

ST. VINCENT

IN THE COURT OF APPEAL

CIVIL APPEAL NO. 8 of 1975

BETWEEN: CARGO CONTRACTORS (ST. VINCENT) LIMITED

VS.

THE ATTORNEY GENERAL OF ST. VINCENT

Before: The Honourable the Chief Justice  
The Honourable Mr. Justice St. Bernard  
The Honourable Mr. Justice Peterkin

Appearances: Emery Robertson and Othniel Sylvester  
with him for the appellants

Arthur Williams, Attorney General for  
respondent.

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1976, May 10, 11, 12, Sept. 20

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J U D G M E N T

ST. BERNARD, J.A.

The appellant sought by motion in the High Court an order that certain matters referred to the Arbitrator, K.L. Gordon, under an agreement called an arbitration Agreement dated the 4th day of December, 1974, (hereinafter referred to as the Agreement) and made between the appellant company and the Government of St. Vincent, be remitted to the arbitrator for his reconsideration and for the purpose of making an award in accordance with the terms of the Agreement. This appeal arises out of the dismissal of this motion. Several grounds of appeal were argued in order to show that the judge's determination of the questions raised in the motion was erroneous.

The Arbitrator refused to make any award in accordance with the terms of the agreement and gave the following reasons:

/"I.....

"I have given careful consideration to terms and provisions of the agreement of the 4th December, 1974, and have come to the conclusion that any award made by me thereunder would be contrary to the express provisions of the cancellation Ordinance whereby all duties, liabilities, rights and privileges of the parties to the agreement of the 26th August, 1964 were thereby extinguished.

Any such award made by me under the agreement of 4th December, 1974, would accordingly be null, void and of no effect."

It should be noted that at the time the parties entered into the agreement on the 4th December, 1974, the House of Assembly of the state of St. Vincent was dissolved prior to general elections and a "care-taker" cabinet was carrying on the Government.

The trial judge found Cabinet had no power to repeal the Cancellation Ordinance, 1968, No.6, and was not competent to enter into the Agreement of the 4th December, 1974, as such an agreement was contrary to public policy and a usurpation of the functions of the legislature. He stated that the rights of the parties were extinguished in 1968 and could not be affected by section 6 of the Constitution which came into operation on the 27th October, 1969.

The main questions which arise for determination are the legal effect especially of sections 2, 3, 4 and 5 of the Port of Kingstown Agreement (Cancellation) Ordinance, 1968, (No.6) having regard to sections 6 and 104 of the Constitution and whether or not any dispute arose which could be submitted to arbitration bearing in mind the definition of "arbitration agreement" under the Arbitration Ordinance, 1952 (No.10).

Sections 2, 3, 4 and 5 of the Cancellation Ordinance, 1968, and the definition of "arbitration agreement" in the Arbitration Ordinance, 1952, read respectively -

/2. ....

Cancel-  
lation of  
Agreement.

2. The Agreement relating to the maintenance and operation of the Port of Kingstown facilities and other matters connected therewith made the 26th day of August, 1964, between the Administrator of Saint Vincent acting therein for and on behalf of the Government of Saint Vincent (hereinafter referred to as the Government) of the One part and Cargo Contractors (Saint Vincent) Limited a Company registered in Saint Vincent under the Companies Act (Cap.219) of Saint Vincent (hereinafter referred to as the Contractors) of the Other part a copy of which Agreement is set out in the Schedule to this Ordinance, is hereby cancelled, and all duties, liabilities, rights and privileges of both parties which may have accrued during the continuance and on or after the cancellation of the said Agreement are hereby extinguished.

Government  
shall take  
over con-  
trol of Port  
facilities.

3. From the date of the coming into operation of this Ordinance, the Government shall take over--

(1) The Port facilities from the Contractors and Government shall make provisions for carrying on the services provided by the Contractors as a Department of Government under the control of the Port Officer or such other person as the Administrator in Council may appoint. Whoever is appointed in charge or in control of this Department shall conform to all instructions issued to him by or on behalf of the Administrator; and

Government  
shall take  
over equip-  
ment, etc.,  
and offer  
reasonable  
compensation.

(2) All equipment (including office equipment) machinery, vehicles, furniture, goods, stores and buildings used in connection with the operation of the Port facilities and shall within six months of the take over, in writing offer the Contractors as reasonable compensation the value of such equipment (including office equipment) machinery, vehicles, furniture, goods, stores and buildings as are taken over and retained by the Government.

Compensation

4. For removing doubts, it is hereby declared that no form of compensation whatever other than that specified in subsection (2) of section 3 of this Ordinance, shall be paid to the Contractors by the Government.

Arbitration.

5. In the event that the Contractors considers that the compensation offered them by or on behalf of the Government is unreasonable, they shall within 15 days of the communication of the offer so notify the Government in writing and each party shall appoint an arbitrator and a third person shall be appointed by the parties arbitrators and the provisions of the Arbitration Ordinance, 1952, shall apply.

No.10 of 1952.

/"Arbitration.....

"Arbitration agreement" means a written agreement to submit present or future differences to arbitration, whether an arbitrator is named therein or not."

The learned trial judge stated as his opinion in his judgment that he did not consider an award was made by the arbitrator. There was much argument before this court as to whether or not the decision given by the arbitrator amounted in law to an award. Counsel for the appellant submitted that it was and cited a number of authorities in support of this view. On the contrary counsel for the respondent supported the view of the judge and submitted that as no award was made there could be no remission of the matter to the arbitrator. In my view the term "award" is a technical term when applied to arbitration proceedings and if I may adopt the language of Richardson J. in *Winter v. White* 129 E.R. 758, I would hold that an award, in its nature, is the determination of a third person, who is to judge of disputes existing between two others or more, who submit to the judgment of such third person giving him power to decide and the duty arises from the contract of submission. It appears to me, therefore, that any decision or determination given by the arbitrator on matters referred him would constitute an award by him and I hold that the decision given in this case was an award. The question which arises in this regard, to my mind, was whether there was misconduct or not on his part so that the matter could be remitted to him for reconsideration under section 18 of the Arbitration Ordinance, 1952.

Counsel for the appellant submitted that the Cancellation Ordinance, 1968, amounted to a compulsory acquisition of property rights without adequate compensation since the compensation was limited by statute. He contended that although the act limited compensation the entitlement to  
/compensation.....

compensation for the breach of contract was recognised. He further contended that section 6 of the Constitution Order, 1969, provided for adequate compensation of property compulsorily acquired. Counsel also submitted that although the Cancellation Ordinance was constitutional at the time of its passing in 1968 when the Constitution Order, 1969, came into operation on the 27th October, 1969, it was an existing law which was repugnant to the Constitution and fell within the provisions of section 104 of the Constitution and therefore these provisions should prevail.

The Attorney General submitted that it was not competent for the cabinet through the Cabinet Secretary to enter into the agreement having regard to the provisions of the Cancellation Ordinance, and especially so, since at the time there was a dissolution of Parliament. He further submitted that the purported Agreement fell within the provisions of the Arbitration Ordinance, 1952, and since there was no dispute between the Government of St. Vincent and the appellant there was nothing in the nature of a dispute which could be referred to arbitration. He contended that in the face of the existing legislation it was contrary to public policy for the Cabinet to enter into such an agreement and had the arbitrator made an award in the terms of the agreement he would have been guilty of misconduct. He cited the case of *David Taylor & Son Ltd. v. Barnett* (1953) 1 A.E.R. 843.

Section 2 of the Cancellation Ordinance, 1968, made reference to a contract recited in the schedule to the Ordinance entered into between the Government of St. Vincent and the appellants on the 26th day of August 1964. Under this contract the appellants had certain duties, liabilities, rights and privileges in and over the port of Kingstown. This state of affairs continued until the 9th day of

/February, .....

February, 1968, when the ordinance mentioned herein came into operation and cancelled the contract and completely extinguished all the duties, right, privileges and liabilities of both parties which may have accrued during the continuance of the contract and on or after the cancellation. Section 4 provided that no form of compensation whatever should be paid other than that specified in subsection (2) of section 3. When the agreement was entered into on the 4th December, 1974 the compensation referred to in section 5 had been settled. The agreement, therefore, was an agreement to assess compensation for which the act expressly provided should not be paid. Sub-paragraph (a) of paragraph 1 of the agreement specifically excludes compensation provided for under the Ordinance and includes compensation for loss of profits as the appellant is entitled to under the agreement of 26th August, 1964, by reason of the breach by Government in termination the same.

In my opinion when the agreement was entered into and the arbitrator appointed there was no dispute or differences between the parties which could properly be submitted for arbitration. The agreement recites in its preamble that notwithstanding the provisions of the Ordinance (No.6 of 1968) the parties have agreed to refer to arbitration the compensation to which the company is entitled as hereinafter appears. The compensation referred to "hereinafter" is the compensation for breach of the agreement which was cancelled by the Ordinance and all rights, privileges etc. thereunder were extinguished. It is the duty of an arbitrator, in absence of express provision in the submission to the contrary, to decide the questions submitted to him according to the legal rights of the parties, and not according to what he

/may.....

may consider fair and reasonable under the circumstances. Under the agreement the arbitrator was given the powers conferred on arbitrators by the Arbitration Ordinance, 1952. It appears to me that the agreement was in direct conflict with the provisions of the Cancellation Ordinance and the definition of "arbitration agreement" in section 2 of the Arbitration Ordinance and unless the appellants are able to show that the Cancellation Ordinance has been impliedly repealed by section 104 of the Constitution Order, 1969, and by its repeal the rights thereby extinguished were revived in my opinion, the agreement was contrary to public policy and unenforceable at law. The arbitrator was to assess compensation as if the Cancellation Ordinance had not been passed. If it is still the law of the state this exercise would be in my view ultra vires the executive branch of Government without legislative sanction.

Counsel for the appellant submitted that at the time the agreement was entered into in 1974, a person, under section 6 of the constitution, was entitled to full compensation and any person so entitled could lawfully enter into a contract to assess the amount of that compensation. He further submitted that vested rights were not taken away without compensation and that the right or entitlement to compensation of the appellant for the breach existed and continued despite the provisions of section 2 of the Cancellation Ordinance since section 4 of the said Ordinance conferred a benefit upon the Government. The Attorney General submitted that at the time of the agreement the rights and privileges of both parties were extinguished. He contended that when the Constitution Order came into operation it preserved existing rights and future rights and privileges and could not resurrect or preserve a right which was already extinguished.

/In.....

In my view although at the coming into operation of the Constitution Order the Cancellation Ordinance was an existing law, the rights and privileges of both parties were extinguished since the 9th February 1968, and the provisions of the Constitution did not resurrect those rights and privileges. Section 6 of the Constitution speaks of property rights; it does not appear that these provisions were intended to cover damages for breach of contract.

Counsel for the appellant further submitted that the arbitrator was in error when he refused to make an award in accordance with the terms of the Agreement. He said it was his duty to make such an award since he had heard all the evidence and allow the parties to enforce that award in the court, the award should therefore be remitted to him for re-consideration.

If I am right in holding that this agreement was unlawful and unenforceable then no useful purpose can be served by a remission. Denning, L.J. (as he then was) said in *David Taylor & Sons Ltd. v. Barnett* (1953) 1 A.E.R. 843 at page 847 -

"There is not one law for arbitrators and another for the court, but one law for all. If a contract is illegal, arbitrators must decline to award on it just as the court would do.....  
...An arbitrator has no jurisdiction or authority to award damages on an illegal contract."

I agree with the trial judge that the agreement was contrary to public policy and illegal and that the arbitrator was right in refusing to make any award in accordance with the terms of the submission referred to him. I would dismiss the appeal with costs.

/E.L. St. Bernard.....

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(E.L.St. Bernard)  
JUSTICE OF APPEAL

I agree

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(N.A. Peterkin)  
JUSTICE OF APPEAL

I also agree

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(Sir Maurice Davis)  
CHIEF JUSTICE