

SAINT CHRISTOPHER AND NEVIS

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 3 of 1991

BETWEEN:

CHARLES EGBERT MILLS

AND SYLVIA MILLS

and

- Appellants

THE ATTORNEY-GENERAL
OF ST. CHRISTOPHER AND NEVIS

and

HUGH HEYLIGER, MINISTER OF
AGRICULTURE, LANDS AND HOUSING

- Respondents

Before: The Rt. Honourable Sir Vincent Floissac - Chief Justice
The Honourable Mr. Justice Byron, J.A.
The Honourable Dr. Nicholas Liverpool, J.A.

Appearances: Dr. Henry Browne, Mr. Lee L. Moore and
Mrs. Jenkins for the Appellants
Mr. Carl Atterbury for the Respondents

1992: Oct. 1,2;
1993: March 22.

JUDGMENT

LIVERPOOL, J.A.

The appellants purchased approximately one acre of land in March, 1972, and thenceforth occupied a house thereon as their residence. At the time of purchase a few tenants lived in chattel houses on part of the land; but by the end of November, 1990 when the appellant swore to an affidavit in support of his notice of motion there remained only three tenants.

By declarations published in the Official Gazette on January 10th and January 17th, 1991, the Government of Saint Christopher and Nevis sought to acquire approximately 8,903.41 square feet of the appellants' land for a public purpose, namely for the purpose of housing. This portion of land corresponds largely with the area then occupied by two of those tenants.

By an amended Notice of Motion the appellants moved the High Court for Orders to the effect that (a) the resolution passed by the National Assembly which purported to approve the making of a declaration to compulsorily acquire the land of the appellants was null, void and of no effect; (b) that the lands purportedly acquired were not acquired for a public purpose; (c) the resolution contravened the rights of the appellants as provided for in section 8(1) of the [1967] Constitution, and (d) the lands described in the resolution were still vested in the appellants. They also sought an injunction to restrain the second respondent by himself, his servants and/or agents from engaging in any act on the lands under the purported exercise of the resolution, and other consequential relief.

The matter was heard by Satrohan Singh J. who, after examining the facts stated in the affidavits which had been filed on behalf of the parties and listening to the arguments of Counsel, held that (1) the Land Acquisition Act, Chapter 273 was not altered by the 1967 Constitution Order; (2) section 8 of the 1983 Constitution (the Constitution) does not affect the operation of Chapter 273 in view of the provisions of paragraph 10(1) of Schedule 2 to the Constitution; (3) he had no jurisdiction to enquire into the circumstances surrounding the exercise of the discretion by Cabinet in relation to the acquisition; and (4) the declarations published in the Official Gazette of January 10th and 17th, 1991 with respect to the acquisition of the property of the appellants were conclusive evidence that the land to which they relate is required for a public purpose. He therefore dismissed the motion and refused the relief sought.

The appellants appealed against the decision of the learned trial Judge on the following grounds:-

"(1) The learned trial Judge erred in law in holding that paragraph 10 of the 1983 Constitution Schedule 2 precludes the Court from scrutinising....any law in force at the commencement of the 1967 Constitution to detect whether it is inconsistent with the human rights provisions and fundamental freedoms secured by the Constitution;

(2) the learned trial Judge erred in law in holding that the declaration made by the Governor-General in the circumstances of this case is final and conclusive and cannot be inquired into by the Court;

(3) the learned trial Judge erred in law in failing to appreciate that the declaration is open to challenge in the Court if the purported acquisition was done in bad

faith as is alleged in the circumstances of the case;

(4) the learned trial Judge erred in law in holding that he is without jurisdiction to enquire into the circumstances surrounding the exercise of the discretion by Cabinet in relation to the acquisition in the circumstances of this case;

(5) the learned trial Judge erred in law in holding that CAP 273 has the approbation of the Constitution and in failing to give effect to the modification of CAP 273 by virtue of the Constitution of 1967;

(6) the learned trial Judge was in error in according to the approval of Cabinet's decision by Parliament a special status affecting the conclusiveness of the declaration in that it renders the resolution of Parliament non-justiciable."

The facts of this case, as learned Counsel for the appellants stated, are by and large not in dispute; but there certainly is a dispute as to the law which is to be applied to those facts. The difference lies in the interpretation which the parties urge should be given to the law cited. But in order to undertake this task satisfactorily it becomes necessary to trace the history of the legislation.

The land Acquisition Act, Chapter 273 came into force on 14th March, 1959 and has regulated the manner in which land is to be compulsorily acquired, and compensation paid therefor in Saint Christopher and Nevis, since that date. On 27th February 1967 the constitutional status of the colony changed to one of Associated Statehood and a new Constitution became operative.

Sections 6(1) and 6(2) of the 1967 Constitution provided protection for the citizen from deprivation of his property and read as follows:-

"6.-(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 by or under the provisions of a law that prescribes the principles on which and the manner in which compensation therefor is to be determined and given.

(2) Every person having an interest in or right over property which is compulsorily taken possession of or whose interest in or right over any property is compulsorily acquired shall have a right of direct access to the High Court for -

(a) 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

(b) the purpose of enforcing his right to prompt payment of that compensation:

Provided that if the legislature so provides in relation to any matter referred to in paragraph (a) of this subsection the right of access shall be by way of appeal (exercisable as of right at the instance of the person having the interest in or right over the property) from a tribunal or authority, other than the High Court, having jurisdiction under any law to determine that matter."

Section 6(3) empowered the Chief Justice to make rules with respect to the practice and procedure of the High Court or any other tribunal or authority in relation to the jurisdiction conferred by section 6(2); and section 6(4) exempted actions taken under certain laws from being held to be inconsistent with that Constitution in certain specified instances.

The 1967 Constitution then went on to provide (section 103(1)) that the existing laws (of which Chapter 273 was clearly one) were, as from the commencement of the Constitution, to be construed "with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the West Indies Act 1967, this Constitution and the Courts Order".

Consequent on the change in the State's constitutional status, certain amendments were effected to Chapter 273 by the Land Acquisition Ordinance (Amendment) Act, 1969 to reflect those changes. Generally those changes related to the substitution of the word "Administrator" wherever it appeared by the words "Governor" "Cabinet" or "Minister of Finance" as appropriate. Two substantive changes were however made to the Act in sections 3 and 19. The change which featured largely in this litigation was in the replacement of section 3(1). As amended, section 3(1) read (after 30th June, 1969) as follows:-

"(1) If the Governor, acting in accordance with the advice of the Cabinet, considers that any land should be acquired for a public purpose he may with the approval of the House of Assembly, cause a declaration to that effect to be made by the Secretary to the Cabinet in the manner provided by this section, and the declaration shall be conclusive evidence that the land to which it relates is required for a public purpose."

The procedure instituted by this change is therefore that if the Cabinet advises the Governor (now Governor-General) that land should be acquired for a public purpose; after receiving the approval of the House of Assembly, the Governor may cause a declaration to be made to that effect by the Secretary to the

Cabinet in the required manner, and on publication, the declaration is to be conclusive evidence that that land is required for a public purpose. This replaces the earlier procedure whereby if the Administrator-in-Council considered that land should be acquired for a public purpose he was empowered, after obtaining the approval of the Legislative Council, to cause a declaration to that effect to be made by the Clerk of the Council, and on publication, the declaration was to be conclusive evidence that the land was required for a public purpose. It seems to me that whereas both the designations of the decision makers and of those who were required to give approval had changed, the basic procedure remained the same.

On 19th September 1983 the Federation of Saint Christopher and Nevis became an independent nation, and a new Constitution came into effect from that date under the authority of the Saint Christopher and Nevis Constitution Order, 1983. Section 8(1) and (2) of the Constitution are almost identical to section 6(1) and (2) of the 1967 Constitution. The two differences are contained in section 8(1) and section 8(2)(b). Section 8(1) now provides that no property is to be compulsorily acquired except "for a public purpose and" by or under the provisions of an appropriate law. Under the provisions of section 8(2)(b) a person whose property has been compulsorily acquired has a right of direct access to the High Court to enforce his right to "prompt" payment of compensation.

Section 8(3) empowers the Chief Justice to make rules (subject to any provisions which may have been made by the legislature); section 8(4) gives a person who has received compensation for property which has been compulsorily acquired a right to remit the amount received to any country of his choice, subject to any taxes which apply generally; and section 8(5) exempts actions taken under certain laws from being held to be inconsistent with the Constitution in certain specified instances.

Paragraph 2 of Schedule 2 to the Constitution Order contains the usual provision which requires that existing laws must, as from 19th September, 1983, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution and the Supreme Court Order; but paragraph 10 of that Schedule contains a novel provision. It is worth quoting in full.

"10.-(1) Nothing in section 8 of the Constitution (which deals with protection from deprivation of property) shall affect the operation of any law that was in force immediately before 27th February 1967 or any law made on or after that date that alters a law that was in force immediately before that

date and does not

- (a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired;
- (b) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or having an interest in the property; or
- (c) deprive any person of such right as is mentioned in subsection (2) of that section.

(2) In section 8(6) of the Constitution the reference to moneys provided by Parliament includes a reference to moneys provided by any legislature having power to make laws at any time before 19th September 1983.

(3) Nothing in section 8 of the Constitution shall be deemed to apply in relation to anything done, or in relation to any compensation payable in respect of anything done, while section 6 of the former Constitution was in force, or to affect any right or liability that accrued to any person by virtue of section 6 of the former Constitution or any such law as is referred to in that section."

I hope that I do no violence to the stimulating arguments advanced by learned Counsel for the appellants when I state that in my view the questions in dispute may be placed under two broad heads, namely - (1) Has the Court got the power to enquire whether land, which has been compulsorily acquired, has in fact been acquired for a public purpose (the public purpose question); and (2) does paragraph 10 of the Second Schedule to the Constitution shield Chapter 273 from being declared unconstitutional if it offends against section 8 of the Constitution.

The public purpose question

On 31st October 1990 the National Assembly passed a resolution approving the making of a declaration that the appellants' land was required for the public purpose of housing; and the relevant declaration was published in the issues of the Official Gazette of 10th and 17th January 1991.

Learned Counsel for the appellants submitted that the learned Judge did not go into the facts of the case or make a determination of the allegation that the land had not been acquired for a public purpose. He urged this Court to read the affidavits and if we find that bad faith has been alleged and proved then the appellant is entitled to a determination and a remedy on that ground.

The appellant Charles Mills filed an affidavit in support of the application for relief on 22nd November, 1990. The respondents filed an affidavit in reply on 24th December, 1990; and this was followed by a further joint affidavit by both appellants on 7th January, 1991. In his affidavit the appellant Charles Mills deposed that he and his wife (Sylvia Mills) had purchased the land on 28th March, 1972 and thereafter occupied a property thereon as their dwelling house. Three tenants still occupied part of the land, and although notices to quit were duly given to two of them, they or their representatives still occupied that land, and a suit brought against them was due to be heard in the High Court of Justice on 28th November, 1990. He referred to correspondence which passed between himself, officials of the Government and the Solicitors of the two tenants pointed out that the area of land occupied by the two tenants consisted of about one fifth of his entire property, and was required by him for cultivation, and to provide an area for his three children, one of whom is married, to construct a home. He therefore concluded that against these facts his land had been unlawfully acquired by the Government as a consequence of its political oppression and victimisation against him and his family and not for any public purpose as ostensibly alleged.

In an affidavit filed on behalf of the respondents it is alleged that at the time of the purchase of property by the appellants that there were some 14 families living on the lands for periods in excess of 50 years, who had been given the assurance by the former owner of the lands that they would secure title to the lands which they occupied. The appellants had recovered possession from all but three of those tenants, and that negotiations had been entered into for the sale to the tenants of the land which they occupied - the only matter outstanding being the purchase price for the lands. Governments of Saint Christopher and Nevis had consistently followed a policy of acquiring village lands on which families have been living for considerable periods of time in order to grant title to those families thereby enabling them to upgrade their housing conditions; and that the intention of the Government in acquiring the appellants' land was in pursuance of that policy and not as a consequence of any political oppression or victimisation against anyone or any vindictive abuse of legislative power, but was part of a programme of upgrading housing and providing security in the ownership of land to persons who have been occupying lands for considerable periods of time.

In their affidavit in answer the appellants denied that there were some 14 families living on the land for periods in excess of 50 years, and they disclaimed being informed by the previous owner of the land of any assurances given to tenants that they would

secure the title to their lands. They admitted that three families occupied the land in issue, but denied that negotiations were ever entered into with respect to the sale of the land to anyone. They claimed that possession of the land occupied by two of the tenants was required to permit one of their children who was married to construct a matrimonial home; to enable the third tenant whose house is landlocked to have a right of way to the public road; and to arrest the advance of a slum in the small area where the three tenants lived. They doubted that the acquisition of such a small parcel of land would in any way enure to the benefit of the two tenants to whom notice to quit had been given; and repeated that the acquisition of their land was not to reduce any social and/or economic evils; but was being done as an act of bad faith against them and was a "disingenuous posture to obscure the malice and bad faith behind the respondents' true motive".

No oral evidence was given and neither side made a request to cross-examine any party on the affidavits filed. It was submitted on behalf of the appellants that the learned Judge did not make any findings of fact in relation to the matters referred to in the various affidavits; but given the state of the evidence as I have tried to state them from a summary of the affidavits, this is not surprising. The appellants also denied that negotiations were ever entered into with respect to the sale of the land to anyone; but an examination of the chain of correspondence leading up to the acquisition of the appellants' lands (including letters written by or on behalf of the appellants) reveals that they were not averse to arriving at a valuation of the land on a per square foot basis for sale to the two tenants provided that all arrears of rent were paid up to date.

As the evidence consisted solely of affidavits, this Court is in as good a position as the Judge below to make a finding on the facts. The declaration stated that the land was to be acquired for the public purpose of housing, and Counsel for the appellant conceded before the learned Judge that housing was in fact a public purpose. An allegation of bad faith was made in the affidavit filed on behalf of the appellants, but this was specifically denied in the affidavit filed on behalf of the respondents. There being no other evidence to sustain this allegation, this ground of appeal must fail since neither bad faith nor ulterior motive has been proved, and neither has it been proved that the appellants' land was not acquired for a public purpose.

The effect of paragraph 10 of the Second Schedule to the 1983 Constitution

As I stated earlier paragraph 10 of the Second Schedule to the Constitution introduced a novel provision, the purpose of which, in

my view, is to restrict the operation of section 8 of the Constitution which protects persons from the deprivation of their property. The paragraph provides that section 8 is not to apply to -

(1) any law which was in force immediately before 27th February 1967 (the date on which Statehood was achieved),
or

(2) any law which was made on or after that date, which alters a law that was in force immediately before that date; if that law does not (a) add to the kinds of property that may be taken possession of or the rights over and interests in property that may be acquired; (b) make the conditions governing entitlement to compensation or the amount thereof less favourable to any person owning or having an interest in the property; or (c) deprive any person of such right as is mentioned in subsection (2) of that section.

The learned Judge accepted the submissions made by learned Counsel for the respondents and observed that the object of the provisions of paragraph 10(1) is not to authorize the scrutiny of any law in force at the commencement of the 1967 Constitution, to detect whether it is inconsistent with the human rights and fundamental freedoms secured thereunder, but to ensure that no enactment passed after the commencement of that Constitution, should derogate from or infringe any of those rights or freedoms. He therefore held that for these reasons Chapter 273 in its unamended form was not affected by section 8 of the Constitution. Learned Counsel for the appellants argued that despite the wording of paragraph 10 of the Second Schedule to the Constitution, if the provisions of Chapter 273 had been amended they were to take effect as amended. I agree in part with this submission. This is in essence what the second part of paragraph 10(1) of the Second Schedule states, but it does go on to say that any law passed on or after 27th February 1967 will run foul of section 8 of the Constitution if it does any of the three things mentioned in subparagraphs (1)(a), (b) and (c).

It is convenient at this stage to examine the effect of the amendments made to Chapter 273 after 27th February, 1967. As I have stated earlier the Land Acquisition Ordinance (Amendment) Act, 1969 (No. 10 of 1969) came into force on 30th June, 1969. None of the amendments which it effected to Chapter 273 were in any way at variance with the matters mentioned in paragraph 10(1). That much was conceded by learned Counsel for the appellants. He argued, however, that the 1967 Constitution itself amended Chapter 273 and that in interpreting the provisions of paragraph 10(1),

Chapter 273 must be read as having been amended by the provisions of section 103(1) of the 1967 Constitution. This states that the existing laws (of which Chapter 273 is one) were, as from the commencement of the 1967 Constitution, to be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution. I will return to this point later.

It was also submitted on behalf of the appellants that the Constitution could not entrench a right under section 8 and at the same time deprive the citizen of that right under a Schedule which is a transitional provision; and that if paragraph 10(1) did save Chapter 273, then section 8 would have no meaning to the citizen once his property is acquired under the provisions of Chapter 273. In my view reading the Constitution as a whole, it has managed to achieve exactly what learned Counsel argued that it could not do. Section 8 provides strict requirements for any law which purports to acquire compulsorily the property of the citizens of the Federation. Their rights and interests are protected under that provision, that much is clear on a reading of the section. However, it is equally clear that paragraph 10 recognizes that the provisions of Chapter 273, or at any rate some of those provisions may be inconsistent with the Constitution and so it has set about saving Chapter 273 "in its pristine form" if I may borrow the words of learned Counsel for the appellant. But amendments to chapter 273 which are made after 27th February 1967 are not completely saved. Any such amendment will contravene the provisions of section 8 of the Constitution if in amending Chapter 273 it - (a) adds to the kinds of property which may be taken possession of, (b) adds to the rights over, and interests in, property that may be acquired, (c) makes the conditions governing entitlement to compensation less favourable to any person owning or having an interest in the property, (d) makes the amount of compensation less favourable to any person owning or having an interest in the property, or (e) deprives any person whose property has been compulsorily acquired of the right of access to the High Court to determine his interest or right, the legality of the acquisition, the amount of compensation to which he is entitled, and to enforce his right to prompt payment of compensation.

I have carefully considered the submissions of learned Counsel for the appellants on this point, but I find myself unable to agree with them. He also urged that where more than one interpretation is open to the Court, it ought to give effect to that interpretation which upholds the fundamental rights of the citizen.

I agree, but hasten to add that the scheme and wording of the provisions of the Constitution when read together do not, in my view, permit of any ambiguity. In **Trinidad Island-Wide Cane Farmers' Association Inc. and Attorney-General v Prakash Seereeram**

(1975) 27 WIR 329 where the Court of Appeal of Trinidad and Tobago was invited to construe that country's Constitution with flexibility and not in any narrow or pedantic sense, Chief Justice Hyatali expressed himself thus (at page 333) -

"This principle however was not intended to apply to the interpretation of words in an instrument which are plain and unambiguous. in such a case, the court is in duty bound to construe such words in their ordinary sense, irrespective of the consequences, and may not modify or bend their meaning to achieve or to avoid a particular result. See in this connexion the dictum of Lord Reid in *Inland Revenue Commissioners v Hinchy* (4) (1960) 1 All E.R. at p 512. As is stated in 36 Halsbury's Laws (3rd Edn) p 407 para 616:

'it is the duty of judges to give fair and full effect to statutes which are plain and unambiguous without regard to the particular consequence in the special case'.

There can be no doubt that a like duty governs the judicial function when plain and unambiguous words in a constitutional instrument fall to be construed."

I would adopt those words of the learned Chief Justice and hold that the effect of paragraph 10(1) of Schedule 2 to the 1983 Constitution, albeit that it is contained in a part of that Constitution entitled "Transitional Provisions", is to protect from scrutiny any law in force on 27th February 1967 which provided for the compulsory acquisition of property.

Was Chapter 273 amended by the 1967 Constitution?

Much effort was spent by learned Counsel for the appellant in arguing attractively that the 1967 Constitution should be regarded as having amended Chapter 273. This must be so, he submitted, by virtue of the wording of section 103(1) which enjoins that the existing laws shall, as from the commencement of that Constitution, be construed with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with the Constitution.

Chapter 273 was an existing law he urged, and that as soon as the 1967 Constitution came into force the provisions of the Act were to be read as if they had been specifically amended by the 1967 Constitution. So that, he concluded, when the 1983 Constitution came into force it found Chapter 273 already suitably amended; and that even if paragraph 10(1) of Schedule 2 to the 1983 Constitution were to be given its full effect, it would be operating on Chapter 273 as amended by the provisions of the 1967 Constitution.

It seems to me that what falls to be construed here are the

provisions of the 1983 Constitution; and as the Land Acquisition Act was never "construed" vis-a-vis the 1967 Constitution it cannot be said to have been amended by it. It has long been recognised and accepted that the power of interpretation of statutes is within the special province and under the exclusive control of the Judicature, a control exercised only in the course of a legal proceeding and generally only upon examination of the terms of the statute itself.

In my view, since the process of construction must be undertaken by the Courts, unless and until that process takes place the law must be deemed to remain uninterpreted. I would therefore hold that Chapter 273 was not amended by the 1967 Constitution.

The result is that this appeal is dismissed. In dealing with the question of costs in the Court below the learned Judge deprecated the conduct of the respondents following an undertaking which had been given to the Court by their Counsel and deprived them of their costs. For the reasons stated by him, I would make no order as to the costs of this appeal.



N.J.O. LIVERPOOL,
Justice of Appeal



SIR VINCENT FLOISSAC,
Chief Justice



C.M.D. BYRON,
Justice of Appeal