JUGNAUTH PRAVIND KUMAR (HON) v THE STATE OF MAURITIUS & ANOR

2015 SCJ 178

Record No. 108728

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Hon. Pravind Kumar Jugnauth

Plaintiff

v.

1. **The State of Mauritius**
2. **The Registrar, Civil Status**
3. **The Honourable Prime Minister**
4. **The Honourable Minister of Information and Communication Technology**
5. **The Honourable Attorney General**

Defendants

…..

JUDGMENT

Introduction: The orders prayed for

In the present action entered by way of a plaint with summons, the plaintiff is seeking redress under section 17 of the Constitution on the ground that sections 3(a), 3 (b), 3 (c), 7 (1), 9 and 13 of the Constitution are likely to be contravened in relation to him. He accordingly prays for such orders, writs and directions as this Court may consider appropriate for the purpose of enforcing, or securing the enforcement of the above-mentioned provisions of the Constitution. He further prays for:

(a) an order declaring and decreeing that sections 7 (1)(b) and 7 (1A) of the National Identity Card Act 1985 are unconstitutional and violate sections 3(a) and 7 of the Constitution;

(b) a permanent writ of injunction preventing and prohibiting the defendants from storing his fingerprints and biometric information on a database;

(c) an order holding and decreeing that the National Identity Card (Particulars in Register) Regulations 2013 (GN No 237 of 2013) made under section 3(2) (b) and 10 of the National Identity Card Act 1985 violate sections 3(a), 3(c) and 9 of the Constitution; and

(d) any such order as may be just and expedient in the circumstances of this case and as this Court may deem fit and proper in the circumstances.

Preliminary Remarks

As a result of general elections which took place after judgment had been reserved in the present case, a new government with new Ministers took over. As the new Minister of Information and Communication Technology – the defendant No. 4 in the present case - is the plaintiff himself, the case was fixed for mention in view of ascertaining whether the stand of the parties was still the same. Counsel for the plaintiff and Counsel for the defendants informed this Court that the stand of their respective clients had remained the same both in facts and in law.

The essential undisputed facts

The following essential facts, as can be gathered from the common statement of agreed facts filed by the parties, are not in dispute:

(1) The plaintiff is a citizen of the Republic of Mauritius.

(2) The defendant No. 2 is the authority vested by law for the issue, delivery and replacement of national identity cards and is the Data Controller for the purposes of the Data Protection Act.

(3) The Mauritius National Identity Scheme *("MNIS")* project has been set up under the aegis of the defendant No.3.

(4) The defendant No. 4 is a member of a Steering Committee responsible for the monitoring of the MNIS project.

(5) The implementation of the new biometric identity card project started as from 1 October 2013.

(6) The National Identity Card Act ("the NIC Act") provides that every person applying for the new identity card is under an obligation to, *inter alia:*

(i) allow his fingerprints and other biometric information about himself to be taken and recorded; and

(ii) allow himself to be photographed.

(7) The plaintiff has not yet applied for a new national identity card.

(8) Ten fingerprints are taken and recorded as part of the registration process and will be stored in the MNIC register. The plaintiff's *"biometric photograph", "biometric information"* and fingerprints will be stored in a database, which is the MNIC register.

(9) The biometric national identity card constitutes a more reliable way of verifying and authenticating the identity of a person especially as the paper-based laminated identity card which it is meant to replace can be easily tampered with and lacks adequate security features.

Outstanding issues raised in the plea *in limine*

The following points, which were raised in the plea *in limine* at the stage of pleadings, were not pressed at that stage but are now being raised:

(a) The issue of exhaustion of remedies

This issue is raised in the following terms:

> *"In the event that there is, or there is likely to be a breach of plaintiff's constitutional rights (which is denied) the Data Protection Act provides adequate investigatory and enforcement safeguards against the misuse of personal data (including biometric information) and as such plaintiff has adequate alternative remedies under the law and therefore cannot avail himself of the remedy under section 17 of the Constitution".*

Section 17(2) of the Constitution, which provides for the jurisdiction of the Supreme Court to hear applications for redress where a person alleges that any of **sections 3 to 16** has been or is likely to be contravened in relation to him, contains the following proviso:

> "*Provided that the Supreme Court shall not exercise its powers under this section if it is satisfied that adequate means of redress for the contravention alleged are or have been available to the person concerned under any other law".*

In our view, that proviso is not applicable in the present case, as the defendants cannot invoke the Data Protection Act, the constitutionality of which is being challenged, as the law under which an alternative means of redress lies.

(b) **The contention that defendants Nos. 3 and 4 should be put out of cause.**

The plea of the defendants contains a motion by defendants Nos. 3 and 4 that the plaint with summons against them be dismissed outright with costs in as much as it discloses no cause of action against them. It is true that, as pointed out in the written submissions of Counsel for the defendants, there have been no direct allegations of acts or omissions of defendants Nos. 3 and 4 said to be in breach of any of the plaintiff's constitutional rights. However, it has been averred in paragraph 6 of the plaint with summons that the MNIS project has been set up under the aegis of the defendant No. 3, while defendant No. 4 is a member of a Steering Committee responsible for the monitoring and implementation of the project. Those averments, which are not in dispute, are sufficient, in our view, to make of defendants Nos. 3 and 4 interested parties. Furthermore, at paragraph 53 (b) of the plaint with summons, a permanent writ of injunction is sought preventing "the defendants" from storing the plaintiff's fingerprints and biometric information on a database. We are accordingly not prepared to accede to the motion of defendants Nos. 3 and 4 that they should be put out of cause.

The case for the plaintiff

It has been made very clear, at paragraph 11 of the written submissions of Counsel for the plaintiff, that the latter is not contesting what he calls the *"verification"* functionality, as opposed to the *"identification functionality"* of the new biometric card. The *"verification"* function involves a comparison of the submitted biometric characteristics - a live fingerprint - with one particular corresponding characteristic, namely the same fingerprint minutiae. Verification therefore involves a one to one comparison. On the other hand, the *"identification"* function involves the recognition of an individual by comparing the submitted biometric characteristics of one person with all previously submitted and stored biometric characteristics in a database through a search. This search is referred to as a *"one to many comparison".*

The plaintiff does not contest the taking of his fingerprints and the storing of the data within the biometric card itself. What he contests is the recourse to the identification functionality which will always need the existence of a database with the biometric data stored for comparison. At paragraph 13 of the written submissions of Counsel for the plaintiff, it is contended that the *"identification"* system, using the MNIC register as a database, does affect the plaintiff's constitutional rights inasmuch as his biometric information and fingerprints will be in the possession of the defendants Nos. 1 and 2 and will be stored and retained in a database for which the defendant No. 2 is the "*Data Controller".*

It is the plaintiff's case that his right not to have his fingerprints and other biometric information stored in a database derives from

(a) a general right to privacy under section 3 (a) of the Constitution;

(b) the right to privacy referred to in section 3(c) of the Constitution;

(c) the specific right to privacy provided in section 9 (1) of the Constitution.

It is his further contention that –

(i) there is no law which has been enacted to provide for the storage of his fingerprints, and other biometric information;

(ii) although section 9(1) of the Constitution affords a right to privacy which is more restrictive than Article 8 (1) of the European Convention on Human Rights (*"*ECHR*"),* the proportionality test under section 9 (2) of the Constitution operates in the same manner as that in Article 8(2) of the ECHR**.**

The defendants' case

The defendants' case is summarized as follows at paragraph 5 of the written submissions of Counsel for the defendants:

> "*(a) 'the right to private life' or a 'general right to privacy' is not afforded by sections 3(a), 3(c) or 9 of the constitution which restrict expressly and unambiguously the right protected to the 'protection for the privacy of his home and other property';*

(b) the right to private life is instead secured by ordinary enactment, namely Article 22 of the Civil Code headed 'Du respect de la vie privée', while the right to protection of personal data is provided for in the Data Protection Act; and

(c) in any event, if the Constitution affords a general right to privacy and that right is engaged, the retention of fingerprints on the MNIC database is done under the authority of the law, in the interest of public order as it poses a legitimate aim of preventing the fraudulent usurpation of identity and cannot be said not to be reasonably justifiable in a democratic society."

Does the plaintiff have any right to invoke under the Constitution?

Section 3(a) of the Constitution

Section 3 (a) of the Constitution recognizes and declares that in Mauritius there have existed and shall continue to exist, without discrimination by reason of race, place of origin, political opinions, colour, creed or sex, but subject to respect for the rights and freedoms of others and for the public interest, "*the right of the individual to", inter alia, "life"..."*

Section 3(c) of the Constitution

Section 3 (c) of the Constitution recognizes in the same terms and subject to the same limitations *"the right of the individual to protection for the privacy of his home and other property and from deprivation of property without compensation".*

In a judgment which we delivered earlier to-day in **M. Madhewoo v The State of Mauritius and anor,** we have considered the ambit of section 3 of our Constitution and explained our view that the wording of that section, when construed in the light of its natural and ordinary meaning, would not afford constitutional protection against the taking of fingerprints.

Section 9(1) of the Constitution

However, the plaintiff can pertinently invoke, in our view, the right conferred under section 9 (1) of the Constitution which reads:-

"***9. Protection for privacy of home and other property.***

(1) Except with his own consent, no person shall be subjected to the search of his person….."

Our conclusions in Madhewoo *(supra)*

As we have concluded in **Madhewoo** (*supra)*, the protection under section 9(1) would clearly be against any form of undue interference by way of a search of any part of the body of a person without his consent **:** and the coercive taking of fingerprints from the fingers of a person, extracting its *minutiae* would clearly fall within the scope of the protection afforded to the integrity and privacy of the person under section 9 (1) of the Constitution. We however concluded, in that case, that such coercive taking of fingerprints as provided in section 4 (2) (c) of the NIC Act and the regulations made thereunder has been shown to have been made in the interests of public order and to constitute a justifiable interference with the right of the plaintiff in that case to a search of his person as provided for under section 9(1) of the Constitution. We also concluded that such interference had not been shown not to be justifiable in a democratic society.

However, in **Madhewoo** *(supra),* we took a different view in relation to the issue of storage of personal biometric data, including fingerprints. For the reasons set out in that judgment, we held, in that connection, that-

(a) the law providing for the storage and retention of fingerprints and other personal biometric data regarding the identity of a person constitutes a permissible derogation, in the interests of public order, under section 9 (2) of the Constitution**;**

(b) the provisions in the National Identity Card Act and the Data Protection Act for the storage and retention of fingerprints and other personal biometric data collected for the purpose of the biometric identity card of a citizen of Mauritius are unconstitutional.

Upon a consideration of the evidence in the present case and in the light of our legal reasoning in **Madhewoo,** our findings at (a) and (b) above are the same in the present case too.

The plaintiff's prayers

We now have to turn to the prayers of the plaintiff in paragraph 53 of his plaint with summons.

Prayer (a) is for "*an order declaring and decreeing that section 7 (1) (b) and 7 (1A) of the NIC Act 1985 are unconstitutional and violate sections 3 (a) and 7 of the Constitution.*"

And prayer (c) is for *"an order holding and decreeing that the National Identity Card (Particulars in Register) Regulations 2013 (GN No 237) made under Section 3 (2) (b) and 10 of the NIC Act 1985 violate sections 3 (a) (c) and 9 of the Constitution."*

Section 7 (1) (b) and 7 (1A) of the NIC Act deal with the requirement to produce an identity card when requested. Counsel for the plaintiff has indicated that the reference in prayer (a) to section 7 of the Constitution is a mistake and should be read as a reference to section 9 of the Constitution which we have referred to earlier in this judgment.

In the light of our observations and conclusions in **Madhewoo [2015 SCJ 177],** we decline to make the order prayed for in prayer (a) as formulated.

In relation to prayer (c), we declare, as we have done in Madhewoo (*supra)* that the provisions in the National Identity Card Act and the Data Protection Act for the storage of personal biometric data, including fingerprints, collected for the purpose of the biometric identity card of the plaintiff, are unconstitutional.

Furthermore, in response to prayer (b), we grant a permanent writ of injunction prohibiting the defendants from storing, or causing to be stored, as the case may be, any fingerprints or biometric information data obtained on the basis of the provisions in the National Identity Card Act and the Data Protection Act.

With costs against the defendants.

E. Balancy
Senior Puisne Judge

A. F. Chui Yew Cheong
Judge

A. A. Caunhye
Judge

29th May 2015

Judgment delivered by Hon. E. Balancy, Senior Puisne Judge

For Applicant :	**Me. Attorney G Nunkoo**
	Me. I. Collendavelloo, SC
	Me Y Bhadain, of Counsel
For Respondent :	**State Attorney**
	State Counsel
For Second Respondent :	**State Attorney**
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