

DOMINICA

IN THE COURT OF APPEAL

CIVIL APPEAL No. 8 of 1994

BETWEEN:

J. ASTAPHAN & CO (1970) LTD

Appellant

and

**(1) THE COMPTROLLER OF CUSTOMS
(2) THE ATTORNEY GENERAL OF THE COMMON-
WEALTH OF DOMINICA**

Respondents

Before:	The Rt. Hon. Sir Vincent Floissac	-	Chief
Justice			
	The Hon. Mr. C.M. Dennis Byron	-	Justice of
Appeal			
	The Hon. Mr. Satrohan Singh	-	Justice of
Appeal			

Appearances:

Mr. A. W. Astaphan for the Appellant
Mr. A. Lawrence for the Respondents

1996: March 12 & 13
May 28.

JUDGMENT

SIR VINCENT FLOISSAC, C.J.

The appellant carries on the business of a merchant in the Commonwealth of Dominica and is reputed to be one of the leading importers in that State. During the years 1991 and 1992, the appellant imported vehicular spare parts from Mitsubishi Motors Corporation. These goods arrived in Dominica in five separate consignments at different times during those years.

On arrival of each consignment the appellant had not yet received the invoice and other necessary shipping documents relating to that consignment and was therefore unable to make perfect entries of the

goods. Since the appellant was anxious to clear the goods from Customs, the Comptroller of Customs or the proper officer required the appellant to pay and the appellant in fact paid sums of money in excess of the estimated duties on the goods. The excesses amounted to \$81,824.40 in the aggregate.

The demands for payments of the excesses were made under section 27 of the Customs (Control and Management) Act Chapter 69:01 of the Laws of Dominica (Revised Edition 1990). Section 27 reads:

“(1) Without prejudice to section 26, where on the importation of any goods the importer is unable for want of any document or information to make perfect entry of those goods, he shall make a signed declaration to that effect to the proper officer.

(2) Where a declaration under subsection (1) is made to the proper officer, he shall permit the importer to examine the goods imported.

(3) Where an importer has made a declaration under subsection (1), and submits to the proper officer an entry, not being a perfect entry, in such form and manner and containing such particulars as the Comptroller may direct, and the proper officer is satisfied that the description of the goods for tariff and statistical purposes is correct, and in the case of goods liable to duty according to number, weight, measurement or strength that number, weight, measurement or strength is correct, the proper officer shall, on payment to him of the specified sum, accept that entry as an entry by bill of sight and allow the goods to be delivered for home use.

(4) For the purposes of subsection (3), the specified sum shall be an amount estimated by the proper officer to be the duty payable on such goods, together with such further sum as the proper officer may require, that further sum being not less than one half of the estimated duty.

(5) If, within three months from the date of making an entry by bill of sight under subsection (3), or such longer time as the Comptroller may in any case permit, the importer makes a perfect entry, and that perfect entry shows the amount of duty C

(a) to be less than the specified sum, the Comptroller shall pay the difference to the importer, or

(b) to be more than the specified sum, the importer shall pay the difference to the Comptroller.

(6) Where no perfect entry is made within the time limit laid down by

subsection (5), the specified sum paid shall be deemed to be the amount of duty payable on the importation of the goods.

(7) Notwithstanding any other provision of this section, where, at any time after the importation of goods, the Comptroller.

is satisfied that in respect of such goods it is impossible for the importer to make perfect entry in respect of those goods, the Comptroller may, subject to such conditions and restrictions as he may see fit to impose, permit the goods to be entered at a value which is, in his opinion, the correct value of the goods, and the entry shall be deemed to be a perfect entry."

On 19th December 1 992, the Comptroller of Customs wrote to the appellants Accountant in these terms:

"I wish to refer to the request in your letter of 7th September, 1992 for an amount of eighty thousand, six hundred and twenty four dollars and sixty one cents (\$80,624.61), to be refunded as amounts due in respect of deposits paid during the period April 1991 to July 1992, and I regret to inform you that where no perfect entry had been made within the stipulated three month period, your claims will be dishonored."

On 30th March 1993, the appellant filed a Notice of Motion in the High Court. The Notice of Motion was filed under section 16 of the Constitution of the Commonwealth of Dominica. By the Notice of Motion, the appellant applied "for redress and for such further or other relief as may be appropriate for the purpose of enforcing or securing the enforcement of section 8(8) and section 6 of the Constitution Order 1978." The appellant also thereby applied for Declarations and Orders predicated on the unconstitutionality and invalidity of subsections (3), (4) & (6) of section 27 of the Customs (Control and Management) Act.

The Motion was heard by *Adams J.* In a judgment delivered on 16th May 1994, the learned judge dismissed the Motion with costs to the respondents. The appellant is dissatisfied with the judgment and has appealed against it.

The appeal is based on the contention that section 27(4) of the Customs (Control and Management) Act is unconstitutional insofar as it authorises the compulsory exaction from the importer of "such further sum as the proper officer may require, that further sum being not less than one half of the estimated duty". The argument is that the "further sum" purports to be either a tax or a duty or a penalty. If the "further sum" purports to be a tax or a duty, section 27(4) is inconsistent with the basic principle of separation of powers implicit in the Constitution. If the "further sum" purports to be a penalty, section 27(4) either

contravenes section 6 of the Constitution (which protects the individual from compulsory acquisition of his property without constitutional authority there for) or is inconsistent with the basic principle of separation of powers. These alternative hypotheses must therefore be examined.

(1) Separation of powers

It is now well established that the basic principle of separation of powers is implicit in the Constitution of the Commonwealth of Dominica and that any law which is inconsistent with that basic principle is unconstitutional and invalid. The authority for that legal proposition is the case of **John v Director of Public Prosecutions** (1985) 32 W.I.R. 230 where the Privy Council applied to the Constitution of Dominica what they had previously said in **Hinds v The Queen** (1977) A.C. 1 95.

In **Hinds v The Queen**, *Lord Diplock* (delivering the judgment of the Board in an appeal from a decision of the Court of Appeal of Jamaica) said (at p212):

"It is taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government. Thus the constitution does not normally contain any express prohibition upon the exercise of legislative powers by the executive or of judicial powers by either the executive or the legislature. As respects the judicature, particularly if it is intended that the previously existing courts shall continue to function, the constitution itself may even omit any express provision conferring judicial power upon the judicature. Nevertheless it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively."

In **John v Director of Public Prosecutions**, *Lord Rasca* (delivering the judgment of the Board in an appeal from the Commonwealth of Dominica) said (at p234):

"Their Lordships do not doubt for one moment that the Constitution of Dominica, like other similar Constitutions, takes for granted the basic principle of separation of powers and they emphatically endorse what was

said in this connection by the Board in *Hinds, Hutchinson Martin, Thomas v 2* (1 975) 24 WIR 326 at page 331 in the majority opinion given by Lord Diplock."

The power to impose taxes and duties is inherently a legislative power constitutionally vested in the Legislature. If the "further sum" which section 27(4) of the Customs (Control and Management) Act has authorised the proper officer to demand is a tax or a duty, the Legislature of Dominica has delegated or transferred its legislative power of taxation to the Executive (i.e. the proper officer). The question thus arises as to whether such delegation or transfer of legislative power offends the basic principle of separation of powers.

I concede that the delegation or transfer of legislative power by the Legislature to the Executive is not per se inconsistent with the principle of separation of powers. There is no such inconsistency if the Legislature retains effective control over the Executive in the latter's exercise of the delegated or transferred legislative power. Such effective control may be retained by circumscribing the power or by prescribing guidelines or a policy for the exercise of the power.

I also concede that the Legislature reserves the right to repeal its own legislation and to revoke any legislative power which it has delegated or transferred to the Executive. To that extent, the Legislature retains ultimate control over the Executive in relation to the exercise by the Executive of delegated or transferred legislative power. But this ultimate control is not effective after the power has been exercised in an individual case or if and when the power has already been abused by the Executive. If the basic principle of separation of legislative and executive powers is intended to be meaningful and effective, the basic principle should not be deemed to have been observed merely by reason of the existence of an ultimate control which operates ex post facto. There must be some Parliamentary control at the time of the exercise of

the power.

For these reasons, I am firmly of the opinion that if the Legislature delegates or transfers its legislative power to the Executive and does so without circumscribing the power or without prescribing guidelines or a policy for its exercise, the Legislature should be deemed to have surrendered or abdicated the power. In that event, the delegation or transfer of legislative power is inconsistent with basic principle of separation of powers.

I find support for this view in the decision of the Appellate Court of Punjab in **Devi Das v Punjab** (1967) 3 SCR. 557 which was drawn to our attention by counsel for the appellant. There, *Hubba Rao C.J.* said (at p565):

"An overburdened legislature or one controlled by a powerful executive may unduly overstep the limits of delegation. It may not lay down any policy at all; it may declare its policy in vague and general terms; it may not set down any standard for the guidance of the executive; it may confer an arbitrary power on the executive to change or modify the policy laid down by it without reserving for itself any control over subordinate legislation. This self effacement of legislative power in favor of another agency either in whole or in part is beyond the permissible limits of delegation. It is for a Court to hold on a fair, generous and liberal construction of an impugned statute whether the legislature exceeded such limits. But the said liberal construction should not be carried by the Courts to the extent of always trying to discover a dormant or latent legislative policy to sustain an arbitrary power conferred on executive authorities. It is the duty of the Court to strike down without any hesitation any arbitrary power conferred on the executive by the legislature."

If the "further sum" authorised by section 27(4) of the Customs (Control and Management) Act. is intended to be by way of additional tax or duty, the Legislature of Dominica has delegated or transferred its legislative power of taxation to the Executive. This the Legislature has done without prescribing a maximum sum or otherwise circumventing the delegated or transferred power arid without prescribing guidelines or a policy for the imposition of the "further sum."

In these circumstances, section 27(4) of the Customs (Control and Management) Act amounts to a surrender or abdication by the Legislature of

Dominica of part of its legislative power. Accordingly, to the extent to which section 27(4) empowers the proper officer arbitrarily and illimitably to impose that "further sum", section 27(4) is inconsistent with the basic principle of separation of powers and is unconstitutional and void to that extent.

(2) Compulsory acquisition and separation of powers

Section 6 of the Constitution of the Commonwealth of Dominica

includes the

following provisions:-

"(1) No property of any description shall be compulsorily take possession of, and no interest acquired, in or right over property of any description shall be compulsory acquired, except where provision is made by a law applicable to that taking of possession or acquisition for the payment, within a reasonable time, of adequate compensation.

.....
 "(6) Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of subsection (1) of this section -

- (a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property, interest or right -
 - (i) in satisfaction of any tax, rate or due;
 - (ii) by way of penalty for breach of any law or forfeiture in consequence of breach of any law;

.....
 (8) In this section -

"property" means any land or other thing capable of being owned or held in possession and includes any right relating thereto, whether under a contract, trust or law or otherwise and whether present or future, absolute or conditional;

"acquisition", in relation to an interest in or right over property, means transferring that interest or right to another person or extinguishing or curtailing that interest or right."

Section 6(1) of the Constitution thus protects the individual from the State's compulsory acquisition of his property without constitutional authority in that behalf. Such compulsory acquisition can be justified only under the circumstances and on the grounds specified in section 6 of the Constitution.

The State's compulsory exaction of money from the individual is a compulsory acquisition of the individual's property within the meaning and intent of section 6. If the compulsory exaction or acquisition of money is by way of a penalty, the compulsory exaction or acquisition is validated by section 6(a)(ii) and cannot be held to be inconsistent with or in contravention of section 6. But the compulsory exaction or acquisition of money from an individual cannot be said to be by way of penalty unless the individual was in breach of the law.

In **Norton v Public Service Commission** (1988) L.R.C. 944, *Lord Ackner* (delivering the judgment of the Privy Council in an appeal from a decision of the Supreme Court of Mauritius) said (at pp947 & 948):

"Section 8(1) and (4) of the Constitution make it clear that there is no power to fine, unless there exists a *law* which gives power to impose a fine for breach of that law. Before such a fine can be enforced, the breach of that law has to be established in the courts. Accordingly, it must follow that the power given to the Public Service Commission to "exercise disciplinary control" does not include the power to inflict a fine. In the result, regulation 41(1), in so far as it provides for punishment by the infliction of a "fine", is *ultra virus* the Public Service Commission."

In the present case, the appellant did not commit any breach of the law. Section 27 of the Customs (Control and Management) Act does not provide that an importer commits an offence if he is "unable for want of any document or information to make a perfect entry" of imported goods. Accordingly, the further sum is not a penalty and is therefore not caught or protected by section 6(a)(ii) of the Constitution. The result is that the compulsory exaction or acquisition from the appellant of the further sum of \$80,624.61 contravenes section 6 of the Constitution and is consequently invalid.

However, assuming that the appellant committed an offence and that the further sum is a penalty, the question of the basic principle of separation of powers recurs. Admittedly, the power to prescribe a fixed or mandatory punishment or a range of discretionary punishments for a criminal offence is a

legislative power constitutionally vested in the Legislature. But the power or discretion to select and inflict a punishment which is subjectively considered to be appropriate to the circumstances of a particular case is a judicial power or discretion which is constitutionally vested in the Judicature and which cannot legislatively be vested in, usurped by or transferred to the Legislature or the Executive.

In **Hinds v The Queen** (1977) A.C. 195, *Lord Diplock* (delivering the judgment of the Privy Council) said (at p226):

"In the exercise of its legislative power, Parliament may, if it thinks fit, prescribe a fixed punishment to be inflicted upon all offenders found guilty of the defined offence-as, for example, capital punishment for the crime of murder. Or it may prescribe a range of punishments up to a maximum in severity, either with or, as is more common, without a minimum, leaving it to the court by which the individual is tried to determine what punishment falling within the range prescribed by Parliament is appropriate in the particular circumstances of his case.

Thus Parliament, in the exercise of its legislative power, may make a law imposing limits upon the discretion of the judges who preside over the courts by whom offences against that law are tried to inflict on an individual offender a custodial sentence the length of which reflects the judge's own assessment of the gravity of the offender's conduct in the particular circumstance of his case. What Parliament cannot do, consistently with the separation of powers, is to transfer from the judiciary to any executive body whose members are riot appointed under Chapter VII of the Constitution, a discretion to determine the severity of the punishment to be inflicted upon an individual member of a class of offenders."

Accordingly, if the further sum authorised by section 27(4) of the Customs (Control and Management) Act is intended to be a penalty, section 27(4) is inconsistent with the basic principle of separation of powers. The "further sum" is not a fixed universal sum. Section 27(4) confers a power or discretion on the Executive (i.e. the proper officer) to decide what that sum should be in the particular circumstances of a particular case. If the further sum purports to be a penalty, the power or discretion to inflict the appropriate penalty is a judicial power or discretion which cannot be legislatively transferred to the Executive.

(3) Conclusion

To the extent to which section 27(4) of the Customs (Control and Management)

Act Chapter 69:01 of the Laws of Dominica authorises the proper officer to exact a "further sum" from an importer, section 27(4) is inconsistent with the basic principle of separation of powers and contravenes the appellant's fundamental right under section 6 of the Constitution of Dominica against compulsory acquisition of his property should be read as if the words "together with such further sum as the proper officer may require, that further sum being not less than one half of the estimated duty" had been deleted therefrom. Consequently, the exaction from the appellant of the sum of \$81,824.40 as a "further sum" under section 27(4) is unconstitutional and should be refunded to the appellant.

Accordingly, I would allow the appeal and would reverse the decision of the learned judge. I would order the respondents to refund to the appellant the sum of 81,824.40 with interest thereon at the rate of six per cent per annum from 7th September 1 992 to the date of refund thereof. I would order the respondents to pay the appellant's costs in the High Court and in this Court.

SIR VINCENT FLOISSAC
Chief Justice

I concur.

C.M.DENNIS BYRON
Justice of Appeal

I concur.

SATROHAN SINGH
Justice of Appeal