

42/84

IN THE PRIVY COUNCIL

ON APPEAL  
FROM THE SUPREME COURT OF MAURITIUS

B E T W E E N :-

- 1. THE MARINE WORKERS UNION
- 2. PREMANANDA PONAMBALLUM
- 3. CLEMENT MOUTOU
- 4. MAURICE PARUIT Appellants

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-v-

THE MAURITIUS MARINE AUTHORITY OF  
PORT LOUIS Respondent

and

THE MINISTERE PUBLIC Co-Respondent  
in the presence of :-

- 1. FEE SIAN YOUNG KIANG YOUNG
- 2. ROGER REQUIN Co-Respondents

and

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- 5. THE MAURITIUS MARINE AUTHORITY  
EMPLOYEES UNION
- 6. PERCY DEREK LINGAYA
- 7. MOUSSA IBRAHIM
- 8. NARAINSAMY VALAYDEN Appellants

-v-

THE MAURITIUS MARINE AUTHORITY OF  
PORT LOUIS Respondents

and

THE MINISTERE PUBLIC Co-Respondent  
in the presence of :-

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- 1. FEE SIAN YOUNG KIANG YOUNG
- 2. ROGER REQUIN Co-Respondents

AMENDED CASE FOR THE APPELLANTS

RECORD

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1. This is an appeal by leave of the Supreme Court of Mauritius, from a Judgment of that Court (Sir Maurice Rault C.J., and Victor Glover J.) dated the 21st December, 1981 rejecting and/or dismissing the Appellants' application to issue an exequatur (make executory) an Award made by an Arbitration Committee by which, inter alia, the Arbitrators re-organised the structure of The Mauritius Marine Authority ("MMA") and laid down new pay structures for most of the employees.

p.127

2. Several questions are raised in this Appeal: the six principal being :-

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p.14  
11.28-29

(i) Whether, after the Prime Minister (who was also the responsible Minister for Ports) had been instrumental in appointing arbitrators to decide the several disputes between the MMA and its employees (represented by the Unions), he could and/or ought, after the Award was given, direct the MMA under section 9 of the Ports Act, 1975, not to implement it. This will involve interpretation of, inter alia, section 9(1) of the Ports Act 1975. Its text is reproduced below at paragraph 28. It was after the Prime Minister had given an assurance that the Award would be binding, that the Unions agreed to go to arbitration;

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(ii) whether, the Mauritius Civil Procedure Amendment Act 1981 (Act 1/81) in its Section 3 was constitutional and did not constitute an interference with, or an arrogation of, judicial power by the legislature and/or the executive. Section 3 was, as conceded by the Respondents, and held by the Supreme Court, "aimed solely at the award" and at the judicial proceedings to obtain exequatur in this case. Section 3 (Article 1026-9) in short de-seized (dessaisi) the jurisdiction of the Judge in Chambers from entertaining Appellants' application upon the Ministere Public (the Attorney General) lodging an objection "opposition" in the Registry of the Supreme Court that the execution of the Award was prejudicial to the public interest (de nature à porter atteinte à l'interêt public).

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p.129  
1.27-40

A translation of Article 1026-9 is hereunder set out in paragraph 3. The original text is set out in the Judgment.

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(iii) whether, the direction, the law and the objection were not excessive, since they nullified entirely the whole Award because of its alleged excesses concerning the salary scale. The Award dealt also with other matters e.g. over-time, bilateral commission of workers and management, work-environment, etc., to which no objection had been formulated at all.

(iv) whether by (a) the Minister's said direction v/s 9 of the Ports Act and (b) the objection of the Attorney-General under the said amendment of the Mauritius Civil Procedure Act, the appellants were deprived of property rights under the award and/or whether the said property rights were compulsorily taken possession of without a law providing for compensation and further without compensation as provided by section 8 and/or section 3 of the Constitution.

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(v) whether section 3 of the Constitution has a meaning of its own and has a life independent of the succeeding sections of Chapter II of the Constitution.

(vi) whether the said Award has been shown not to be

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in the public interest and/or the 'objection' of the Attorney-General has been shown to be in the public interest.

3. Article 1026-9 of Act 1/81 is translated as follows :-

"The Ministere Public may object to the enforcement of any arbitral award where in his opinion it would be contrary to the public interest to give effect to the Award.

10 Notice to the objection shall be served on the parties by extra-judicial act making express reference to this Article.

A copy of the notice shall be lodged in the Registry of the Supreme Court.

The objection of the Ministere Public constitutes a bar to any application for the enforcement of the Award.

20 Where the objection is lodged before an application for exequature the Judge shall have no power to entertain the application.

Where the objection is lodged pending the hearing of an application the Judge, or in the case of an appeal the Supreme Court, shall not proceed with the hearing of the application or appeal.

Any provision of arbitral convention contrary to this article shall be null and void".

PART I - (Paras. 4 to 10)

30 The facts of the case

Facts concerning the extent of operations of the MMA. appearing from the Award and documents cited by Arbitrator

40 4. In 1976, the MMA, set up by the Ports Act, took over as one of its activities a government service, the Marine Services Department. Besides it had several functions covering all the maritime activities of Mauritius. It controls and regulates several important and diverse activities ranging from rescue at sea and salvaging wrecks to the direction and running in part of the sole port in Mauritius - Port Louis.

P.6  
1.33 et  
seq.

5. The MMA had in April 1979 about 569 employees divided into 105 grades. These included some government employees from the former Marine Services Department seconded for duty since July 1976, when the MMA became operational. In course of time, several of these government employees opted to become direct employees of the MMA.

p.42  
1.34

p.42  
1.30-34

At the same time the responsible Minister instructed that salaries at the MMA be as prevailing in the civil service.

The grades of employees are listed in Annexure 1 to this case and included manual workers, office workers and specialised staff.

6. Besides the MMA, there operated in the port, at all material times, several private bodies like the docks, stevedores and private companies which provided manual labour to handle cargo. These private operators were the United Docks, Desmarais Brothers Limited, the Association of Port and Harbour Employees (Stevedoring section), d'Hotman & Sons, Taylor Smith and Company etc. Salaries in these private bodies were higher than at the MMA. 10

7. In April 1979, another para-statal body the Central Electricity Board (referred for short as the CEB), had its pay structure and salaries revised and its pay to its employees increased as a result of a report made by a French Expert, Mr. Guillemain. The civil service pay pattern was not followed. 20

8. The employees of the MMA belonged mainly to three unions at the time of the dispute which led to the Award -

- (a) The appellant Mauritius Marine Authority Employees Union (MMAEU) represented 385 employees.
- (b) The Waterside Workers Union represented panel operators, crane drivers/mechanics, service plant operators and crane overseers. 30
- (c) The Marine Workers Union represented mainly the employees in the "Marine" section and came into existence during the arbitration.
- (d) Certain government servants had their case presented to the arbitrators by the Government Servants Association.

9. The appellant MMAEU had long been asking that salary scales at the MMA be not kept aligned on the civil service structure. 40

10. In April 1979, dissatisfied with their service conditions, the members of the MMAEU and other unions took industrial action as inter alia their demands for better pay scales and overtime, job evaluations, working conditions etc. were not met. A "go slow" ensued.

On 29th June 1979, the Minister of Labour and Industrial Relations arranged for a meeting of all the Unions presided over by the Prime Minister

(who was also minister responsible for the MMA, as the Minister for Ports and Communications).

PART II (Paras. 11 to 17)

The events of 29th June, 1979 at the meeting chaired by the Prime Minister and leading to the setting up of the Arbitration. p.14 et seq.

10 11. The Unions in their dispute with the MMA were asking for "formal guarantees". The Minister of Labour and Industrial Relations at the meeting of the 29th June, 1979 answered back, stating that "the issue had been taken at the highest possible level (i.e. the Prime Minister's level and head of Government level) as the Union had asked for guarantees". p.15 1.13 p.15 1.15

20 12. At that meeting the Prime Minister said he would appoint an arbitrator, on the condition that work should resume normally at the MMA. The Appellants agreed to the proposal concerning resumption of normal work. The Prime Minister then explained the difference in nature between the duties of a "consultant" and those of an "arbitrator". He stressed the fact that once an "arbitrator" had been chosen then "both parties would have no alternative but to abide by the decision of the arbitrator".

13. Government took over the responsibility for the finding of a qualified person to be the arbitrator. p.14

30 14. (a) It is submitted that at that meeting where agreement was reached both on arbitration and on its binding nature, those who bound themselves were :- p.15 1.19

- 40 (i) the Government acting by the Prime Minister;
- (ii) the Minister responsible for Ports and Communications; and
- (iii) the MMA acting by its Chairman and its Director-General (in the presence and with the concurrence of the Prime Minister).

(b) It is submitted that the expression "both parties" used by the Prime Minister included in any event, the responsible Minister and the MMA, as well as the workers and employees represented by the Unions.

15. The Unions, pending the final recommendation of the Arbitrator decided not to make any new or further demands concerning their work.

16. The MMA and the Unions collaborated in drafting the terms of reference and at every juncture the Chairman of the MMA or its Director-General sought the consent of the Government, e.g.

- p.18 1.5-6 (i) on 3rd July, 1979 when the terms of reference were agreed;
- (ii) on 4th July, 1979 when the Chairman of the MMA reiterated, in regard to the reference, that "contrary to a consultant the award of the arbitrator was final" and further stated that the Arbitrator would have two Assessors (one appointed by the management and the other by the Union); 10
- (iii) The Unions pressed for additional clauses, but the Director-General of the MMA stated that "management would have to seek the advice and consent of the Government before signing the agreement". He considered that management would need two weeks to finalise the matter; and
- (iv) The Assessor appointed by management was Mr. R. Requin, a public officer of the Prime Minister's Office and it is submitted he could not have been so appointed except with the consent of his employer, the Government. Regarding the choice of Arbitrator the Chairman of the MMA stated that "management would first have to intimate the above choice to Government". 20

- p.4-5 17. The first item of the terms of reference is important and it was "To undertake a job evaluation for the various posts .... having regard to the special operational requirements of the service, and taking into account internal relativities and all other related sectors in Mauritius with a view to reviewing the salary scales, introducing .... appropriate allowances," (en tenant compte des nécessités de fonctionnement du service et de salaires relatifs internes, aussi bien que ceux des autres secteurs qui lui sont liés à Maurice). 30
- p.7 1.5-7

### PART III - (Paras. 18 - 23)

#### The Arbitration

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- p.24 1.23 18. The Government after seeking the assistance of the French Ambassador and other authorities obtained the services of Mr. Francis Jean Lefebvre, a French National and an International Consultant on Port Management to be the Arbitrator.

- p.6 1.13 19. On 4th July, 1980 the MMA appointed Mr. Lefebvre as Arbitrator and Messrs. Requin (Establishment officer in the Prime Minister's Office) and Young were the Assessors appointed by the MMA and the Unions respectively. The Unions were asked to make specific proposals and that their proposals for each grade to be on a separate sheet. 50
- p.61.1.21.

20. Mr.Lefebvre arrived in Mauritius on 20th July, 1980 and the hearings lasted till end July, 1980.

21. (a) At a meeting of the Joint Negotiating Panel of the MMA on 1st August, 1980, where its Director-General was present, the employees criticised Management for maintaining the status quo in respect of salary scales. The Director-General said there was no "need for management to make any specific proposals for salary increases" before the Arbitrator. p.23 1.25 p.23 1.28

10 (b) The Unions thereupon drew the attention of Management to the agreement of the 13th July, 1979 where it was already specified that the findings of the Arbitrator would be binding. The Director-General confirmed that there was no change in this respect and that the findings "are binding". p.23 1.32 1.33

22. The Appellant whilst presenting its case, produced documents showing the earnings of comparable employees of the private sector enterprises in the Port. This chart is annexed to this case as Annexure 2. 20

23. On 2nd August, 1980 the Arbitrator and the Assessors made their Award. The original was given to the MMA by the Arbitrator who left Mauritius thereafter.

24. The Marine Workers Union ("MWU") which had made representations to the Arbitrators had after the judgment of the Supreme Court in this case, been dissolved and has merged with the Appellant. It also made an application to render executory the Award and by Order of the Supreme Court, its appeal and the present one were consolidated. 30

#### PART IV - The Award (p1-33)

25. The salient points of the Award were :-

- (a) It reduced the grades from 109 to only 22.
- (b) It further created a 'Commission Paritaire Permanent' (a bilateral permanent committee) presided by the Chief of Personnel of the MMA with 6 members - three representing management and three representing the main Unions. 40

This Committee was to deal with classification, interpretation and to study points on which Management and Unions were not agreed. This Committee would give its views with reasons on each topic for submission to the Director-General and/or the Board.

This Committee would decide the time and stages by which the salaries at the MMA should reach the same level as in the Private Sector Enterprises of the Port. The final 50

limit was fixed at 5 years from 1st July, 1980.

(c) It fixed the coming into force of the Award and its duration as follows :-

1st January, 1980 as regards gross salaries;

1st July, 1980 as regards allowances, overtime, extra duties etc.,

The Award was to be in force for three years reckoning from 1st July, 1980.

PART V - (Paras. 26 to 42)

Judicial proceedings for enforcement of Award and the stand of the Appellant, the MMA and the Attorney-General 10

p.2-4 26. The MMA not having implemented the Award as it was bound to do, the appellants summoned the MMA and the two Assessors who were then in Mauritius to lodge the Award in the Registry of the Supreme Court (Grefe). The Award was so lodged on the 12th December, 1980 and on the same day Appellants applied to the Judge in Chambers for summons against the MMA and pro-forma Co-Respondents to show cause why an order should not be made, making executory the Award. This was duly supported by a detailed first affidavit of Appellants. 20

p.9 1.1-7 27. On the return of the summons, the MMA put in a first affidavit admitting all the facts of the Appellants' affidavit, but adding "with regard to the implementation of the Award, the Minister responsible for ports has in the exercise of its powers under Section 9(I) of the Ports Act directed the Authority (MMA) not to implement the Award". It stated that it was bound by the direction. 30

28. Section 9(1) of the Ports Act 1975 reads as follows :-

"The Minister may, in relation to the exercise of the powers of the Authority under this Act, after consultation with the Authority, give such specific and general directions to the Authority, not inconsistent with the provisions of this Act, as he considers necessary in the public interest and the Authority shall comply with these directions". 40

p.10 29. In their second affidavit the appellants briefly stated that the Minister having expressly and tacitly instigated and set up the Arbitration Committee, could not, after award given, issue directions not to implement. He could not direct a breach of contract. The direction was not within Section 9 of the Ports Act and inter alia was unfair, unreasonable, made for a collateral and illegal purpose.



Further the Minister's direction could not affect an application made under article 1028 of the Code de Procedure Civile and was so belated as to be inoperative.

10 30. The MMA in its 2nd affidavit stated that though the Minister had concurred in setting the arbitration, he was not a 'party' to it and there was no estoppel. The avowed policy of government was to align salaries in para-statal bodies on those in the civil service. This had been overruled by the Arbitrators, though the MMA raised the point before them. p.16

31. The appellants put in a third affidavit. Many assertions made in appellant's second and all the assertions of third affidavit remained unanswered. These assertions inter alia were that - p.24-27

20 (a) the Minister's direction was for a collateral and illegal purpose;

(b) Government was a party and privy to the terms of reference; p.24 1.34 et seq.

(c) at every juncture, it had been stated by the MMA that it had obtained the agreement of the Minister;

(d) Government had concurred in the MMA's acts and approved by conduct and acts the Arbitration proceedings; p.25

(e) the objection of the MMA was not bona fide. p.27 1.2

30 32. Appellants also stated the MMA, the Minister and Government had favoured the Civil Service structure and pay scales. The Unions were asking for alignment on the private companies. Both contentions were referred to the arbitrators, and urged before them. Government and the MMA clearly knew beforehand that the Arbitrators might or might not uphold their respective contentions. p.25 1.22

40 33. The contention of the appellant Unions was to adopt the scales in the private sector and a system of grades as contained in the Guillemain report for CEB. They contended that "les secteurs qui lui sont lies" referred to the private operators mentioned in paragraph 17 above.

50 34. Arguments were heard by Justice Glover at Chambers on 3rd April 1981. Earlier, Counsel for the MMA had at the hearing of the arguments on behalf of the Workers Union stated "that the direction of the Prime Minister (was) not unreasonable as he was entitled to say that the implementation of the award was not in the public interest for it ignored the avowed policy of the p.28-31

government to align salaries etc. in the para-statal bodies on those of the public service".

35. The arguments on behalf of the MMA are set out at page 32 of the Record. It urged that the Arbitration was subject to the overriding discretion v/s 9; the Minister could not exercise his discretion before the event, on which the exercise of the discretion depended, occurred. The direction impliedly amended the Code de Procedure Civile.

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p.29 1.10

36. The appellants urged that there had been no allegation of denial of natural justice (droits de defense), no fraud was alleged against the MMA, the Minister had been kept fully informed. The power of the Minister to give directions was no larger than that of the MMA itself (the latter was bound by the award). The Prime Minister had clearly stated that the arbitration was binding.

Addendum  
XJ p.7

37. The addendum to the Record shows that at all relevant times especially as at 1st July 1980, salaries, wherever comparable were aligned on the civil service, starting from that of the Director-General and including 48 grades of employees.

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Addendum  
p.8

38. It is submitted that there were several categories of employees of the MMA who, as a fact, did not have counter-parts in the civil service and, as such it was impossible for all salaries to be aligned on those of the civil service. These 55 categories are listed in Annexure XK to this case.

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39. It is submitted that the MMA under section 37(1) of the Interpretation and General Clauses had all the rights of a natural person. "Every statutory corporation shall ....

(c) have the rights of a natural person".

40. Under the Ports Act, apart from raising funds when it needed the sanction of the Minister of Finance v/s 15 and investing s/s 16 (when it needed the approval of the Ports Minister), the MMA had plenary powers. It had to conduct its business according to commercial principles (section 14(1)(c) and had to ensure that its revenues were sufficient to meet its expenses.

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41. (a) It cannot in the circumstances be in the public interest, when an Arbitration Committee (composed of an international expert and a representative of government from the Prime Minister's Office - Mr. Requin) had considered all the implications of granting the pay rise not to implement the award and the direction of the Minister cannot and should not make the word of

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the Head of Government appear as not worthy of credence.

(b) It is submitted that employees cannot be thus allowed to lose faith in legality and be compelled to resort to unlawful means to hold Government to its bargain.

10 42. Appellants contended that the direction of the Minister was no reason for the Judge in Chambers, or for the Court to whom the matter was referred, to refuse exequatur. Defences concerning merits (le fonds) are not for the "juge de l'exequatur". Dalloz 1971, Sommaire p.177.

PART VI - (paras. 43 to 61)

20 43. On Saturday 4th April 1981, a Bill scheduled for early introduction was published. On Tuesday 7th April 1981, a new session of Parliament was called and sat. The Standing Orders were waived on the motion of the Prime Minister and the new Bill was passed (Act 1/81 - Code of Civil Procedure (Amendment Act). It received the assent and was published on 8th April 1981. p.36 1.18 et seq

44. The Bill was moved by Sir Harold Walter, as Acting Attorney General. He - as Attorney General, being the Ministere Public, - on 9th April 1978, "objected" to the exequatur on the ground that, it was in his opinion contrary to public interest "de nature a porter atteinte a l'interet public". This objection was served on appellants and deposited in the Registry of the Supreme Court. p.34 1.14 p.34 1.32

30 45. On 22nd April 1981, the matter was called by Justice Glover at Chambers and he drew the attention of Counsel Matadeen of the Crown Law Office, that the "Ministere Public" should be separately represented "as the latter is now a party to this application". p.35 1.9

46. The appellants raised several objections to this "objection" of the Attorney-General and they reiterate these before the Judicial Committee. p.36 1.35 to p.38

40 47. On 13th May 1981, the Judge in Chambers referred the matter to Court under section 84 of the Constitution.

50 48. The matter was called before Court, appellants filed a fifth affidavit stating that from 1st January 1981 to April 1981 the only applications for exequatur before the Judge or court were theirs and there were none others, and that the amendment of the law and the amended section was "aimed at and to defeat only" the application of appellants. They stated that no opportunity to be heard was given to them by the Attorney General on his intended objection. p.41 p.41 1.28

49. In the course of argument before court, it was agreed by all that the court should deal not only with the constitutional reference, but with all matters, so as to avoid piecemeal judgments.

p.42 50. On 22nd October 1981, a draft affidavit was put in by Counsel for the MMA and incorporated in a third affidavit. The MMA therein stated that it had on the instructions of the Minister of Ports made representations to the "arbitrator" that salaries and wages be aligned on the public civil service as to do otherwise would have serious repercussions on the public and private sectors. The Arbitrator had overruled this on the ground that the Authority was empowered to conduct its business on commercial principles. 10

51. Appellants repeated their contentions as regards the 'directions' of the Minister, Section 9 of the Ports Act.

p.100 1.18 52. Counsel for the MMA upon questions from the court at the hearing stated that implementation of the Award would not mean bankruptcy. 20

53. No affidavit of any kind was put forward on behalf of the Attorney-General and thus there was no opportunity for cross-examination.

Workers union brief p.13 1.1 54. Counsel for appellants pointedly referred to appellant's affidavit that the award did not affect the public interest; this was left unrebutted by the MMA and the Attorney-General.

p.116 1.18 to p.117 55. At the stage of argument only, counsel for the Attorney-General listed nine reasons, in support of the 'objection'. 30

56. It is submitted that each and every one of these factors was known, foreseen and foreseeable to the Minister and the Government when they decided on resorting to arbitration on the demand of the appellants that the salaries be not aligned on the civil service etc.

57. Appellants urged that section 3 of the Constitution prevented deprivation of property without compensation. That Government and the State was taking possession of 'property' without the consent of appellants and for this there had to be a law providing for compensation and at least adequate compensation. 40

p.131 1.33 p.135 1.37 58. The Supreme Court held that the Minister's direction was lawful, the objection of the Attorney-General was legitimate, the new law was constitutional and rejected the application of appellants. It also held that the MMA was a party of limited capacity, whose contracts had to be ratified and which could be annulled by the Minister. The appellants knew this. 50

59. Leave was granted to appeal to the Judicial Committee finally on 28th June 1982.

60. At the same time as the appellant's present case, the Supreme Court composed of the same judges (Sir Maurice Rault C.J. and V.Glover, J.) were hearing arguments in another case known as the United Docks case involving the proper interpretation of section 3 and section 8 of the Constitution.

10 Sir Maurice Rault C.J. delivered an interlocutory judgment relying on the Privy Council's decision in Thornhill (1981) A.C.61, and held that section 3 of the Constitution, had a life of its own independent of the succeeding section of chapter II of the Constitution. He also held that at the time of the coming into force of the Constitution, people in Mauritius held their property as of right and Government had no right to take over their property without law and payment of adequate compensation.

20 61. Appellants aver that the judgment of the Supreme Court should be modified, set aside, reversed for the following, amongst other,

#### R E A S O N S

(1) Because the direction of the Minister for Ports v/s 9 of the Ports Act -

(a) was in excess of his powers;

(b) was improperly exercised for an impermissible purpose;

(c) was not fairly, honestly and reasonably made;

30 (d) was not in the public interest;

(e) deprived appellants of property and accrued rights without adequate compensation or provision therefor.

(2) Because the new law (Act 1/81) was part of a scheme to deprive appellants of their accrued rights under the Award.

40 (3) Because the new law, specially in its section 3 which made it retrospective, was aimed at and made solely to defeat appellants' rights and to deprive them of property without compensation or provision therefor, and this contrary to -

(a) section 3 of the Constitution; and/or

(b) section 8 of the Constitution.

(4) Because the implementation of the Award was in the public interest and the Attorney-General had failed to show that it was not so. In any event, appellants had discharged whatever onus was on them to show that the 'objection' was not in the public interest and that it was not reasonably or honestly made.

(5) Because the objection of the Attorney-General was not fairly, reasonably and/or honestly made. It deprived appellants of property without compensation. There was no provision made by the law for compensation to be paid for such compulsorily deprivation or taking possession.

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(6) Because the effect of the new law and objection left no legal forum to the appellant to make the claims they did in the arbitration agreement.

(7) Because in any event an 'objection' of the Attorney-General under the new law, could only operate, where, after objection made, there was still a legal right in person like appellants to canvass their claims before a court of law.

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(8) Because the new law, section 3 (of Act 1/81) and the objection of the Attorney-General constituted an interference with the judicial process in this case and was also in breach of section 10 (8) of the Constitution in that it further prevented the "fair hearing" of the appellants' application.

(9) Because those parts of the Award to which no objection had been taken should have been maintained.

MADUN GUJADHUR Q.C.

IN THE PRIVY COUNCIL

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O N A P P E A L  
FROM THE SUPREME COURT OF MAURITIUS

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