(3)

IN THE SEYCHELLES COURT OF APPEAL

GERVAIS AIMEE — APPELLANT

versus

PHILIP SIMEON — 1ST RESPONDENT
THE COMMISSIONER OF POLICE — 2ND RESPONDENT
THE SEYCHELLES GOVERNMENT — 3RD RESPONDENT

Civil Appeal No.7/2000

[*Before: Ayoola, P., Silungwe & De Silva, JJ.A]*

Mr.P.Boulle for the Appellant
Ms.D.Zatte for the 2nd and 3rd Respondents

JUDGMENT OF THE COURT

(Delivered by De Silva, JA.)

This is an appeal from the "determination" of the Constitutional Court made under the provisions of Article 46(7) of the Constitution. The question referred to the Constitutional Court for "determination" was whether section 3 of the Public Officers (Protection) Act contravenes Article 27(1) of the Constitution. The unanimous decision of the Constitutional Court was that section 3 of the said Act is not inconsistent with Article 27(1) of the Constitution and it therefore continues to be valid law.

Section 3 of the Public Officers (Protection) Act (hereinafter referred to as the "Act") reads as follows :

> *"No action to enforce any claim in respect of*
>
> *(a) any act done or omitted to be done by a public officer in the execution of his office;*
>
> *(b) any act done or omitted to be done by any person in the lawful performance of a public duty ; or*
>
> *(c) any act done or omitted to be done by a person lawfully acting in aid of, or lawfully giving assistance to, a person referred to in paragraph (a) or (b)*
>
> *shall be entertained by a court unless the action is commenced not later than six months after the claim arose"*
>
> (emphasis added)

A careful reading of section 3 of the Act shows it is not every act or omission set out in paragraphs (a), (b) and (c) that falls within the ambit of the section. The test envisaged by section 3 is the legality of the act or the omission. The section operates within the narrow confines of a lawful act or omission. Moreover, it is relevant to note that section 3 does not take away the right of access to the courts. It merely imposes a period of limitation. At the argument before us, it was common ground that statutes of limitation are not per se unconstitutional.

The contention on behalf of the appellant is that section 3 of the Act is inconsistent with Article 27(1) of the Constitution and is therefore void.

Article 27(1) reads thus :

> *"Every person has a right to equal protection of the law including the enjoyment of the rights and freedoms set out in this Charter without discrimination on any ground except as is necessary in a democratic society."*

The essential meaning of "equal protection of the law" is the right to equal treatment in similar circumstances both in the matter of privileges conferred and liabilities imposed by the law. The principle of equality, however, does not take away from the State the power of classifying persons for legitimate purposes. A reasonable differentiation between the two categories which is fairly related to the object of the legislation does not violate Article 27(1) and is constitutionally permissible. In other words, Article 27(1) does not forbid classification for the purpose of legislation provided that such classification is not arbitrary and has a rational basis.

Article 14 of the Constitution of India is similar to Article 27(1) of the Constitution of Seychelles. In the case of ***Pathumma Vs State of Kerala*** 1978 S.C.771 at 781 and 786, the Supreme Court of India stated

> "*What Article 14 forbids is hostile discrimination and not reasonable classification. Equality before the law does not mean that the same set of laws should apply to all persons under every circumstance ignoring differences and disparities between man and things. A reasonable classification is inherent in the very concept of equality because all persons living on this earth are not alike and have different problems;.....It is for the State to make a reasonable classification.....All that is necessary is that the classification shall not be arbitrary, artificial or illusory.*"

In so far as section 3 of the Act is concerned, there are 2 groups of persons classified for the purpose of limitation of actions. The classification broadly is between "public officers" and "non public officers". The object of the Act is to protect public officers acting in the discharge of their duties from being sued after the lapse of a period of 6 months. To permit an inordinate length of time for the institution of actions against public officers would have an "unsettling effect" on them and hamper them in the discharge of their duties. The public interest requires that there should be certainty in the claims against the persons set out in paragraphs (a), (b) and (c) of section 3 and this could be achieved by limiting the period within which actions could be instituted in court.

All other litigants would fall into a distinct category outside the procedural protection envisaged by section 3 of the Act. Mr.Boulle, learned counsel for the appellant submitted that both groups are litigants and therefore the "classification" is constitutionally impermissible. This submission is unacceptable for the reason that though both groups are litigants they are not similarly circumstanced We are of the view that there is an "intelligible differentia" between the two categories and the "differentia" has a rational relation to the object sought to be achieved. The classification is therefore constitutionally valid.

The Indian case of ***Nav Rattanmal Vs State of Rajasthan*** AIR 1961 S.C.1704 is of relevance to the issue in the appeal before us. The Supreme Court took the view that a longer period of limitation allowed to the government for enforcing its claims as compared to private persons in respect of similar claims does not offend Article 14 of the Constitution of India. Justice Ayyangar J in the course of his judgment at page 1707 stated :

> *"If learned counsel is right in his submission that there is no rational basis for placing private individuals and the Government in different classes while framing a legislation providing for limitation for actions he might succeed; but if he is wrong there and the correct view is that there is a rational basis of classification, then the period that should be allowed to the Government to file a suit would be a matter of legislative policy and could not be brought within the scope or purview of a challenge under Article 14 or indeed of any other article in the Constitution. It is sufficient therefore if we confine ourselves to the first point viz., whether there is a rational basis for treating the Government differently as regards the period within which claims might be put in suit between the Government on the one hand and private individuals on the other.....First, we have the fact that in the case of the Government if a claim becomes barred by limitation, the loss falls on the public, i.e.on the community in general and to the benefit of the private individual who derives advantage by the lapse of time. This itself would appear to indicate a sufficient ground for differentiating between the claims of an individual and the claims of the community at large....."* (emphasis added)

There is also the case of ***Metajog Dobey Vs H.C.Bhari*** AIR 1956 S.C. 44, where the question arose whether section 197 of the Criminal Procedure Code of India contravenes Article 14 of the Constitution of India. Section 197 of the Criminal Procedure Code requires the sanction of the government for the prosecution of public servants but no such sanction is necessary for the prosecution of private persons. The Supreme Court of India held that the distinction does not offend Article 14 of the Constitution. Justice Chandrasekhara Aiyar J in his judgment stated thus :

> *"Article 14 does not render section 197 of the Criminal Procedure Code "ultra vires" as the discrimination is based upon a rational classification. Public servants have to be protected from harassment in the discharge of official duties while ordinary citizens not so engaged do not require this safeguard."*

The true meaning of Article 27(1) was carefully considered by Ayoola J.A. in his landmark judgment in ***Roger Mancienne Vs The Attorney General*** delivered on 3rd April 1997 (Civil Appeal No.15 of 1996)

> *"Article 27(1) guarantees a general right to equal protection of the law. Its plain meaning is that all persons must have equal access to law's benefit and privileges and be equally subject to its obligations. In practical and meaningful terms, equal access must be read as equal opportunity of access. This, unqualified, means that the state either by executive action or legislative act must not put one person at an advantage over the other or another at a disadvantage to which the other is not subject. The exception to the generality of the guarantee of equality which permits differential treatment (discrimination) "as is necessary in a democratic society" is an acknowledgement that absolute equality is unattainable.....In the context of Article 27 of the Constitution and permissible discrimination and in fashioning a test of acceptable differentiation, the word necessary has been used to describe a factor that must be present. <u>The word "necessary" is not used in the absolute sense as indicating something that cannot be done without, but as something useful to the promotion of an end or an objective.</u>"* (emphasis added)

On a consideration of the interpretation given to the expression "necessary in a democratic society" in the case of ***Roger Mancienne Vs. Attorney General*** (supra) we find ourselves unable to accept the submission made by Mr.Boulle that the Constitutional Court failed to distinguish that which is reasonable from that which is necessary in a democratic society. Mr.Boulle's argument proceeds upon the erroneous basis that "necessary" means "indispensable" in the context of Article 27(1) of the Constitution. We see no error in the judgments of Perera J and Juddoo J in this regard.

Mr.Boulle next submitted that there was no evidence at all to support "the derogation to Article 27" and to show that it was necessary in a democratic society. The expression "democratic society" is defined in Article 49 in the following terms :

> *"Democratic society means a pluralistic society in which there is tolerance, proper regard for the fundamental human rights and freedoms and the rule of law and where there is a balance of power among the Executive, Legislature and Judiciary."*

The norms and values of a "democratic society" are well known and well recognized. They are matters within the common knowledge of all people. Therefore they are matters in respect of which a court could properly take judicial notice. Hence there is no need to adduce evidence and to reach findings of fact. What is more, the matter which arose for consideration before the Constitutional Court related to the construction of section 3 of the Public Officers (Protection) Act and Article 27(1) of the Constitution. This gave rise to what was essentially a question of law.

Mr.Boulle further contended that the Constitutional Court failed "to give proper consideration to the onus of proof." Mr.Boulle relied on Article 46(8) of the Constitution in support of his submissions. Article 46(8) reads thus :

Where in an application under clause (1) or where a matter is referred to the Constitutional Court under clause (7), the person alleging the contravention or risk of contravention established a prima facie case, the burden of proving that there has not been a contravention or risk of contravention shall, where the allegation is against the State, be on the State."

It was the submission of Mr.Boulle that the law of evidence provides that the plaintiff must discharge his burden on a "balance of probability" while the Constitution requires "only a prima facie case to be established, which is a very different burden." With this submission we are unable to agree. What Article 46(8) of the Constitution in effect provides is that the initial burden of proof is on the "person alleging the contravention or risk of contravention" of a provision of the Charter. If that burden is discharged, the onus shifts to the State where the allegation is against the State. The standard of poof remains the same, namely, proof on a balance of probabilities. The contention that there is a lesser burden of proof on the person "alleging the contravention" than the burden that lies on the State is unacceptable. "Prima facie" evidence means evidence which is sufficient to establish the matter in issue unless rebutted by evidence to the contrary. Mr.Boulle submitted that the State did not lead any evidence. State Counsel pointed out that the petitioner too did not lead any evidence to establish a prima facie case. Viewed in the light of the matters set out above, we see no misdirection on the burden of proof, in the judgments of Perera J and Juddoo J.

For these reasons, we are of the view that the finding of the Constitutional Court that section 3 of the Public Officers (Protection) Act is not inconsistent with Article 27(1) of the Constitution is correct. The appeal is accordingly dismissed but, in all the circumstances, without costs.

E.O.AYOOLA	**A.M.SILUNGWE**	**G.P.S.DE SILVA**
PRESIDENT	**JUSTICE OF APPEAL**	**JUSTICE OF APPEAL**

Dated at Victoria, Mahe this 12th day of April 2001