Privy Council Appeal No. 58 of 1986

Harel Freres Limited *Appellant*

v.

The Minister of Housing, Lands, and Town and Country Planning *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER 1987

Present at the Hearing:

LORD BRIDGE OF HARWICH
LORD ROSKILL
LORD GRIFFITHS
LORD ACKNER
SIR JOHN STEPHENSON

*[Delivered by **Lord Bridge of Harwich**]*

This is an appeal from a judgment of the Supreme Court of Mauritius (Sir Cassam Moollan C.J. and Lallah J.) delivered on 7th May 1986 dismissing an appeal against a decision of the respondent Minister to acquire compulsorily certain land belonging to the appellant pursuant to notice given in accordance with section 8 of the Land Acquisition Act 1973 ("the Act").

The appellant owns a large sugar growing estate known as Solitude at Pointe-aux-Piments. The estate is separated from the coast by a strip of undeveloped Crown land known as the Pas Geometriques which extends inland to a depth of some 80 to 90 metres from high water mark. On 5th June 1985 the Ministry wrote to the appellant offering to purchase part of the Solitude estate approximately 11 hectares in area comprising a strip of land approximately 600 metres by 200 metres immediately adjacent to the Pas Geometriques ("the subject land"). The appellant refused the offer. In June and July 1985 notices were published and served on the appellant as required by section 6 of the Act indicating that the subject land was likely to be acquired compulsorily.

The purpose of the acquisition was stated in the notices to be "for the public purpose of tourism development". On 15th July 1985 the appellant wrote to the Ministry asking for full and detailed particulars of the proposed development. No reply to this letter was ever received. On 11th September 1985 the Minister gave notice under section 8 of the Act of his decision to acquire the land compulsorily.

The appellant duly gave notice of appeal against the decision pursuant to section 10 of the Act and in accordance with the Land Acquisition (Appeal) Rules 1974. The hearing of the appeal by the Supreme Court was fixed for 18th March 1986. On 17th March 1986 an affidavit was filed sworn by a Principal Surveyor in the Ministry which, omitting formal parts, deposed as follows:-

"4. It is the policy of the Government to promote tourism development in Mauritius in furtherance of its overall economic and social development of the country and in so doing the Government acquires property which it is considered can help towards that objective.

5. The subject property purchased at Points-aux-Piments will be used for building -

i) a hotel complex; and

ii) a hotel complex together with clinic."

This last minute disclosure, if such it can be called, represented the sum total of the information available to the appellant and to the court as to the Minister's intentions for the development of the subject land.

It is unnecessary for the purposes of this judgment to rehearse in detail the various grounds of appeal which were canvassed before the Supreme Court and in due course rejected by them. It suffices to say that the argument proceeded on the footing that the appeal against the Minister's decision was in the nature of a judicial review. On this basis the Court drew a distinction between the "merits" and the "legality" of the decision, held that they could not consider the former and found no ground on which to impugn the latter.

The law relating to compulsory acquisition of land in Mauritius is strikingly different from that with which their Lordships are familiar in England. In England different statutes empower different authorities to acquire land compulsorily for different specific purposes. But the normal statutory procedure which must be followed before a

particular compulsory acquisition can be authorised ensures that a public inquiry will be held at which any landowner objecting to the acquisition may be heard and at which it will fall to the acquiring authority to make good its case in support of the acquisition by fully detailed evidence which can be tested, challenged, and, it may be, controverted. It is at this stage that the merits of the proposed acquisition are examined and assessed and it is normally on the basis of facts found and recorded in a report of such an inquiry that a Ministerial decision to give effective authority for compulsory acquisition must rest. Such a decision is then open to challenge in the courts on the limited grounds, analogous to those of a judicial review, that the compulsory acquisition authorised was *ultra vires* the enabling statute or that the landowner objecting to the acquisition was prejudiced by a failure to follow the prescribed procedures.

By contrast the Mauritius Act gives the Minister a power of compulsory acquisition which is quite general in its ambit and which he can exercise by notice under section 8 of the Act if he is satisfied that the conditions of section 8(1)(a) and (b) of the Constitution are fulfilled. There is no provision in the Act for any inquiry into the merits of the proposed acquisition to be held or otherwise giving the landowner objecting to the acquisition any opportunity to be heard before the Minister makes his decision to acquire and issues his notice to give effect to it under section 8 of the Act. It is in section 8 of the Constitution alone that a safeguard for the interests of the landowner is provided. The section is entitled "Protection from deprivation of property" and provides by sub-section (1) as follows:-

> "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 -
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> (a) the taking of possession or acquisition is necessary or expedient in the interests 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;
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> (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."

Compliance with the relevant part of section 8(1)(c)(ii) is secured by section 10 of the Act which provides:-

"An interested person who wishes to challenge the legality of the compulsory acquisition of any land may appeal to the Supreme Court within such time and in such manner as may be provided by rules made by the Supreme Court for the purpose."

The rules made for the purpose of section 10 of the Act are the Land Acquisition (Appeal) Rules 1974. The Rules require the appellant to give notice of appeal indicating the grounds of appeal within a stipulated time. Other grounds may only be raised at the hearing with the leave of the court. The Minister is required to forward to the Registry of the Supreme Court "a certified copy of all documents relating to the compulsory acquisition of the land, subject matter of the appeal". Apart from these provisions the Rules are silent as to how the court is to conduct the proceedings on the hearing of an appeal. But the Rules are merely procedural. They cannot in any way circumscribe the challenge to the legality of the compulsory acquisition for which section 10 of the Act makes provision and, if section 10 is construed, as it should be, as effective to satisfy the requirements of section 8(1)(c)(ii) of the Constitution, then it is clear that any issue raised as to whether the requirements of section 8(1)(a) and (b) of the Constitution are fulfilled must be for the court to determine and for that purpose the court must receive all relevant evidence, whether upon affidavit or orally, and in either case subject to cross-examination. Once the Minister's decision is challenged on appeal on grounds which raise issues as to whether the conditions of section 8(1)(a) and (b) of the Constitution are fulfiled, it must be for the court, not the Minister, to be

satisfied that the proposed compulsory acquisition is indeed necessary or expedient to enable the intended development to be carried out and that there is reasonable justification for causing any hardship to the landowner which will result. If it were not so, the owner's right of access to the Supreme Court "for the determination of the legality of the ... acquisition of the property" would be valueless and compulsory expropriation, as the present case shows, would depend upon the unexaminable *ipse dixit* of the Minister. Hence, as the Solicitor-General very properly conceded before their Lordships, the Supreme Court fell into error in confining attention to such issues as could properly be raised upon an application for judicial review and in not treating the appeal as a full scale appeal against the Minister's decision which required to be considered on its merits.

The appellant's notice of appeal challenges the legality of the proposed compulsory acquisition, *inter alia*, upon the ground in quite general terms that the conditions of section 8(1)(a) and (b) of the Constitution are not fulfilled. The two paragraphs of the sub-section are to a large extent overlapping. Every compulsory expropriation of an unwilling landowner is *prima facie* a hardship and the question whether there is reasonable justification for imposing such a hardship under paragraph (b) is intimately bound up with the question whether it is necessary or expedient that the land should be taken into public ownership in order to achieve one of the public purposes envisaged by paragraph (a). There was no evidence led on behalf of the Minister at the hearing before the Supreme Court which was capable of discharging the onus resting upon him with respect to either of those interlocking issues.

It must follow that the order of the Supreme Court cannot stand. However, since there appears to have been some misapprehension on both sides before the Supreme Court as to the true nature of the appeal process under section 10 of the Act and section 8(1) of the Constitution, their Lordships do not think it necessary that the Minister's decision should be quashed, but accede to the proposal of the Solicitor-General that the matter should be remitted to the Supreme Court to give the Minister the opportunity at a re-hearing of the appeal to lead evidence indicating with all necessary particularity the nature and extent of the proposed hotel development, showing how, when and by whom it is proposed to be carried out and why it is necessary or expedient that it be achieved through the medium of public ownership of the land. The appellant will in its turn have the opportunity to controvert the Minister's case by demonstrating, if it can, its own willingness and ability, which it has asserted, to secure that the

appropriate development is carried out so as to achieve the social and economic benefits of tourism envisaged by the Government without the need for public acquisition of the land. Their Lordships would only add that, in the interests of securing a fair trial of the issues, it will be essential that, in advance of the re-hearing, the Minister makes full disclosure of all documentary material relating to the planned development of the subject land pursuant to rule 4(a) of the Land Acquisition (Appeal) Rules 1974.

Their Lordships will humbly advise Her Majesty that the appeal be allowed, the judgment of the Supreme Court be set aside and the matter be remitted to the Supreme Court for determination in accordance with this judgment. There will be no order for costs before the Board. All costs of the proceedings on the appeal to the Supreme Court under section 10 of the Act will be reserved to the Supreme Court.