad and Tobago;
- (9) BECAUSE the judgment of Braithwaite J. was correct;
- (10) BECAUSE the judgment of the Court of Appeal was wrong.

FENTON RAMSAHOYE

RAMESH MAHARAJ

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