IN THE SEYCHELLES COURT OF APPEAL

[Coram: S. Domah (J.A) , A. Fernando (J.A) , M. Twomey (J.A)]

Constitutional Appeal SCA CP 42/2013

(Appeal from Constitutional Court Decision 04/2012)

Nelson Robert Poole — Appellant

Versus

Government of Seychelles — Respondent

Heard: 06 April 2015

Counsel: Mr. Philipe Boulle for Appellant

Mr. Jayaraj Chinnasamy for Respondent

Delivered: 17 April 2015

JUDGMENT

S. Domah (J.A)

[1] This is a seemingly bad case for the appellant who was petitioner before the Supreme Court in an action seemingly prescribed by 17 years and which was further struck seemingly by the rule of *res judicata*. He owned a parcel of 415, 219m² of land, Parcel No. T627, at Anse Gaulettes, Mahe. On 1 October 1983, Government compulsorily acquired the property under the Land Acquisition Act 1977. On the matter of compensation arising out of the 1977 Act, there arose a dispute. He brought a case against Government. The Supreme Court decided in his favour in the sum of SR450,845 (vide case of Civil Side no. 139 of 1985). That was prior to the coming into force of the current Constitution.

[2] On 1 October 1993, Seychelles moved into a new and current constitutional arrangement, the Constitution of the Third Republic: see **Chetty v Government of Seychelles SCA 4 of 1989.** This Constitution is characterized by several entrenched and overriding features: namely, the primacy of the Constitution, the democratic system of government, the rule of law, the entrenched civil and political rights and

separation of powers between the three Arms of the State. Speaking only for right to property for the time being, it contained a special and dedicated Clause which imposed a continuing obligation upon the State to reconsider all cases of land acquisitions effected between June 1977 and the date of the coming into force of the new Constitution. Article 14(1)(a), Part III, Schedule 7 provides for the government of the day to receive applications for a return of the lands acquired or where they could not be returned for the provision of full compensation in terms of money, property transfer of a similar value or a combination of both.

[3] That special and dedicated constitutional provision is entrenched by a special time period within which applications were to be made. This Redemption Regime applied to "all applications made during the period of twelve months from the date of coming into force of this Constitution." It was meant to correct past injustices done to citizens at a time when the Constitution was ushering the Republic from a regime of state owned property to one of private ownership of land subject to public interest considerations.

[4] Mr Poole did make his application within the 12 months constitutionally provided for. By letter dated 12 October 1993, the Permanent Secretary of the line Ministry informed the applicant that his application was receiving attention. A meeting was held on the 8 April 1994 following which he continued corresponding with the Ministry. As we see it, at one moment, he fell into a technical trap: in course of negotiation, he ceded to the wish of Government to accept compensation rather than the return of the land even if he was under no obligation to do so: vide letters dated 18 April 1994, 9 May 1994 and 7 January 1995. Finally, by letter dated 16 February 1995, the Principal Secretary of the Ministry concerned informed him that he could not take the negotiations further. The reason he gave was that compensation had already been paid to him by the Supreme Court in a case he had brought against Government. The Principal Secretary obviously referred to the compensation paid to the appellant under the Land Acquisition Act 1977 in the sum of SR450,845 in the Supreme Court case of Civil Side no. 139 of 1985. That decision, be it noted, was under the defunct and decried Constitution.

[5] The appellant challenged such summary administrative abortion of his 1993 application purporting to use a pre-dated 1987 court judgment and he made known his persistence in pursuing his claim on 9 January 1996. On 18 January 1996, he received a reply to the effect that the Government was unable to review the monetary compensation as the sum had already been determined by the Supreme Court. That 1996 letter made reference to the letter which had been sent to him on 16 February 1995. On 22 February 1996, therefore, the appellant filed a petition for certiorari and mandamus for the Government to review the decision so that the latter could resume negotiation to obtain the constitutional remedy provided under the Constitution. The authorities in the case raised two objections to his application for judicial review: (a) *res judicata* and (b) time bar.

[6] The Constitutional Court gave a majority judgment and a minority judgment in the matter. On the issue of *res judicata*, both the minority and majority judgment decided that the objection of Government could not be upheld. The reason it gave was that Part III, Schedule 7 of the Constitution afforded a citizen a special action independent of the action under the Land Acquisition Act 1977. On the legal proposition, therefore, the appellant won the day.

[7] However, on the issue of time bar, the majority judgment by two to one, held that the date from which time began to run was 16 February 1995 as Government had pleaded and not 18 January 1996 as the petitioner had pleaded. Since the petition had exceeded the 30-day rule then laid down in the Supreme Court Rules, the Court decided that application had failed to abide by the Rules and set aside the judicial review application. The minority judgment, on the other hand, held that the date from which time began to run was 18 January 1996 so that the appellant was within the 30-day rule then applicable.

[8] The contest, therefore, between the appellant and the State continued apace. The appellant relied on the positive pronouncement on his substantive right decided by the Supreme Court while the respondent relied on the negative pronouncement based on a procedural issue with regard to his application. The appellant continued to press government to entertain his application for the purposes of negotiation in good faith. But to no avail.

[9] In the year 2000, therefore, he initiated the present action from which this appeal arises for constitutional redress before the Constitutional Court. The action has been couched as an action for "the refusal of the Government to return the land and pay compensation to the Petitioner (which) is a violation of the Petitioner's rights to the remedies under the Schedule of the Constitution to the return the land … and payment of compensation …" He prayed for an order for the return of the land and for compensation in the sum of over 64m Seychelles rupees for the lands which had been sold to third parties.

[10] To learned counsel for the State, it was a cast iron case for the State by the fact that events since the 1993 case had reinforced the position for the State. He raised the same two objections as before: (a) *res judicata*; and (b) prescription. The arguments under either limb offered by learned counsel for the State had been reinforced by events which have intervened in between. On the issue of *res judicata*, there is the further judgment of majority decision of 1998. On the issue of prescription, there was a time lag between the 1998 decision which was not appealed against and the date of the fresh petition – a span of 17 years, according to the learned Counsel. As per his argument, appellant was an eternal litigant whose tendency should be curtailed. But as per the argument of the appellant, he is only a resilient litigant who is vindicating a remedy for an action he triggered under Clause 14(1) of the Constitution, and which he won by a unanimous pronouncement of the Court. To him, the Government was bound to resume negotiation for the purpose of either transferring the land or paying the compensation due, neither of which had occurred as a result of which failure he has been till now without a remedy.

[11] The Constitutional Court readily accepted and upheld the rehashed objections of Government and dismissed the petition. To the three learned judges, the action was barred by *res judicata* by previous actions between the parties and *laches* of 17 years. This is the judgment against which the appellant has appealed.

[12] His grounds may be succinctly put as follows. As regards *res judicata*, he had won the day on the constitutional issue that there was a constitutional breach and this had been decided by all the three judges in the majority and the minority judgment. As

regards time bar, the Constitutional Court failed to entirely adjudicate on the issue of time bar in relation to the facts of his case as set out in paragraphs 23 to 31 of the petition which gave the summary history of his application and details of the parcels, some of which had been undeveloped and some sold.

OUR DECISION

[13] We agree with the submission of the appellant that the Constitutional Court erred in its determination of both the preliminary issues before dismissing the application. The order of dismissal cannot stand.

OUR REASONS

Res Judicata

[14] Our reasons follow in the order in which they have been dealt with above. On the issue of *res judicata*, we are unable to see the Court having gone into the facts to identify properly the issues in the relevant cases. The 1987 case, the 1996 case and the 2000 case were not all the same. On the facts relating to the cause of action, the learned judges relied heavily on a paragraph in the 1996 case and use the same argument and the same reasoning. That it could not do inasmuch as the present petition was a petition in its own right and had to be dealt with on its own facts.

[15] With regard to the first question whether this petition i.e. the year 2000 petition was *res judicata*, the Court should have examined in the light of the settled jurisprudence in the matter. Article 14(1), Part III of Schedule 7 of the Constitution reads:

> *"The State undertakes to continue to consider all applications made during the period of twelve months from the date of coming into force of this Constitution by a person whose land was compulsorily acquired under the Land Acquisition Act 1977 during the period starting June 1977 and the ending on the date of the coming into force of this Constitution and to negotiate in good faith."*

[16] The Constitutional Court should have applied the decisions in the cases of **Daniel Bonte v Government of Seychelles SCA 20 of 1986; Joseph Marzorcchi and Anor v The Seychelles Government and Anor SCA 8 of 1996; Georges Verlaque**

v Government of Seychelles SCA 8 of 2000; Government of Seychelles and Anor v Moulinie v SCA 16 of 2012. It failed to do that and in so failing it erred.

[17] The learned judges would have noted that the above provision creates a constitutional action in its own right and speaks of the continuing obligation of the State to negotiate, and to negotiate in good faith at that, for the purpose of either transferring the land or paying compensation for lands which could not be transferred on account of development having taken place or development due. Apart from the fact that the Constitutional Court did not apply the existing jurisprudence on Article 14(1)(a), Part III, Schedule 7, it further missed applying the canon of interpretation of Constitutional provisions in that it should be purposive and *sui generis*: see **In re 342A of the Criminal Procedure Code SCA 18 of 2003**; **Mathew Servina v The Speaker & Anor SCA 4 of 2001; Paul Chow v Hendricks Gappy & Ors SCA 10 of 2007.**

[18] True it is that the parties were the same in all the three cases. But the subject matter i.e. the cause and the object were not the same: see **La Serenissima Ltd v Francesco Boldrini SCA 26 of 2000**. Identity of subject-matter is a vital element in a plea of Res Judicata: see **Article 1351 of the Civil Code; Nataranjan Pillay v Bank of Baroda 28 SCA of 2001; Hoareau v Hemrick [1973] SLR 272** and **Pouponneau and Ors vs Otto Janisch (1979) SLR 130.** The first was an action under the Land Acquisition Act, the second was a judicial review to give effect to an action under the Constitution and the third the real action of remedy for past acquisition of land.

[19] If the Court had properly delved into the relevant facts relating to the subject matter, it would have found that the first action was based on the Land Acquisition Act 1977 and the remedy was adequate compensation. That action did not preclude the petitioner from bringing an action under article 14(1) in that the acquisition by Government had taken place during the period starting June 1977 and the ending on the date of the coming into force of this Constitution, more particularly on 18 October 1983. As we stated earlier, this is in fact one issue on which both the minority and the majority judgment concur.

[20] The second case was not a substantive action under the constitution or the civil law but an administrative action for mandamus and certiorari for the State not to abort

negotiation on the illegal ground that compensation had been paid. The object was the constitutional remedy prescribed.

[21] The present action on which this appeal is based is one of giving effect to the action based on article 14(1)(a), Part III, Schedule 7 specifically referred under the Constitution as "Compensation for Past Acquisition of Land."

[22] On account of the special and dedicated cause of action created by Article 14(1)(a) of the Constitution and the further wording that the State shall continue to consider applications, the State's continuing obligation would not stop until the constitutional remedies of those applications have been provided. The action is a special and particular constitutional action created by the Constitution in the light of the special and particular circumstances of transition in the history of the country at a time when it was moving from state-owned property regime into people-owned property regime under a democratic system of government for developmental reasons. When the Constitutional Court, therefore, decided that the case was *res judicata*, it slipped into error.

Time Bar

[23] Now as regards the second issue of time bar: this special and dedicated constitutional cause of action contains an in-built time bar. The action created by Article 14(1), Part III of Schedule 7 relate to "*…. all applications made during the period of twelve months from the date of coming into force of this Constitution …"* Accordingly, no other time-bar imposed by an ordinary Act of Parliament, or the Rules of the Supreme Court which are made by the Chief Justice for purposes of practice and procedure only, could be passed to derogate therefrom. The applicable time bar was whether the application was "*made during the period of twelve months from the date of coming into force of this Constitution by a person whose land was compulsorily acquired under the Land Acquisition Act 1977 during the period starting June 1977 and the ending on the date of the coming into force of this Constitution and to negotiate in good faith."* And no other.

[24] The questions which the Constitutional Court should have simply asked are as follows:

1. Was the application made within the stated 12 months?

2. Is the State negotiating in good faith?

3. Has the eligible applicant obtained one of the remedies prescribed in the constitution?

[25] The answers to the above are respectively: On 1: Yes! the application made within the stated 12 months. On 2: No! the State has not negotiated in good faith in that it has relied on a pre-dated judgment to oust the appellant's claim. On 3: No! the appellant is still awaiting his remedy. We hold, therefore, that the State used the wrong reason to discontinue negotiation. That the appellant received his compensation under the Land Acquisition Act, account taken of the clear jurisprudence on the matter since, did not disqualify the appellant. On the contrary it reinforced his position. Accordingly, the termination of negotiation was not in good faith but motivated by extraneous considerations. The appellant is still waiting for his remedy. We hold, therefore, that because the application was made within the twelve months prescribed and the State raised an invalid ground for not pursuing the application as a result of which the applicant is still awaiting his remedy, the State is in breach of article 14 (1) of the Constitution.

[26] The Constitutional Court in the present action has been under the same misapprehension as the Constitutional Court in the 1996 majority judgment in a crucial element for the determination of *time bar*. The majority judgment states that the letter dated February 1995 contained a clear and an unambiguous decision of the Government. If the present Court which relied on that statement had read the content of the earlier letter critically, it would have found as an undeniable objective fact that the wording in it was anything but clear and unambiguous. As at that date, the Government decision was hardly imprinted with the mark of finality. What both Courts missed are the three words in that letter "at this juncture." The sentence reads: "at this juncture, I cannot take the matter any further." We are quite sure that had this been brought to the attention of the Constitutional Court in the judicial review application No. 4 of 1996, there would have been a unanimous decision based on the minority decision. Further, if this had been brought to the attention of the Constitutional Court

in the present case, the learned Judges would not have simply reproduced the operative part of the 1996 judgment and decided the present case on that basis. They would have seen the misapprehension and come to their own decision with respect to the relevant facts in issue.

CONCLUSION

[27] In the light of the above, we allow the appeal on the preliminary objections raised by the Respondents in the court below which fore-stalled the further hearing of the petition. We order that the Constitutional Court proceeds to hear the matter on the merits.

[28] On the matter of Article 14(1)(a), Part III, Schedule 7 of the Constitution of the Republic of Seychelles, we need to state as forcefully as possible that the sun will set on it only when the last timely application has been disposed of in good faith. And not before. That is destined to be the Day of Redemption of the past injustices. And no other.

S. Domah (J.A)

I concur:. **…….** A.Fernando (J.A)

I concur:. **…….** M. Twomey (J.A)

Signed, dated and delivered at Ile du Port on 17 April 2015