Privy Council Appeal No. 20 of 1989

Endell Thomas *Appellant*

v.

The Attorney General of Trinidad and Tobago *Respondent*

FROM

THE COURT OF APPEAL OF TRINIDAD AND TOBAGO

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 13TH NOVEMBER 1990

Present at the hearing:-

LORD BRIDGE OF HARWICH
LORD GOFF OF CHIEVELEY
LORD JAUNCEY OF TULLICHETTLE
LORD LOWRY
MR. JUSTICE TELFORD GEORGES

*[Delivered by **Lord Jauncey of Tullichettle**]*

This is the second appeal to this Board by the appellant in relation to his removal by the Police Service Commission of Trinidad and Tobago from the Police Service while holding the rank of Assistant Superintendent. The removal took effect in August 1972 consequent upon disciplinary proceedings in which he was charged with three separate and unconnected offences. In October 1972 he raised an action against the Attorney General in which he sought declarations that the regulations which created the offences with which he had been charged and the disciplinary proceedings consequent upon those charges were null and void. He sought further and consequential declarations to the effect that he was then and at all material times had been a member of the Police Service and as such entitled to full salary. In his statement of claim he contended:-

(1) that the three offences with which he had been charged did not exist in law because the Police Service Commission had no power to make them under section 102 of the Constitution,

[49] (2) that the tribunal which heard the charges conducted the inquiry improperly in as much as

certain procedural irregularities had taken place, and

(3) that the tribunal was improperly constituted contrary to the relevant regulations.

He did not contend that he had been deprived of a fair hearing contrary to the principles of natural justice.

In his defence the Attorney General traversed the appellant's contentions and maintained in addition that the jurisdiction of the High Court to inquire into the matter was ousted by the following provision in section 102(4) of the Constitution:-

> "The question whether - (a) a commission to which this section applies [sc. Police Service Commission] has validly performed any function vested in it by or under this Constitution ... shall not be inquired into in any court."

Thereafter Maharaj J. ordered that the following three questions should be tried as preliminary points of law:-

> "(1) Whether the power to create offences for which the plaintiff was triable resides in the Governor-General only or whether the three offences with which the plaintiff was charged were validly and properly created by the Police Service Commission Regulations 1966 made by the Police Service Commission with the consent of the Prime Minister under section 102 of the Constitution of Trinidad and Tobago and existed in law at any material time. (2) Whether the plaintiff's action is maintainable in view of sections 99 and 102 of the Constitution of Trinidad and Tobago. (3) Whether the plaintiff was a servant of the Crown dismissible at pleasure."

For the purposes of this appeal it is sufficient to refer to the manner in which this Board dealt with these questions without condescending upon the decisions in the courts below. The Board answered questions (2) and (3) in the negative, and concluded, albeit for reasons not referred to in question (1), that the Police Service Commission's removal of the appellant was *intra vires Thomas v. A.-G. of Trinidad and Tobago* [1982] A.C. 113. In relation to question (2) Lord Diplock said at page 135:-

> "There is also, in their Lordships' view, another limitation upon the general ouster of the jurisdiction of the High Court by section 102(4) of the Constitution; and that is where the challenge to the validity of an order made by the commission against the individual officer is based upon a contravention of 'the right to a fair hearing in accordance with the principles of fundamental justice for the determination of his rights and obligations' that is secured to him by section 2(e) of the Constitution, and for which a special right to apply to the High Court for redress is granted to

him by section 6 of the Constitution. Generalia specialibus non derogant is a maxim applicable to the interpretation of constitutions. The general 'no certiorari' clause in section 102(4) does not, in their Lordships' view, override the special right of redress under section 6.

In the instant case, however, there is no suggestion that the plaintiff was not given a fair hearing in accordance with section 2(e). Nor can it be plausibly argued that the commission acted outside its jurisdiction in removing the plaintiff from the police service in the exercise of disciplinary control over him. What it did fell fairly and squarely within the functions and jurisdiction conferred upon it by section 99(1). The High Court had no jurisdiction to inquire whether it was validly done or not.

Their Lordships' answer to question (2) is: 'No'; and since this necessarily disposes of the plaintiff's action their Lordships in dismissing the appeal will also order that the action itself be dismissed with costs here and below."

The judgment of the Board was delivered on 27th July 1981 and on 15th December of that year the appellant initiated the present proceedings by way of Originating Motion in which he sought the following relief:-

(1) A declaration that the decision of the Police Service Commission interdicting him from duty on half pay was *ultra vires* the former Constitution and null and void;

(2) A declaration that the decision of the Police Service Commission dismissing him from the Police Service was *ultra vires* the former Constitution and null and void;

(3) A declaration that he was then and at all material times had been a member of the Police Service and entitled to full salary;

(4) Damages.

It will be noted that the third declaration is for all practical purposes in terms identical to the consequential declarations sought in the first action.

The grounds relied upon by the appellant in respect of the foregoing claims were certain contraventions of various parts of sections 1 and 2 of the former Constitution which entitled him to redress in accordance with section 6 thereof.

On 11th July 1983 on the amended summons of the respondent Des Iles J. dismissed the appellant's motion on the ground that the matters set out therein were *res judicata* and on 22nd June 1988 the Court of Appeal dismissed his appeal on the same ground.

The principles applicable to a plea of *res judicata* are not in doubt and have been considered in detail in the judgment of the Court of Appeal. It is in the public interest that there should be finality to litigation and that no person should be subjected to action at the instance of the same individual more than once in relation to the same issue. The principle applies not only where the remedy sought and the grounds therefor are the same in the second action as in the first but also where, the subject matter of the two actions being the same, it is sought to raise in the second action matters of fact or law directly related to the subject matter which could have been but were not raised in the first action. The classic statement on the subject is contained in the following passage from the judgment of Wigram V.-C. in *Henderson v. Henderson* (1843) 3 Hare 100 at page 115:-

> "... where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

The principles enunciated in that dictum have been restated on numerous occasions of which it is sufficient to mention only three. In *Hoystead v. Commissioner of Taxation* [1926] A.C. 155 Lord Shaw of Dunfermline, at page 165, in delivering the opinion of the Board said:-

> "Parties are not permitted to begin fresh litigations because of new versions which they present as to what should be a proper apprehension by the Court of the legal result either of the construction of the documents or the weight of certain circumstances. If this were permitted litigation would have no end, except when legal ingenuity is exhausted."

In *Greenhalgh v. Mallard* [1947] 2 All E.R. 255 Somervell L.J. at page 257 said:-

> "I think that on the authorities to which I will refer it would be accurate to say that *res judicata* for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

In *Yat Tung Co. v. Dao Heng Bank* [1975] A.C. 581 Lord Kilbrandon, at page 590, in delivering the opinion of the Board referred to the above quoted passage in the judgment of Wigram V.-C. and continued:-

> "The shutting out of a 'subject of litigation' - a power which no court should exercise but after a scrupulous examination of all the circumstances - is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless 'special circumstances' are reserved in case justice should be found to require the non-application of the rule."

It is clear from these authorities that when a plaintiff seeks to litigate the same issue a second time relying on fresh propositions in law he can only do so if he can demonstrate that special circumstances exist for displacing the normal rules. It is against this background that the appellant's submissions must be examined.

Dr. Barnett advanced the following four propositions to which their Lordships hope they do justice by summarising as follows:-

(1) The principles of *res judicata* only apply where the cause of action was validly determined or could and should have been validly determined in the first proceeding.

(2) The constitutional contraventions conferred upon the High Court a new and original jurisdiction and gave to the appellant a separate and distinct right of application which rendered *res judicata* inapplicable.

(3) The first action having been commenced by writ of summons claiming common law remedies could not appropriately have raised the issue of breaches of the appellant's fundamental rights under the Constitution.

(4) The issues in the first action were limited to the three preliminary points of law and did not permit

determination of the appellant's right to constitutional redress.

The first proposition is unexceptionable. The remaining three propositions were relied upon by Dr. Barnett as constituting special circumstances which rendered the plea of *res judicata* inapplicable. In support of his second proposition he cited a number of cases before this Board which stressed the importance of constitutional rights. It is sufficient to refer to one, namely, *Maharaj v. A.G. of Trinidad and Tobago* [1979] A.C. 385 in which Lord Diplock, delivering the opinion of the Board, at page 398B said:-

> "Section 6(1) and (2) which deal with remedies, could not be wider in their terms. While section 3 excludes the application of sections 1 and 2 in relation to any law that was in force in Trinidad and Tobago at the commencement of the Constitution it does not exclude the application of section 6, in relation to such law. The right to 'apply to the High Court for redress' conferred by section 6(1) is expressed to be 'without prejudice to any other action with respect to the same matter which is lawfully available'. The clear intention is to create a new remedy whether there was already some other existing remedy or not. Speaking of the corresponding provision of the Constitution of Guyana, which is in substantially identical terms, the Judicial Committee said in *Jaundoo v. Attorney-General of Guyana* [1971] A.C. 972, 982:
>
> > 'To 'apply to the High Court for redress' was not a term of art at the time the Constitution was made. It was an expression which was first used in the Constitution of 1961 and was not descriptive of any procedure which then existed under Rules of Court for enforcing any legal right. It was a newly created right of access to the High Court to invoke a jurisdiction which was itself newly created. ...'"

It was, argued Dr. Barnett, the creation by section 6 of the Constitution of this new remedy which rendered the plea of *res judicata* inapplicable in this case. However Lord Diplock was not saying that this newly created remedy could only be pursued separately from any other existing remedy and indeed such a course would be contrary to normal practice in numerous cases where a number of remedies exist in relation to the same subject-matter.

Their Lordships are satisfied that the existence of a constitutional remedy such as that upon which the appellant relies does not affect the application of the principle of *res judicata*. Although no decision of this Board could be found in which this matter had been considered the researches of counsel revealed a decision of the Supreme Court of India, *Daryao and*

Others v. The State of U.P. and Others (1961) 1 SCR 574 in which the court rejected a submission that the principle of *res judicata* could not apply to a petition for redress in respect of an infringement of fundamental rights under the Constitution. Gajendragadkar J. at page 582-3 in delivering the judgment of the court said:-

> "But, is the rule of *res judicata* merely a technical rule or is it based on high public policy? If the rule of *res judicata* itself embodies a principle of public policy which in turn is an essential part of the rule of law then the objection that the rule cannot be invoked where fundamental rights are in question may lose much of its validity. Now, the rule of *res judicata* as indicated in s. 11 of the Code of Civil Procedure has no doubt some technical aspects, for instance the rule of constructive *res judicata* may be said to be technical; but the basis on which the said rule rests is founded on considerations of public policy. It is in the interest of the public at large that a finality should attach to the binding decisions pronounced by Courts of competent jurisdiction, and it is also in the public interest that individuals should not be vexed twice over with the same kind of litigation. If these two principles form the foundation of the general rule of *res judicata* they cannot be treated as irrelevant or inadmissible even in dealing with fundamental rights in petitions filed under Art. 32."

At page 585 he said:-

> "In our opinion, therefore, the plea that the general rule of *res judicata* should not be allowed to be invoked cannot be sustained."

Their Lordships would respectfully agree with the foregoing reasoning and conclusion. Furthermore notwithstanding the terms of his third proposition Dr. Barnett accepted that although it was normal practice in Trinidad to raise constitutional matters by way of originating motion it would have been possible to have raised in the first action the matters which are the matters of the present action.

So far as Dr. Barnett's fourth proposition is concerned it is correct that as a result of Maharaj J.'s order the issues before this Board were limited to the three preliminary points of law. However Maharaj J. is in no way responsible for the omission from the preliminary points of law of the constitutional questions since there was no reference thereto in the pleadings before him. If they had been referred to, it is more than probable that an appropriate question would have been included. If, however, the judge had refused to include them in the preliminary points the appellant could have appealed the order. It follows that any

limitation in the issues which were debated before this Board in the first action is entirely due to the failure of the appellant to raise all relevant matters at that time. Their Lordships therefore have no doubt that no special circumstances exist in this case for not giving effect to the plea of *res judicata*. No valid reason for not raising the constitutional issues in the first action has been advanced by the appellant. Those issues clearly should have been raised and to allow them to be raised now would be little short of an abuse of process. The relative timing of the judgment of the Board in the first action and the initiation of the present proceedings strongly suggest that the constitutional issues had not been considered by the appellant until Lord Diplock pointed out at page 135 that the ouster of the jurisdiction of the High Court under section 102(4) of the Constitution did not override the special right of redress conferred by section 6 thereof.

For the foregoing reasons their Lordships will dismiss the appeal. The appellant must pay the respondent's cost before the Board.