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Guyana Stores Ltd v Attorney General and others

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COURT OF APPEAL OF GUYANA

SINGH C, CUMMINGS-EDWARDS AND ROY JJA

26 JANUARY, 18 MARCH, 27 APRIL, 25 JUNE 2015, 21 DECEMBER 2016, 20 FEBRUARY 2017

c

Fundamental rights and freedoms – Property – Deprivation of property without compensation – Taxes – Appellant seeking conservatory orders and declarations preventing second and third respondents from demanding payment of taxes – Whether demand for taxes under taxing legislation contravening right to property d *– Constitution of the Co-operative Republic of Guyana 1980, art 142.*

Fundamental rights and freedoms – Protection of the law – Enforcement – Remedies – Damages – Appellant seeking conservatory orders and declarations preventing second and third respondents from demanding payment of taxes – e *Whether declaratory relief made in isolation of claims for enforcement permissible in claims made under Constitution – Constitution of the Co-operative Republic of Guyana 1980, art 153 – Fundamental Rights (Practice and Procedure) Act (Cap 3:03) [Guy].*

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In 2012, the second respondent, the Guyana Revenue Authority, wrote to the appellant ('GS') demanding payment of approximately $3.8bn for income, corporation and capital gains taxes for the period 1986–2010. GS contended that the respondents had not followed the procedures of g the Income Tax Act prior to demanding payment of the taxes and sought conservatory orders from the High Court preventing the second and third respondents from collecting or levying the taxes, as well as interest and penalties, and stipulating that it was not required to pay the sums assessed. GS also sought declarations from the High Court that any h attempt to levy or impose those taxes was in breach of, inter alia, art 142[a] of the Constitution of the Co-operative Republic of Guyana 1980. GS further sought damages for breach of its constitutional rights. The judge found that since no taxes were paid by GS, the only enforceable orders were for the payment of general compensatory damages and punitive damages. GS appealed to the Court of Appeal, i contending that the judge had: (i) erred in law when holding that declaratory relief was not permissible in claims made under art 153[b] of

a Article 142 of the Constitution, so far as material, is set out at [18], below.

b Article 153 of the Constitution, so far as material, is set out at [18] below.

the Constitution, unless made in conjunction with claims for enforcement; (ii) misconstrued art 153 of the Constitution and ignored its express provisions providing for securing the enforcement of fundamental rights; (iii) misapplied the principles of interpretation applicable to the Constitution; (iv) disregarded the provisions of the Fundamental Rights (Practice and Procedure) Act; and (v) erred in law when holding that GS could not maintain a claim of damages for breach of constitutional rights owing to the lack of evidence that taxes were paid.

Held – (1) GS's argument amounted to a claim of compulsory acquisition of property. It was trite law that taxation, taxing statute or the taking of taxes did not fall under the umbrella of compulsory acquisition of property. While money was property, imposition of tax was not compulsory acquisition of property. That was supported by earlier authority and the provisions of art 142 of the Constitution, which contemplated the exception to enactments imposing tax (see [21]–[25], below); *Matthews v Chicory Marketing Board* (*Vict*) (1938) 60 CLR 263, *IRC v Lilleyman* (1964) 7 WIR 496 and *Bata Shoe Co Guyana Ltd v Comr of Inland Revenue, Guyana Unit Trust Management Co Ltd v Comr of Inland Revenue* (1976) 24 WIR 172 considered.

(2) A claim which did not satisfy any deprivation or compulsory acquisition, or any other constitutional violation, could not enjoy a remedy under art 153. Article 153 gave the court wide powers to fashion a remedy and provide redress in order to secure the enforcement of rights protected by the Constitution. While it was true that a liberal interpretation had to be given, it also had to be purposive and not stretch the bounds of credibility to include a claim that was clearly exempted by the very Constitution. The Constitution provided that, without prejudice to any other action with respect to the same matter which was lawfully available, a person or association could apply to the High Court for redress and the existence of a parallel remedy was no bar to a claim for violation of constitutional rights. However, care had to be taken not to misuse constitutional redress where a claim bore no constitutional infringement. In that regard, it could not properly be said that the judge had erred in ruling that the declaratory orders should be accompanied with a consequential order and that GS had to seek redress with an enforceable order. It was not therefore the case that the judge was of the view that redress was not available. Rather, he looked at the nature of the application to secure the provision of the enforcement of the order given the constitutional guarantee. If there was no breach of a constitutional right or no breach was established, declarations in the circumstances would be useless. It followed that the judge was correct in refusing the reliefs sought and did not misconstrue art 153 or ignore its

provisions for securing the enforcement of fundamental rights (see [26], [32]–[34], [37], [39], [47], below); *Maya Leaders Alliance v A-G* (2015) 87 WIR 178 considered.

(3) The Fundamental Rights (Practice and Procedure) Act sought to remedy a defect complained of in earlier case law with respect to the practice and procedure in relation to the jurisdiction of the High Court to grant redress for breach of fundamental rights. It recognised not only the originating motion but also the writ of summons as appropriate procedures for invoking the jurisdiction of the High Court in order to obtain redress under art 153 of the Constitution. In the instant case, the applicability of the Act to the proceedings before the judge did not appear to be an issue (see [48], below).

(4) Damages were available to provide redress when it was proven that there was breach of a constitutional right. Proof of actual damage was not necessary. While under art 153 there was no need for an applicant to establish that he had suffered damages in personam, the fact of a breach of the right had to be established. In the instant case, GS had not shown infringement of that right and, in the absence of any loss, the judge could not have granted any relief (see [51], below).

Cases referred to

A-G v James (1996) 50 WIR 477, T & T CA.

Bata Shoe Co Guyana Ltd v Comr of Inland Revenue, Guyana Unit Trust Management Co Ltd v Comr of Inland Revenue (1976) 24 WIR 172, Guy CA.

Blomquist v A-G of Dominica (1987) 35 WIR 162, [1987] AC 489, [1988] LRC (Const) 315, [1987] 2 WLR 1185, Dom PC.

Chiranjit Lal Chowdhuri v Union of India (1950) SCR 869, AIR 1951 SC 41, Ind SC.

Chokolingo v A-G of Trinidad and Tobago (1981) 32 WIR 354, [1981] 1 All ER 244, [1981] 1 WLR 106, T & T PC.

Comr General of the Revenue Authority v Caribbean Chemical (Guyana) Ltd (Civil Appeal No 112 of 2008, unreported).

Durity v A-G [2002] UKPC 20, (2002) 60 WIR 448, [2003] 1 AC 405, [2003] 1 LRC 210, T & T PC.

Faultin v AG of Trinidad and Tobago (1978) 30 WIR 351, T & T CA.

Gairy v A-G of Grenada [2001] UKPC 30, (1999) 59 WIR 174, [2002] 1 AC 167, [2001] 4 LRC 671, Gren PC.

Harrikissoon v A-G (1979) 31 WIR 348, [1980] AC 265, [1979] 3 WLR 62, T & T PC.

IRC v Lilleyman (1964) 7 WIR 496, British Caribbean CA.

Jaroo v A-G [2002] UKPC 5, (2002) 59 WIR 519, [2002] 1 AC 871, [2002] 5 LRC 258, T & T PC.

Jaundoo v A-G of Guyana (1971) 16 WIR 141, [1971] AC 972, [1971] 3 WLR 13, Guy PC.

Kent Garment Factory Ltd v A-G of Guyana (1991) 46 WIR 177, [1993] 3 LRC 240, Guy CA.
Maharaj v A-G of Trinidad and Tobago (*No 2*) (1978) 30 WIR 310, [1979] AC 385, [1978] 2 All ER 670, T & T PC.
Makhan Singh v State of Punjab (1964) 4 SCR 797, AIR 1964 SC 381, Ind SC.
Matthews v Chicory Marketing Board (*Vict*) (1938) 60 CLR 263, [1938] ALR 370, (1938) 12 ALJR 184, Aus HC.
Maya Leaders Alliance v A-G [2015] CCJ 15 (AJ), (2015) 87 WIR 178, [2016] 2 LRC 414, Bel CCJ.
Mings Products and Services Ltd v A-G (221-M2008, unreported).

Appeal

The appellant, Guyana Stores Ltd, appealed against the decision of Chang CJ (Ag) dismissing its motion seeking conservatory orders and declarations to prevent the payment of various taxes demanded by the second respondent, the Guyana Revenue Authority, as well as damages for breach of its constitutional rights. The facts are set out in the judgment.

Stephen Fraser and *S Scott* for the appellant.
E Sam and *Mohabir A Nandlall, Attorney General* for the first respondent.
Ashton Chase SC and *P Chase* for the second and third respondents.

20 February 2017. The following judgment of the court was delivered.

CUMMINGS-EDWARDS CJ (AG).

INTRODUCTION

[1] On 21 December 2016, this Court ruled that it had the opportunity to carefully consider the written submission in these proceedings and our unanimous position was that the relief sought by the appellant will not be allowed. We promised to reduce our reasons in writing and deliver those on a subsequent date. We now give our reasons for decision.

BACKGROUND

[2] On 9 July 2012 the appellant, Guyana Stores, sought certain conservatory orders and declarations in the High Court. It sought orders preventing the second and third named respondents from collecting or levying Income Tax, Corporation Tax, Property and Capital Gains Taxes, interest and penalties for the years of assessments as demanded by the second named respondent. Guyana Stores also sought conservatory orders that it was not required to pay the sums assessed. Declarations were also sought that any attempt to levy or impose those taxes was in breach of arts 39, 40 and 142 of the Constitution. Guyana Stores also sought declaration that it was not liable to pay the said taxes, interest and penalties. Declarations were sought too that the respondents were not

entitled to assess or reassess them except in accordance with the procedures set out at ss 70, 72, 76 and 78 of the Income Tax Act. Guyana Stores contended that the respondents did not follow the procedures in the said sections of the Income Tax Act prior to issuing the demand letter of 24 May 2012. Additionally, damages were prayed in aid for breach of their constitutional rights.

[3] Guyana Stores Ltd, previously a government controlled company, was privatized on or around October 2000. It appears that issues arose between Guyana Stores and the Revenue Authority as to liability and quantum of taxes prior to and after privatization. In May 2012, the Guyana Revenue Authority wrote to Guyana Stores demanding payment in the sum of three billion, eight hundred and eleven million, three hundred and forty six thousand three hundred and ninety seven dollars for Income Tax, Corporation Tax and Capital Gains Tax for the period 1986–2010. They further demanded that the sum be paid within 21 days of the receipt of the letter and threatened the institution with legal proceedings on failure to comply with the request.

[4] Guyana Stores then moved to the High Court seeking the declarations and conservatory orders mentioned above. Chang CJ (Ag) heard the motion and initially granted ex parte conservatory orders. However, after consideration of the evidence by way of affidavit and legal submissions, his Honour recalled and discharged the ex parte orders. His Honour also refused to grant the declarations and other reliefs sought by Guyana Stores.

[5] The basis of the court's ruling was that the only enforceable orders sought by Guyana Stores was for the payment of general compensatory damages and punitive damages. Chang CJ found that since no taxes were paid by Guyana Stores, he could not grant the orders sought. He ruled that no final prohibitory or other enforceable order on which the conservatory orders can be sustained had been sought as a means of redress. Accordingly, his Honour dismissed the motion.

[6] Dissatisfied with the ruling of Chang CJ (Ag), Guyana Stores filed this appeal, contending as follows:

> 1. The learned Chief Justice (Ag) erred in law when he held that declaratory relief was not permissible in claims made under art 153 of the Constitution, unless made in conjunction with claims for enforcement.
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> 2. The learned Chief Justice (Ag) misconstrued art 153 of the Constitution and ignored its express provisions providing for securing the enforcement of fundamental rights.
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> 3. The learned Chief Justice (Ag) misapplied the principles of interpretation applicable to the Constitution.
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> 4. The learned Chief Justice (Ag) disregarded the provisions of the Fundamental Rights (Practice and Procedure) Act.

5. The learned Chief Justice (Ag) erred in law when he held that Guyana Stores could not maintain a claim of damages for breach of constitutional rights owing to the lack of evidence that taxes were paid.

[7] For convenience we considered that some of the grounds of appeal can be taken together. We therefore considered that grounds 1, 2 and 3 can conveniently be discussed together.

WHETHER THE CHIEF JUSTICE (AG) ERRED IN LAW WHEN HE HELD THAT DECLARATORY RELIEF WAS NOT PERMISSIBLE IN CLAIMS MADE UNDER ART 153, UNLESS MADE IN CONJUNCTION WITH CLAIMS FOR ENFORCEMENT, MISCONSTRUED ART 153 AND MISAPPLIED PRINCIPLES OF INTERPRETATION

[8] The Chief Justice ruled that Guyana Stores sought no enforceable order which has the capacity of giving permanence to the conservatory orders prayed for in the motion. He said that no final prohibitory or other enforceable order on which the conservatory orders can be sustained has been sought as a means of redress. The Chief Justice, after dissecting the claim, went on to declare that the only remaining remedy sought by Guyana Stores is for a number of declarations without any related consequential relief.

[9] Mr Stephen Fraser, counsel for Guyana Stores, contended that the Chief Justice (Ag) misconstrued art 153 of the Constitution. He said the court ignored the express provisions in art 153 for securing the enforcement of fundamental rights. He said the court erred in ruling that the declaratory reliefs sought must be made in conjunction with claims for enforcement. Mr Fraser submitted that the Chief Justice (Ag) relied on decisions of the Supreme Court of India and an extract from the *Law of Writs* by V G Ramchandran to reach a wrong conclusion. He contended that declaratory reliefs were permissible without the need for enforceable orders.

[10] Relying on dicta in *Jaundoo v A-G of Guyana* (1971) 16 WIR 141, [1971] AC 972, Mr Fraser expressed the need for caution in seeking to apply remedies under the Indian Constitution to Caribbean situations and circumstances. He submitted that the declaration is the preferred relief to be sought in constitutional proceedings in Guyana and the Commonwealth Caribbean. Mr Fraser also criticized the Chief Justice's finding that Guyana Stores sought bare declarations without consequential relief and the declarations were not enforceable orders. He said too that the Chief Justice erred in finding that the reliefs sought cannot be categorized as orders under art 153 of the Constitution since they were no more than non-enforceable orders.

[11] In support of his arguments Mr Fraser relied on the majority decision in the case of the *Comr General of the Revenue Authority v Caribbean Chemical (Guyana) Ltd* (Civil Appeal No 112 of 2008, unreported). He said that by a majority decision, a stay of execution was granted against the effect of certain declaratory orders in that case.

Mr Fraser argued that the reliefs sought in the *Caribbean Chemical* case are basically the same reliefs in the present case. He therefore saw no reason why Chang CJ disallowed the motion.

[12] Mr Fraser also submitted that given the wide provisions of art 153, the orders that the Court can issue in this case are not limited to enforceable orders only. He contended that declaratory orders are not excluded as there are no limiting or qualifying words to 'order'. Relying on *Jaundoo v A-G of Guyana* (1971) 16 WIR 141, [1971] AC 972, he argued strenuously that declaratory relief was a proper remedy. He contended further that, given the ruling in *Gairy v A-G of Grenada* [2001] UKPC 30, (1999) 59 WIR 174, [2002] 1 AC 167, a more enlightened approach should have been adopted by Chang CJ.

[13] Mr Mohabir A Nandlall, Attorney General and Mr Ashton Chase SC, appearing for the respondents, submitted that the decision of the Chief Justice was correct in law. They argued that the claim by Guyana Stores was for constitutional relief in relation to taxing statute and was therefore misconceived and erroneously opposed to art 142 of the Constitution.

[14] The Attorney General submitted that given the provisions of art 142 of the Constitution, property taken in satisfaction of tax is specifically excluded as being compulsorily acquired. He said that the Income Tax Act, Corporation Tax Act and Fiscal Amendments Act are taxing statutes and are not amendable to challenge under art 142(1) as compulsory acquisition. The Attorney General accordingly submitted that the claim by Guyana Stores for constitutional relief in relation in this regard is misplaced. In support of his submissions he relied on the cases of *Mings Products and Services Ltd v A-G* (221-M2008, unreported) and *Bata Shoe Co Guyana Ltd v Comr of Inland Revenue, Guyana Unit Trust Management Co Ltd v Comr of Inland Revenue* (1976) 24 WIR 172.

[15] Mr Chase SC argued along similar lines, contending that art 153 of the Constitution could not properly be the base of the claim by Guyana Stores as there was no substantive allegation of any breach of the Constitution. He stressed that what was being claimed was a fundamental right not to pay taxes. Senior Counsel laid emphasis on the fact that under art 142, taxation laws are exempted from the fundamental rights provisions. He submitted therefore that this case is almost wholly concerned with the issue of taxation.

[16] In looking at the rival contention between Guyana Stores and the respondents, it may be appropriate to set down the reasoning of the learned Chief Justice on the subject. Chang CJ, in expressing the rationale for his decision stated that:

> 'Declaratory orders without any consequential enforceable order(s) cannot be considered as orders made "for the purpose of enforcing or securing the enforcement of any of the provisions of Article 138 to 151". As such, in a constitutional action or motion

> for redress under Article 153 of the Constitution, it is incumbent upon the plaintiff or applicant to seek redress in the form of an enforceable order or, at the very least, a declaratory order coupled with a consequential enforceable order.'

Later on the learned Chief Justice declared that:

> 'In the instant case, no consequential relief by way of prohibition against the second and/or third respondents has been sought by the applicant. All the applicant has sought are bare declarations without consequential relief. Such declarations being non-enforceable orders per se cannot be categorized as orders "for the purpose of enforcing or securing enforcement" of the applicant's rights under Article 142 or any other Article since they are no more than non-enforceable court orders.'

[17] In support of his conclusions, the Chief Justice relied on cases from India, in particular, *Chiranjit Lal Chowdhuri v Union of India* (1950) SCR 869, AIR 1951 SC 41 and *Makhan Singh v State of Punjab* (1964) 4 SCR 797, AIR 1964 SC 381. In the former case the following observations of Mukherjea J were emphasized:

> 'It would appear from the language of Article 32 of the Constitution that the sole object of the Article is the enforcement of fundamental rights guaranteed by the Constitution. A proceeding under this Article cannot really have any affinity to what is known as a declaratory suit. The first prayer made in the petition seeks relief in the shape of a declaration that the Act is invalid and is apparently inappropriate to an application under Article 32.
>
> It would be unreasonable to suggest that what the detenu cannot do to secure his release, he should be allowed to do merely for the purpose of obtaining an academic declaration … if the sole relief which the detenu seeks to obtain cannot be claimed by him by virtue of the Presidential Order. It would unreasonable to hold that he can claim a different relief viz. a mere declaration: such a relief is clearly outside the purview of the proceedings under Article 49(1)(b) and Articles 226(1) and 32(1).'

[18] Was his Honour correct in so finding? To answer that question recourse must be had to the Constitution as well as the factual basis of the claim. Indeed, as Mr Fraser argued, care must be taken not to adhere slavishly to legal expositions and commentaries on statutes that are dissimilar to ours. Article 153 of the Constitution provides that:

> '(1). Subject to the provisions of paragraph (6), if any person, including a person acting on behalf of another who is not acting in his or her own name, or a person acting on behalf of a group or an

a association acting on behalf of its members, alleges that any of the provisions of articles 138 to 151 (inclusive) has been, is being, or is likely to be contravened in relation to him or her (or in the case of a person who is detained, if any other person alleges such a contravention in relation to the detained person) then, without b prejudice to any other action with respect to the same matter which is lawfully available, that person or association (or that other person) may apply to the High Court for redress.

(2) The High Court shall have original jurisdiction—

(a) to hear and determine any application made by a person in c pursuance of the preceding paragraph;

(b) to determine any question arising in the case of any person which is referred to it in pursuance of the next following paragraph,

and may make such orders, issue such writs and give such d directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of article 138 to 151 (inclusive).' (Emphasis added.)

Article 142(1) of the Constitution stipulates that:

e '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 authority of a written law and where provision applying to that taking of possession or acquisition is made by a written law f requiring the prompt payment of adequate compensation.'

Article 142(2)(a)(i):

'(2) Nothing contained in or done under the authority of any g law shall be held to be inconsistent with or in contravention of the preceding paragraph—

(a) to the extent that the law in question makes provision for the taking of possession or acquisition of any property—

(i) in satisfaction of any tax, duty, rate, cess or other h impost …'

[19] The foregoing constitutional provisions clearly set out the jurisdiction of the High Court in relation to securing the fundamental rights of persons. Accordingly, it must be determined: (1) what relief is i being sought by Guyana Stores; (2) whether it is capable of being enforced as a fundamental right and consequently entitled to protection.

[20] Shorn of all frills, the claim of Guyana Stores is simply that it must not be made to pay tax for the years assessed by Guyana Revenue Authority. It sought orders preventing Guyana Revenue Authority from imposing or levying the taxes assessed. Guyana Stores contended that it

was not required to pay the taxes. It argued too, placing reliance on arts 39, 40 and 142 of the Constitution, that any attempt to impose the taxes would breach their fundamental rights.

[21] This argument of Guyana Stores amounts to a claim of compulsory acquisition of property. The provisions of art 142, admitting of no ambiguity, clearly state that property shall not be compulsory acquired except under the authority of a written law with provision for prompt payment of adequate compensation. It is trite law that taxation, taxing statute, or the taking of taxes does not fall under the umbrella of compulsory acquisition of property.

[22] The nature of a tax as stated in *Matthews v Chicory Marketing Board* (*Vict*) (1938) 60 CLR 263 at 276, [1938] ALR 370 is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and is not a payment for services rendered. Money is property but imposition of tax is not compulsory acquisition of property. Put another way, while money is property, imposition of tax is not compulsory acquisition of property. Payment of tax is not considered compulsory acquisition of property. Therefore the obligation to pay compensation does not occur when tax is imposed as it does not contravene the right to the property

[23] Support for this, if needed, can be found in a number of cases including *IRC v Lilleyman* (1964) 7 WIR 496 and *Bata Shoe Co Guyana Ltd v Comer of Inland Revenue, Guyana Unit Trust Management Co Ltd v Comr of Inland Revenue* (1976) 24 WIR 172. In the latter case (at p 188) Crane JA observed that:

> '… a power to tax must necessarily exclude the obligation to compensate, for the latter is necessarily incompatible with the former. But even if it were possible to go as far as to say that a monetary tax on property can be compulsorily taken possession of, I think it would make no sense of the article under consideration to suggest that prompt and adequate compensation must become payable to the individual for so doing. The truth would seem to be that taxation is absolutely unrelated to, and irreconcilably opposed to art 8(1).'

[24] Similar sentiments of the law have been expressed in Margaret DeMerieux's *The Fundamental Rights in Commonwealth Caribbean Constitutions* (p 396). She noted that:

> 'Since a law imposing a tax does not infringe the right, courts must articulate the criteria of a valid tax and it is noticeable that the only form of taking so far held non-compensable has been premised on the taxing power of the state.'

These authorities all emphasize that the taking possession of or acquisition of property in satisfaction of any tax, rate or due does not contravene the right to property.

[25] The provisions of the Constitution (art 142) also contemplate the exception to enactments imposing tax or taxes. We are of the view that taxation does not contravene the right to property. Taxation being exempted, Guyana Stores has not shown any constitutional breach or fundamental rights violation in this regard.

[26] We recognise the constitutional right to protection from compulsory acquisition of property and deprivation of property. However, a claim which does not satisfy any deprivation or compulsory acquisition or any other constitutional violation, cannot enjoy a remedy under art 153. Accordingly, given that the law imposing tax does not run foul of constitutional right to property, we find that the Chief Justice was correct in refusing the reliefs sought. Guyana Stores' claim for constitutional protection from compulsory acquisition is misconceived in the circumstances. This Court therefore agrees with the finding of Chang CJ that the constitutional jurisdiction of the High Court cannot be invoked to correct assessment of tax made by the Guyana Revenue Authority.

[27] It seems that there has been a constitutional challenge to one of the taxation statutes under which assessments were made. The observation is made that one of the declarations sought by Guyana Stores is that Fiscal Enactments (Amendment) Acts Nos 16 of 1994 and 3 of 1996, insofar as they impose a 2% minimum corporation tax are inconsistent with arts 39, 40 and 142 of the Constitution. It was contended that they would be accordingly void to the extent of the consistency.

[28] Mr Chase SC mounted the argument that it was a challenge to the legislation, which challenge generally must be timely. He said that this challenge came too late. He said that this motion sought to have the court pronounce against the validity of the Taxing Acts—the Corporation Tax Act 1970, Fiscal Enactments (Amendment) Act No 16 of 1994 and Fiscal Enactment (Amendment) Act No 3 of 1996. He said too that Guyana Stores was seeking the Court's relief on taxation imposed in the years of assessment.

[29] Guyana Stores also sought a declaration that the second and/or third named respondent did not adhere to or follow or apply the procedures set out in ss 70, 72, 76 and 78 of the Income Tax Act prior to issuing the letter of demand of 24 May 2012.

[30] It appears to us that the claim by Guyana stores falls under the appeal provision in the Taxation Act. The provisions mentioned relate to assessment and the power of the Commissioner General to revise assessment where there is objection to it. The relevant taxation statutes provide that where there are disputes regarding the assessments of taxes, notice of objection and appeal can be made to the Review Board against the assessment.

[31] The argument was also advanced on behalf of Guyana Stores that art 153 carries a wide meaning. It was contended therefore that there was no need for any enforceable orders to be prayed for before relief could be granted.

[32] Article 153 gives the court wide powers to fashion a remedy and provide redress in order to secure the enforcement of rights protected by the Constitution. The Caribbean Court of Justice in *Maya Leaders Alliance v A-G* [2015] CCJ 15 (AJ), (2015) 87 WIR 178, [2016] 2 LRC 414 recently emphasized that fact. The Court, after citing the relevant provision in the Belize Constitution, remarked (at [6]):

> 'The power thus granted to the courts to provide redress for constitutional infractions confers, and again this bears emphasis, a broad discretion to fashion effective remedies to secure the enforcement of constitutional rights.'

[33] True is it that a liberal interpretation must be given. It must also be purposive and must not stretch the bonds of credibility to include a claim that is clearly exempted by the very Constitution.

[34] We are fully aware that the Constitution provides that without prejudice to any other action with respect to the same matter which is lawfully available, a person or association may apply to the High Court for redress. The existence of a parallel remedy is no bar to a claim for violation of constitutional rights. However, care must be taken not to misuse constitutional redress where a claim bears no constitutional infringement.

[35] Mr Nandlall advanced the argument that subsequent authorities after the decision in *Maharaj v A-G of Trinidad and Tobago* (*No 2*) (1978) 30 WIR 310, [1979] AC 385 point to the fact that not every violation gives rise to constitutional redress. He said that the instant case should not have been for constitutional redress but for remedy under the Revenue Authority Act by way of appeal or revision and assessment.

[36] In *Harrikissoon v A-G* (1979) 31 WIR 348 at 349, [1980] AC 265 at 268, Lord Diplock stated that:

> 'The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by Chapter 1 of the Constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action.'

a See also *Chokolingo v A-G of Trinidad and Tobago* (1981) 32 WIR 354, [1981] 1 All ER 244, *Jaroo v A-G* [2002] UKPC 5, (2002) 59 WIR 519, [2002] 1 AC 871 and *Durity v A-G* [2002] UKPC 20, (2002) 60 WIR 448, [2003] 1 AC 405. In any event the facts of this present case do not stand up to examination as an infringement of constitutional b rights.

[37] Considering the arguments and the relevant case law on the subject, it cannot be properly said that the Chief Justice erred in ruling that the declaratory orders should be accompanied with a consequential order. His Honour did not err in ruling that Guyana Stores should seek c redress with an enforceable order. The redress could be sought with a declaratory order coupled with an enforceable order. The mere declaratory order would just declare the rights of the parties with the need for enforcement.

[38] The marginal note of the Constitution, relied on by the Chief d Justice, speaks to enforcement of protective provisions. While courts can be inventive and devise or fashion remedies, if there is no enforcement, it may be hollow. Whatever redress or remedy is granted, it must be enforced. In this regard the consideration of DeMerieux (op cit) (p 454) in relation to redress for infringement is instructive. She observed:

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> 'Another question arising directly from the formulation of the section, is as to the power conferred on courts to create or devise remedies or "modes of judicial action" to *enforce* rights—particularly f when it is noted that redress is only one aspect of enforcement, as a general term.'

[39] As we see it therefore, it is not a case that the learned Chief g Justice was of the view that redress was not available. He looked at the nature of the application to secure the provision of enforcement of the order given the constitutional guarantee. He found, taking the wheat from the chaff, that what remained of the motion, were mere declarations. If there is no breach of a constitutional right or no breach h is established, declarations in the circumstances would be useless. Declarations cannot be given where there is no basis for the claim. Guyana Stores could not secure enforcement of fundamental rights in that regard. In the circumstances, the learned Chief Justice was correct in refusing the declarations.

i **[40]** No declaration could have been given where the basis of the claim was repugnancy to the Constitution of a taxing statute. Declaratory reliefs can be granted generally without claim for enforcement where rights have been established. However, in the instant case it would be inappropriate to do so where no fundamental right can be established.

[41] Moreover, assuming that declaration could have been granted, a mere declaration by itself, in the circumstances of this case, while it may pronounce on the rights of Guyana Stores, cannot, without more, enforce those rights.

[42] Indeed, as the respondents submitted, relying on Zamir and Woolf *The Declaratory Judgment*, a declaratory order or judgment merely pronounces upon the existence or non-existence of a legal state of affairs. It is to be contrasted with an executive or coercive judgment which can be enforced by the courts. The authors noted that:

> 'in the case of an executive judgment, the courts determine the respective rights of the parties and then order the defendant to act in a certain way, for example, by an order to pay damages or to refrain from interfering with the plaintiff's rights: If the order is disregarded, it can be enforced by official action, usually by levying execution against the defendant's property or by imprisoning him for contempt of court. A declaratory judgment, on the other hand, pronounces upon a legal relationship but does not contain an order which can be enforced against the defendant …'

[43] Surely, the court, as the guardian of the Constitution and in giving effect to the provision, can give such directions as it may consider appropriate for enforcing, or securing the enforcement, of any of the rights to give redress. However, following dicta in *Blomquist v A-G of Dominica* (1987) 35 WIR 162, [1987] AC 489 the enforcement must relate to the property taken. A court cannot give relief where the property taken is exempted from a condition of breach of fundamental right.

[44] True enough the power to give redress is wide but it is also discretionary. While the 'redress' does not seem to exclude any form as such and the Chief Justice (Ag) could have devised a remedy to enforce the right, there could be no remedy where no right is breached.

[45] In *Jaundoo v A-G of Guyana*, the Privy Council held that the right to apply for redress under the Constitution was wide enough to cover the case by an applicant of any form of procedure by which the High Court may be approached to invoke the exercise of its power. However, in our view, the applicant must state a claim that is enforceable.

[46] Again, in *Faultin v AG of Trinidad and Tobago* (1978) 30 WIR 351 at 370, the Court of Appeal of Trinidad and Tobago refused to decide whether the legislation being challenged had infringed s 2 of the Constitution. The Court gave as one of its reason that the applicant had requested a bare declaration with no claim for consequential relief such as damages.

[47] As pointed out from the foregoing cases and authorities, we are not of the view that that the Chief Justice erred in his decision. We are

of the view that the Chief Justice did not misconstrue art 153 or ignore its provision for securing the enforcement of fundamental rights. This ground of appeal therefore fails.

WHETHER THE LEARNED CHIEF JUSTICE (AG) DISREGARDED THE PROVISIONS OF THE FUNDAMENTAL RIGHTS (PRACTICE AND PROCEDURE) ACT

[48] The Fundamental Rights (Practice and Procedure) Act (Cap 3:03) is an Act to give effect to art 153(6) of the Constitution and for matters connected therewith. Article 153(6)(a) provides that Parliament may make provision with respect to the practices and procedures of the High Court in relation to the jurisdiction and powers conferred upon it by or under this article. The Act allows for an application for redress to be made by way of summons or originating motion. It seeks to remedy the defect complained of in *Jaundoo's* case with respect to the practice and procedure in relation to the jurisdiction of the High Court to grant redress for breach of fundamental rights. As George C noted in *Kent Garment Factory Ltd v A-G of Guyana* (1991) 46 WIR 177, [1993] 3 LRC 240, it recognizes not only the originating motion but also the writ of summons as appropriate procedures for invoking the jurisdiction of the High Court in order to obtain redress under art 153 of the Constitution. That apart, the rules committee is tasked with making rules with respect to practice and procedure in relation to certain matters. The applicability of the Act to the proceedings before the Chief Justice does not appear to be an issue.

WHETHER THE LEARNED CHIEF JUSTICE (AG) ERRED IN LAW WHEN HE HELD THAT GUYANA STORES COULD NOT MAINTAIN A CLAIM OF DAMAGES FOR BREACH OF CONSTITUTIONAL RIGHTS BY REASON OF THERE BEING NO EVIDENCE OF TAXES BEING PAID

[49] The Chief Justice ruled that it did not appear that Guyana Stores had paid any of the taxes assessed or demanded. He said that since there was no allegation of payment of income tax, the claim for damages could not be sustained. As such, the court ruled that there was no cause of action for a claim for damages. The Chief Justice said also there were no facts to support a claim for monetary compensation for loss or injury suffered. He said that the claim for damages was therefore misconceived and must therefore be dismissed.

[50] The contention of counsel on behalf of Guyana Stores was that the learned Chief Justice erred in finding that damages will only be recoverable where taxes have been paid. Mr Fraser argued that there was no need to establish that taxes were paid. He contended that the cases establish that there is a much broader approach when assessing damages in constitutional matters.

[51] We are of the view that damages are available to provide redress when it is proven that there is breach of a constitutional right. Proof of actual damage is not necessary. In the instant case, the consideration is whether there is proof of any violation or infringement of constitutional

right to property. The claim falling within the proviso to art 142, as counsel for the respondents argued, and which argument finds favour with us, excludes the question of compensation. While we agree that under art 153, there is no need for an applicant to establish that he had suffered damages in personam, the fact of a breach of the right must be established, Guyana Stores has not shown infringement of the right. How could damages then be assessed in the circumstances? In the absence of any loss, the Chief Justice could not have granted any relief.

[52] The case of *A-G v James* (1996) 50 WIR 477, a case relied on by Mr Fraser, shows the approach which the court should take in relation to damages for constitutional violation. In that case their Lordships considered that no specific type of damage suffered by the victim of the constitutional breach was necessary before the question of monetary compensation could be considered. There did not need to be some form of additional damage (beyond being the victim of discrimination) before the question of damages could be considered. The Privy Council ruled that while constitutional violations required emphatic vindication, that vindication could be supplied by a mere declaration in appropriate cases. Their Lordship emphasized that to treat entitlement to monetary compensation as automatic where violation of a constitutional right had occurred would undermine the discretion that was invested in the court under the Constitution.

[53] In relation to the ground of appeal whether the learned Chief Justice misapplied the principles—we rule that he did not. Indeed, a Constitution must be given broad and purposive interpretation.

CONCLUSION

[54] The issue at the heart of this case is whether the demand for taxes under the taxing legislation contravened Guyana Stores' right to property. We are of the view that this is a case of taxation, and involves no claim for or finding of arbitrary deprivation of property, or compulsory acquisition of property. The remedy is provided for in the appeal process under the relevant Tax Act. It is worthy of note that there is the removal in our Constitution of alternative remedy. Consequently, even though Guyana Stores came by way of constitutional motion, there is no harm in so approaching the court albeit that a remedy exists under the Tax Act. The possibility of relief under the statutory process is no bar to relief under the Constitution. However, care must be taken not to clog the system for constitutional relief when there is no violation of the Constitution. Article 40 makes it clear that protection of fundamental rights is subject to the limitations contained in the particular fundamental rights provisions.

[55] For all the reasons given above and the particular circumstances of this case, we uphold the decision of the learned Chief Justice. Costs to each respondent is fixed in the sum of $250,000.

Appeal dismissed.