

La Compagnie Sucrière de Bel Ombre Ltée and 9 Others *Appellants*

v.

The Government of Mauritius *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL,
Delivered the 13th December 1995

Present at the hearing:-

Lord Goff of Chieveley
Lord Jauncey of Tullichettle
Lord Woolf
Lord Steyn
Mr. Justice Hardie Boys

[Delivered by Lord Woolf]

This is an appeal from a decision of the Supreme Court of Mauritius dated 13th July 1994. It is brought with the leave of that Court. The Supreme Court decided that the additional statutory regulation of land cultivated under metayage introduced by section 5 of the Sugar Industry Efficiency (Amendment) Act 1993 ("the 1993 Act") did not contravene sections 3 and 8(1) and (2) of the Constitution of Mauritius. Sections 3 and 8 are in Chapter II of the Constitution. Chapter II is the part of the Constitution which contains the provisions protecting the fundamental rights and freedoms of the individual. These include the right to property, which is the right which it is alleged section 5 of the 1993 Act contravenes.

The growing of sugar cane plays a central role in the Mauritian economy. One system of land tenure under which sugar cane is grown is metayage. Metayage is an historic system of leasing land established by the French prior to Mauritius becoming a British

colony. Under metayage, planters, like the present appellants, lease their land to metayers in return for a rent based on a share of the price now fixed by statute which the metayers receive for the sugar cane they harvest on the land. At the present the share varies between 15% and 20% of the price.

The relationship between a planter and a metayer is a personal one. It has many of the qualities of a partnership and is usually of long standing. Even prior to the 1993 Act, if a metayer should die the contract came to an end, but the metayer's heirs were entitled to be compensated up to the amount of the profits which would have been earned if the lease had continued to the end of the term. In the past the land subject to metayage was usually marginal land. Over the years the land has been substantially improved. In the course of argument Lord Lester, who appears on behalf of the appellants, indicated that the appellants would welcome being able to retake possession of the land when a contract of metayage comes to an end.

Section 5 of the 1993 Act amended the Sugar Industry Efficiency Act 1988 ("the 1988 Act") by adding a new section, section 5A to the 1988 Act. The respective preambles to the 1988 and 1993 Acts indicate their purpose and are in the following terms.

The 1988 Act:-

"To provide for an efficient and viable sugar industry, to preserve agricultural land, to promote agricultural diversification and diversification within sugar, to ensure that all commitments under the Sugar Protocol are met and to ensure fairness, equity and transparency within the sugar industry."

The 1993 Act:-

"To provide for additional incentives in order to increase the efficiency and the viability of the sugar industry, to promote greater diversification within sugar and in agriculture and to ensure that all additional commitments of the country are honoured."

In the Supreme Court the executive director of the Mauritius Sugar Authority gave evidence which described more fully what the legislation was designed to achieve. Prior to the 1993 Act the metayage land was already subject to substantial statutory control. The position is described in the judgment of the Supreme Court in these terms:-

"...it is well known that historically the sugar industry has been the main pillar of this country's economy, affecting the well-being not only of all the partners in the industry but

also of almost everyone else. For this reason, the industry, as a whole, has been profoundly organised over the years with a view to achieving progressively the highest degree of efficiency, with equity and fairness for all partners in the industry, even if this entails the statutory regulation of its operations by, in particular, limiting and controlling individual contractual freedom.....

Under the enactment, everyone planting canes is bound to sell his canes, by a statutorily regulated contract appended to the Act, to no other miller than the miller in the appropriate factory area and the miller is bound to buy the canes. The price paid for the canes is in terms of sugar, including its by-products or their value, the sucrose content of the canes being determined by a statutorily prescribed method. The delimitation of factory areas does not depend on the will of the persons owning land in or around the area but is determined by a Board with guaranteed access to the Courts when there is a grievance against a decision of the Board.

If only in the above respects, unfettered freedom to contract in respect of various aspects of the exercise of one's right to property has been made subject to statutory control. It can be imagined what chaos, possibly leading to the destruction of the industry itself, would follow from unbridled competition among the millers or planters which would inevitably result from untrammelled freedom of contract among the partners of the industry. All these controls and measures must be seen in the context of the additional responsibility and duty of the State to ensure, in the public interest, the remunerative marketability of a national product by the negotiation of quotas with outside institutions like the EEC, as was indicated in evidence, or under bilateral State-to-State arrangements which only the State could undertake."

By inserting section 5A into the 1988 Act, the 1993 Act did, however, introduce a considerable degree of additional control over land which is subject to contracts of metayage. The important provisions of the section are in these terms:-

"(1)Whenever a metayer contract expires and the metayer is willing to renew the contract, the planter shall renew it for such period which shall not be less than the period of the expired contract.

(2) Whenever a metayer-

(a) is no longer able to cultivate land under metayage for the production of sugar cane during the lease period defined in the metayer contract; or

(b) is not willing to renew a metayer contract at its expiry, the planter shall, through the Mauritius Sugar Authority, offer the land on lease for such period which shall not be less than seven years to metayers cultivating land in the same factory area, or, if there is none, in any other factory area.

(3) Where the land under metayage for the production of sugar cane is not taken by any other metayer it shall not be put to any use other than the production of sugar cane without the prior written authority of the Minister."

It will be observed that section 5A gives the metayer the right to renew his contract, requires the planter to relet the land to a metayer and confines the use of the land to growing sugar cane.

Sections 3 and 8(1) and (2) of the Constitution provide:-

"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 of origin, political opinions, colour, creed or sex, but subject to respect for 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 limitations 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."

"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 -

- (a) the taking of possession or acquisition is necessary or expedient in the interest of defence, public safety, public order, public morality, public health, town and country

- planning or the development or utilisation of any property in such a manner as to promote the public benefit or the social and economic well-being of the people of Mauritius;
- (b) there is reasonable justification for the causing of any hardship that may result to any person having an interest in or right over the property; and
 - (c) provision is made by a law applicable to that taking of possession or acquisition-
 - (i) for the payment of adequate compensation; and;
 - (ii) securing to any person having an interest in or right over the property a right of access to the Supreme Court, whether direct or on appeal from any other authority, for the determination of his interest or right, the legality of the taking of possession or acquisition of the property, interest or right, and the amount of any compensation to which he is entitled, and for the purpose of obtaining payment of that compensation.

(2) No person who is entitled to compensation under this section other than a resident of Mauritius, shall be prevented from remitting, within a reasonable time after he has received any amount of that compensation, the whole of that amount (free from any deduction, charge or tax made or levied in respect of its remission) to any country of his choice outside Mauritius."

Similar language is to be found in the provisions of many of the Constitutions of former British territories. The initial approach to their interpretation and application has recently been considered by acting Judge Kentridge in the Constitutional Court of South Africa in his judgment in *S. v. Zuma and Others* [1995] (4) B.C.L.R. 401 which was unanimously endorsed by the other 10 members of the court. Judge Kentridge reviewed the relevant authorities in a number of Commonwealth Jurisdictions. He referred to Lord Wilberforce's comments in *Minister of Home Affairs (Bermuda) v. Fisher* [1980] A.C. 319 at p. 328-9 emphasising two principles which have to be applied when interpreting constitutional provisions of this nature: the first being that they should be given a generous rather than a legalistic interpretation while at the same time giving effect to the purpose for which they were enacted; the second being that respect must still be paid to the language used, while at the same time taking into account the traditions and usages which give meaning to that language. As Judge Kentridge added in relation to the second principle:-

"If the language used by the lawgiver is ignored in favour of a general resort to 'values' the result is not interpretation but divination." (412H)

When construing the language of sections 3 and 8 of the Constitution in accordance with these principles, it is also appropriate to give weight to the two legal traditions which exist in Mauritius, both of which attach great importance to the protection of property rights from deprivation by the State without proper compensation. They are, as to Mauritian private law, the French civil code and, as to Mauritian public law, the common law. An illustration of the former is provided by Article 545 of the Mauritian Civil Code, now repealed by the Land Acquisition Act 1973, which was derived from Article XVII of The Declaration of the Rights of Man and of the Citizen 1789; and as to the position at common law reference can be made to the statement of Lord Warrington in *Colonial Sugar Refining Co. Ltd. v. Melbourne Harbour Trust Commissioners* [1927] A.C. 343 at 359. Construed literally the language of section 3 could have been treated as only providing an introductory declaration as to the scope of the rights referred to in the subsequent sections of Chapter II, including section 8. However because of the background to the Constitution, both in the Supreme Court of Mauritius, in *Societe United Docks v. Government of Mauritius* [1981] M.R. 500 and in the Privy Council, in *Societe United Docks and Others v. Government of Mauritius* [1985] A.C. 585, section 3 has been held to create additional protection for property to that provided by section 8. In the Privy Council, Lord Templeman was not troubled by what could be said to be the literal interpretation of the language of the section. He stated the position as being as follows:-

"Their Lordships have no doubt that all the provisions of Chapter II, including section 8, must be construed in the light of the provisions of section 3. The wording of section 3 is only consistent with an enacting section; it is not a mere preamble or introduction. Section 3 recognises that there has existed, and declares that there shall continue to exist, the right of the individual to protection from deprivation of property without compensation, subject to respect for others and respect for the public interest. Section 8 sets forth the circumstances in which the right to deprivation of property can be set aside but it is not to curtail the ambit of section 3. Prior to the Constitution, the government could not destroy the property of an individual without payment of compensation. The right which is by section 3 of the Constitution recognised and declared to exist is the right to protection against deprivation of property without compensation. A Constitution concerned to protect the fundamental rights and freedoms of the individual should not be narrowly construed in a manner which produces anomalies and inexplicable inconsistencies. Loss caused by deprivation and destruction is the same in quality and effect as loss caused by compulsory acquisition."

The correct approach is therefore to read section 3(c) and section 8 together, with the relevant language of each section influencing the interpretation of the other. Section 3(c), however, remains at the same time both the more general and the more qualified provision: more general, as its protection applies to a wider range of situations and a broader concept of property than does section 8; more qualified, because the protection it provides is restricted by broader limitations than that to which the protection provided by section 8 is subject. Even when generously construed section 8 is limited to protecting property and property interests from interference which in a broad sense involves some formal compulsory taking of possession or acquisition of property or of what loosely corresponds to a right over property. The property or interest in property must be sufficiently identifiable to be capable of being taken possession of or acquired in this way. However once property to which section 8 applies is compulsorily taken or acquired, then the section is contravened unless all the requirements of section 8(1)(a), (b) and (c) are fulfilled or one of the other limited exceptions in section 8 applies. The qualification on the protection provided by section 3 is in much more general terms. There is therefore a significant distinction between the protection provided by section 3(c) and section 8, notwithstanding their close relationship.

An analogy can be drawn with Article 1 to the Protocol of the European Convention of Human Rights. Article 1 provides:-

"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law.

"The preceding provisions shall not, however, in any way impair the right of a State to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties."

Article 1 comprises three distinct rules. As was stated by the European Court of Human Rights in *Sporrong and Lönnroth v. Sweden* (1982) E.H.R.R. 35 at page 50:-

"The first rule, which is of a general nature, enounces the principle of peaceful enjoyment of property; it is set out in the first sentence of the first paragraph. The second rule covers deprivation of possessions and subjects it to certain conditions; it appears in the second sentence of the same paragraph. The third rule recognises that the States are

entitled, amongst other things, to control the use of property in accordance with the general interest, by enforcing such laws as they deem necessary for the purpose; it is contained in the second paragraph."

The first rule approximately corresponds to the protection provided by section 3(c), the second rule corresponds to the opening words of section 8(1) to "the taking of possession", and the third rule to the references to compulsory acquisition in the remainder of section 8(1).

The grounds of decision in the *Sporrong* case are also of some interest to the issues on this appeal. The complaint in the *Sporrong* case was that land of the applicants in Stockholm had been the subject of expropriation permits entitling the properties to be acquired compulsorily and notices prohibiting any construction on the land for a great many years (up to 23 years) prior to the permits and the notices being revoked. During this period the Court held the substance of the owners' property rights were "significantly reduced" and rendered "precarious and defeasible" without their receiving compensation. This interference did not contravene the second or third rule but it did contravene the first rule of Article 1. The first rule required a proper balance to be maintained between the owners' rights and the requirements of the public interest. The prolonged period during which the owners were without remedy meant there was here a violation of rule 1. In coming to their decision the Court treated the threat of expropriation as the primary intrusion on the complainant's interests. The prohibition on construction was a secondary matter. The particular interest of the decision for the present appeal is that the threat of expropriation and prohibition on building had limited or no immediate effect on the owners' property rights. There was no taking of possession or acquisition of property. There was no more than interference with the ability of the owners to exercise a normal incident of ownership of property and a threat of expropriation. However, this was a sufficiently substantial interference that when continued for a disproportionate period of time it amounted to what could be described as a constructive deprivation of the property rights of the owners.

In *Sporrong* the European Court was adopting a fact and degree approach which is not dissimilar to that of Holmes J. in *Pennsylvania Coal Co. v. Mahon* (1922) U.S. 393 at 415/6. When dealing with the test for determining whether there has been a "taking", for the purposes of the 5th and 14th Amendments to the United States Constitution, Holmes J. pointed out that there could be more and more "qualification" of private property rights until they disappeared and added that "the general rule at least is, that

while property may be regulated to a certain extent, if regulation goes too far it will be recognised as a taking". Holmes J. was referring to the cumulative effect of a number of different restrictions on the normal incidents of ownership of property, none of which in themselves would amount to a taking but which cumulatively amounted to a taking. The European Court was also looking at the cumulative effect of interference, but in their case they were considering the cumulative consequences of the continuation of a state of affairs which only constituted a breach of Article 1 when continued for a prolonged period of time.

This approach involves looking at the totality of what is relied on as an interference with interests, is relevant when determining whether there has been a contravention of section 3(c). In Mauritius it is the task of the Supreme Court to carry out that exercise. Unless the Supreme Court in doing this misdirects itself in law or otherwise fails to have proper regard to the relevant considerations, it is not for their Lordships to interfere with their decision. Their Lordships on an issue of this nature, like the European Court, will extend to the national court a substantial margin of appreciation. Similarly their Lordships are in accord with the European Court in respecting the national legislature's judgment as to what is in the public interest when implementing social and economic policies unless that judgment is manifestly without foundation (*James v. United Kingdom* (1986) 8 E.H.R.R. 123).

Having set out the general approach to be adopted to the Constitutional provisions on which the appellants rely, it is now necessary to apply that approach to the issues which the appellants raise. Those issues depend on the effect of section 5A of the 1988 Act (as amended) on the appellants' property interests. Lord Lester made his submissions under three alternative headings. The first submission was as to whether section 5A applies to contracts of metayage which were in existence when section 5 of the 1993 Act came into force. Under section 9 some sections, not including section 5, have expressly appointed dates of commencement. Section 5 came into force on the Act being passed by the National Assembly on 2nd February 1993. The second submission was as to whether the 1988 Act, as a result of it being amended by the inclusion of section 5A, should be construed as having an implied requirement for the payment of compensation for the loss resulting to planters in consequence of the controls introduced by section 5A. The third submission is the one of most substance. It is whether the Supreme Court properly came to the conclusion that Section 5A does not contravene section 3 or 8 of the Constitution.

Underlying the appellants' first head of argument is the contention that if section 5A were to apply to contracts of metayage which existed when the section came into force this would retrospectively change the terms of those contracts adversely to the interests of the planters. This, it is contended, would be unfair to the planters and so it is argued that the section should be construed so as not to have this effect. In the Supreme Court it was conceded by counsel then appearing for the Government that the section only applies to future contracts, that is contracts which were made after the section came into force. Before their Lordships that concession was withdrawn.

Read literally section 5A only bites when contracts have come to an end and therefore strictly it does not affect existing contracts. However this approach is unduly legalistic and the reality is that if section 5A does apply to existing contracts it will have significant consequences for the appellants. It will mean that while the legislation is in force the appellants will have to relet their property on a contract of metayage irrespective of whether they wish to do so and possibly to let it to a "partner" with whom they would prefer not to have anything to do. It is therefore a situation where the section will not be construed so as to have this unfair effect unless the result is unavoidable because of the language used (see *Yew Bon Tew v. Kenderaan Bas Nara* [1983] 1 A.C. 553, Lord Brightman at page 558). However here the result is unavoidable. If, as Lord Lester submits, the effect of section 5A is to reduce substantially the value of the planters' reversion if it applies to existing contracts, then unless section 5A does so apply it will not ensure the security of tenure for metayers which it was clearly intended they should have. This is because if the section did not apply to existing contracts the planters could choose whether to apply the Act to their land or not. It would only apply to their land if they entered into a fresh contract with a metayer. Presumably their decision would be not to do so if this would be adverse to their interests. Thus the metayers would not benefit from the protection the 1993 Act provides. Their Lordships are satisfied that this cannot be the intended result and so section 5A must be construed so as to apply to contracts in existence when it came into force. This does not mean the 1993 Act is to be classified as being retrospective. An Act is not normally to be treated as retrospective because as is the case with the 1993 Act it applies to an existing state of affairs.

Their Lordships are equally clear that it is impossible to construe section 5A as including an implied right to compensation merely because of its effect on existing contracts.

Turning therefore to the third issue, the question which has to be answered is whether the Supreme Court properly came to the conclusion that even without any provision for compensation section 5A does not contravene section 3 or 8 of the Constitution. The answer to this question is more appropriately treated as depending on section 3 than section 8. The restrictions which section 5A places on contracts of metayage cannot even on a generous interpretation be considered as the "compulsorily" taking possession or acquiring possession of a right in or an interest over property which is the subject of the protection provided by section 8(1). Even in the case of section 3 there is difficulty in bringing the increased control of land which section 5A involves within its language. The ownership of land has a multiplicity of incidents and every regulation of those incidents in the public interest does not attract a *prima facie* right to compensation. This is especially true where, as here, the regulation is part of the general control of an industry which is already subject to substantial regulation in the interests of all those involved in the industry, including the appellants.

However, even assuming that section 3 does apply because cumulatively the controls in section 5A amount to a constructive deprivation of property, it by no means follows that section 5A contravenes section 3. The restrictions on the contract of metayage only contravene the protection provided by section 3 if, because of the lack of any provision for compensation, they do not achieve a fair balance between the interests of the community and the rights of the individuals whose property interests are adversely affected. In the situation which existed when the 1993 Act came into force this is very much a question of fact and degree for the Supreme Court. The regime which existed before the 1993 Act was not suggested to be other than constitutional and the fact that the position of metayers was improved by the 1993 Act does not mean that the scheme was no longer in balance. The Supreme Court took the view on the evidence that the section "was designed to give some security of tenure to what was a small and weak sector of the sugar industry constituted by metayers".

Lord Lester questioned whether there was sufficient evidence available before the Supreme Court to enable the balance to be struck and he therefore suggested that it might be necessary to remit the case for further evidence to be called. However their Lordships do not consider that to be necessary. Mr Rajputty, who is the executive director of the Sugar Authority, gave ample evidence as to the background of the statutory sugar regime to enable the balancing exercise to be performed between the interests of the community at large and the planters.

Lord Lester's main criticism, however, of the Supreme Court's decision is that they took a too narrow approach to the construction of sections 3 and 8 of the Constitution in a passage of their judgment in which they examined the categories of property rights referred to in those sections. Lord Lester recognises that his criticism of this passage of their judgment if made out might only result in the question having to be reconsidered by the Supreme Court.

The initial passage of the judgment to which Lord Lester directs criticism is a passage which deals with both section 3 and 8 which is in these terms:-

"In our view, these provisions of sections 3 and 8 relate basically to two categories of rights to property. The first relates to property of any description. The second relates to any interest in or right over property. The first category, in our view, envisages the ownership itself of the property, whereas the second envisages some right or interest in property other than ownership, for example, a lease, a usufruct or some other such right which is distinct from the right to the ownership of the property, so that where the State compulsorily acquires a property which the owner has leased to a third party, the State is bound to compensate not only the owner but the third party or indeed any other party who has some right in the property."

The passage is more appropriate when applied to section 8 than section 3. However, in the next paragraph of the judgment, after making other statements which Lord Lester criticises, it is made clear that what was said earlier is subject to what they refer to later as "constructive deprivation". The Supreme Court then goes on to consider the analogous situation under Article I of the European Convention with its reference to the wide term "possessions". Having done so the judgment states:-

"In this context, it may very well be that, although there may not be deprivation as such, nevertheless the restrictions and controls are such as to be so disproportionate to the aims which may be legitimately achieved under the concluding part of section 3 as to leave the right to the property as a valueless shell. In which case, the Courts may very well hold that there has in effect been a deprivation, even though that may only be what one might describe as a "constructive deprivation".

The crucial question that remains to be decided is whether by restricting the freedom of contract of landlords in respect of leases with "metayers", in the manner envisaged under

section 5A, the plaintiffs have been effectively deprived of their property.

In our view, the restrictions and controls imposed under section 5A do not amount to a deprivation of property, although they certainly amount to restrictions and controls on the landlord's otherwise unfettered freedom of contract in respect of his property. These restrictions and controls are permissible under section 3 of the Constitution and under Article 544 of the Civil Code and, given their nature, do not amount to what one may characterise as an effective or constructive deprivation of property. We say so for the following reasons:..."

The "reasons" are then set out in separate paragraphs. They include a resume of the restrictions to which the planters are subject by section 5A and of the benefits which accrue to the planters as well as other members of the sugar industry and the community as a whole. The "reasons" make it abundantly clear that the Supreme Court has carried out the very exercise which Lord Lester correctly argues they should. This involves weighing the benefits of the legislative action to the appellants as major players in the sugar industry as against the controls to which section 5A subjects them.

It is right as Lord Lester also argues that to refer to a "valueless shell" is to overstate the situation which needs to exist before there is a constructive deprivation. Nonetheless their Lordships are satisfied that the reasoning of the judgment as a whole makes it clear that the Supreme Court set themselves the right task and having done so properly concluded that there had been no contravention of the Constitution. Indeed on the basis of the facts set out in their "reasons" it would not have been open to the Supreme Court reasonably to come to any other conclusion.

Their Lordships therefore dismiss this appeal with costs.