Tong v. Takabwebwe

High Court
Topping J.
9 August 1988

Constitutional law—parliamentary privilege—jurisdiction of courts to inquire into affairs of Maneaba ni Maungatabu and issue injunctions to restrain the legislative process.
Constitutional law—separation of powers—jurisdiction of courts to issue injunctions against Ministers of the Crown.
Practice and procedure—interlocutory injunctions—principles upon which applied.

Tong, a member of the Maneaba ni Maungatabu (the Kiribati legislature) sought an interlocutory injunction to restrain Takabwebwe (the Attorney-General of Kiribati) from taking part in the proceedings of the Maneaba ni Maungatabu on the grounds that Takabwebwe had not taken the oath of office after a general election as required by section 70 of the Constitution of Kiribati. In the substantive proceedings, Tong was also seeking a declaration that Takabwebwe could not participate, and that votes cast by Takabwebwe prior to his taking the oath should not be counted.

Takabwebwe defended the injunction application on two grounds: (1) that he had taken the required oath in 1983 upon assuming office after an earlier general election and did not need to do so again; and (2) that in any event his entitlement to vote was a matter for the Speaker of the Maneaba and that the courts of Kiribati were precluded by the doctrine of parliamentary privilege from inquiring into the internal affairs of the Maneaba and granting injunctive relief.

HELD:

(1) It was doubtful whether the Court had power to grant an injunction against a Minister of the Crown so as to interfere with the parliamentary process. *Harper* v. *Home Secretary* [1955] Ch. 238; [1955] 2 W.L.R. 316; [1955] 1 All. E.R. 331 (C.A.); *Rediffusion (Hong Kong Ltd.)* v. *Attorney-General of Hong Kong* [1970] A.C. 1136 (P.C.); [1970] 2 W.L.R. 1264; *Hughes & Vale Pty. Ltd.* v. *Gair* (1954) 90 C.L.R. 203 referred to.

(2) In any event even if there was jurisdiction to issue an injunction against a Minister of the Crown so as to interfere with the legislative process, the Court ought not to do so. *Hughes & Vale Pty. Ltd.* v. *Gair* (*supra*) referred to.

(3) Further, and in any event, even if the Court was wrong in the above two respects, it was not satisfied that an interlocutory injunction should be issued as the plaintiff had failed to show that irreparable harm would be caused, nor that the balance of convenience favoured an injunction, and the plaintiff was guilty of unexplained delay in bringing this proceeding. *American Cyanamid Co. Ltd* . v. *Ethicon* [1975] A.C. 396; [1975] 2 W.L.R. 316; [1975] 1 All. E.R. 504 applied.

Other cases referred to in judgment:
Adegbenro v. *Akintola* [1963] A.C. 614; [1963] 3 All E.R. 544; [1963] 3 W.L.R. 63
Bentley-Stephens v. *Jones* [1974] 1 W.L.R. 638; [1974] 2 All E.R. 653
Bribery Commissioner v. *Ranasinghe* [1965] A.C. 172; [1964] 2 W.L.R. 1301; [1964] 2 All. E.R. 788
Browne v. *La Trinidad* [1887] 37 Ch. D. 1
Clayton v. *Heffron* (1960) 105 C.L.R. 214
Ebrahimi v. *Westbourne Galleries* [1973] A.C. 360; [1972] 2 W.L.R. 1289; [1972] 2 All E.R. 492
Hinds v. *R.* [1977] A.C. 195; [1976] 2 W.L.R. 366; [1976] 1 All E.R. 353
James Madhavan v. *Falvey* (1973) 19 Fiji Law Reports 140
Kenilorea v. *Attorney-General of Solomon Islands* [1986] L.R.C. 126
Liyanage v. *R* [1967] 1 A.C. 259; [1966] 2 W.L.R. 682; [1966] 1 All E.R. 650
Siale v. *Fotofili* [1987] L.R.C. (Const.) 247; [1987] S.P.L.R. 339
Trethowan v. *Peden* (1930) 31 S.R. (N.S.W.) 183

Legislation referred to in judgment:
Constitution of Kiribati, section 70
Privileges, Immunities and Powers of the Maneaba ni Maungatabu Act 1986, section 5

Legal sources referred to in judgment:
Cowen, "The Injunction and Parliamentary Process" (1955) 71 L.Q.R. 336
Halsbury, *Laws of England* (4th. ed.) vol. 24, paragraph 536
O'Hare and Neil, *Civil Litigation* (2nd. ed.) 238

Interlocutory application:
This was an application by the plaintiff for an interlocutory injunction against the defendant, a writ of summons and statement of claims seeking permanent relief having been filed.

TOPPING J.

Judgment:

In this notice of motion Dr. Tong, a member of the Maneaba ni Maungatabu, seeks an injunction to restrain the respondent, who is the Attorney-General of Kiribati, from taking part in the proceedings of the Maneaba ni Maungatabu (hereinafter referred to as the Maneaba) until he either takes the oath in accordance with section 70 of the Constitution of Kiribati, or until the High Court of Kiribati makes a declaration as to his eligibility to take part in these proceedings.

A writ of summons was issued prior to the motion in which the applicant seeks a declaration that the respondent Attorney-General cannot take part in the proceedings in the Maneaba following a general election until he has taken an oath in accordance with section 70 of the Constitution, and that the votes cast by the Attorney-General prior to his taking oath be not counted.

The statement of claim delivered with the writ claims an injunction and further or other relief by way of a declaration or otherwise as the Court shall deem just. Section 88 of the Constitution confers jurisdiction on this Court to hear applications for relief in certain constitutional matters.

The applicant's motion is supported by an affidavit of Dr. Tong in which he swears that the Attorney-General failed to take the oath on 6 April 1987. There is no real dispute that this is so. The Attorney-General in his affidavit in reply states that in his view he need not do so. Dr. Tong states that his opinion is that a prior oath does not carry over and in paragraph 5 he complains of the defeat of his Immigration Ordinance Amendment Bill which he claims was caused by the Attorney-General's vote being counted although he had not been sworn. In paragraph 8 of his affidavit he points to the imminent sitting of the Maneaba and asserts that the Attorney-General is not qualified to take part in those forthcoming proceedings until either he takes the oath or the High Court makes a declaration.

The Attorney-General has filed an affidavit in reply. In this affidavit he claims to have taken oath on 8 August 1983 and states that he still considers himself bound by such an oath. He will be bound until he ceases to be Attorney-General. He points to the *ex officio* nature of his appointment and to the fact that a previous Attorney-General did not take the oath more than once. He adds that his right to vote and take part in the affairs of the Maneaba has never been questioned in the Maneaba by the Speaker and he claims that the question of whether he has the right to take part in proceedings in the Maneaba is a matter for the Speaker to decide. This is a question of the internal proceedings of the Maneaba he claims.

In paragraph 7 of his affidavit the Attorney-General swears:

> Because of the importance of the Constitutional principle of law in issue, and with greatest respect to this honourable court I will not regard myself as bound by any attempt to restrain my participation in the proceedings of the Maneaba ni Maungatabu since I am lawfully entitled to take part in those proceedings.

On the face of it this seems to be a statement by the Attorney-General that he has no intention to abide by the orders of this Court if he does not agree with them. In fact I think that the matter is put in a particularly unfortunate way and that this was not the intention of the Attorney-General. I have already expressed views in Court about this paragraph. Suffice it to say now shortly that everyone must obey the decisions of the courts for this is the basis of the rule of law. If a person considers a decision to be wrong then avenues of appeal are in most cases open to that person which can be exploited. In the meantime the decision given stands until altered by the appeal court and if that court confirms the decision complained of the decision is binding on all parties unless and until the law is changed. The decision must be obeyed. It is not possible to pick and choose which decisions are acceptable and will be followed and which will not. The Constitution is supreme in Kiribati and the decisions of the Court lawfully constituted under the same constitution are binding on all persons whoever they may be in Kiribati. I have no doubt myself that the Attorney-General will abide by all decisions of the Kiribati courts and that clause 7 of the affidavit merely amounts to a claim to parliamentary privilege amplified in paragraph 8 of the affidavit. The privilege he claims is under the Privileges Immunities and Powers of the Maneaba ni Maungatabu Act 1986, section 5.

It is not necessary for me to decide this point now, but suffice it to say that there are authorities which strongly suggest that where parliamentary privilege and the Constitution conflict the Constitution is supreme. In *James Madhavan* v. *Falvey* (1973) 19 Fiji L.R. 140, the Court said: "The Constitution is by article 2 thereof the

Supreme Law, and to any extent that parliamentary privilege was inconsistent with it, but only to that extent the privilege would be void".

Again in *Bribery Commissioners* v. *Ranasinghe* [1964] 2 All E.R. page 788 Lord Pearce remarked:

> The court has a duty to see that the Constitution is not infringed and to preserve it inviolate. Unless therefore there is some very cogent reason for doing so the court must not decline to open its eyes to the truth.

Again the case of *Siale* v. *Fotofili and Others* reported in [1987] L.R.C. (Const.) page 247 and [1987] S.P.L.R. 339 was a case relating to the separation of powers, but it also dealt with the proceedings in the Legislative Assembly and considered whether judicial review was available for alleged breaches of parliamentary procedure in relation to the passing of the Bank of Tonga Act 1972. While the decision is authority for the proposition that the Court had no power to pronounce on the validity of "internal proceedings" of the House, which included the procedure adopted to conduct its business, and that it was not the function of the courts to become involved in the legislative process, yet it firmly rejected the ideas that the courts could not examine statutory provisions to see whether what had been done in the House was in accordance with Tongan Constitution and statute law.

In that case Martin J. said at page 244:

> Insofar as these Statutory provisions are relevant to an issue raised before the court, the court is entitled to—indeed must—consider whether what has been done in the House is in accordance with Tongan Constitution and statute law. No claim to privilege can alter that. That is clear on principle, and from a number of cases cited by counsel for the Plaintiff, *Kenilorea* v. *Attorney General* [1986] LRC Cons, 126, a Solomon Islands case. *Liyanage* v. *R* [1966] 1 All ER 650 (a Ceylon case), *Bribery Commissioners* v. *Ranasinghe* [1964] 2 All ER 785 (another Ceylon case), and there are dicta in *Hinds* v. *The Queen* [1976] 1 All ER 353 (a Jamaican case) and *Adegbenro* v. *Akintola* [1963] 2 All ER 544 (a Nigerian case) I will not refer to them in detail.
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> Suffice it to say that the court held in each case that it was entitled to pronounce whether parliament had acted in accordance with the written constitution and statutes of the country concerned. Where there is no statutory provision this court must apply the common law of England.

This country is not England although its present legal system owes a considerable amount to English law. It does not necessarily follow that all the rights and privileges of parliament in England apply to Kiribati and that all immunities enjoyed there from judicial review apply here. It is not a matter which needs to be decided now and is one which could entail considerable argument. Suffice it to say that it is open to the courts to examine and adjudicate on whether or not parliamentary privilege applies and that a mere claim to such privilege is not conclusive. It is as well to be clear that this is an interlocutory matter only. The relief claimed by the applicant does not accrue to him as of right. It is a matter of discretion only. The exercise of that discretion is not arbitrary but proceeds on well-established principles of law. It seems to me that two points fall to be considered. The first is: "Can an interlocutory injunction issue against a Minister with regard to the legislative process?" If the

answer to this is "Yes", the second question follows from the first: "Is this a proper case for the grant of such an injunction in all the circumstances shown before the court?"

Can an injunction be granted against a Minister? There would seem to be authority for the proposition that at any rate under Australian law (which has the same basic common law root as I-Kiribati law) an injunction ought not to be granted in connection with the legislative process. The casting of a vote by the respondent Attorney-General would be part of the legislative process. Cases such as *Harper* v. *Home Secretary* [1955], ch. 238, *Rediffusion (Hong Kong) Ltd.* v. *Attorney General of Hong Kong* [1970] A.C. 1136, quoted in Hood Phillips's *Constitutional and Administrative Law* (7th. ed.) page 89, seem to support this view, but reports of such cases are not available to me. I have also had the opportunity to read an article tendered by the State Advocate entitled: "The Injunction and Parliamentary Process" by Zelman Cowen taken from a Law Quarterly Review of 1955. Mr. Cowen's qualifications are not stated but presumably as he is published in Law Quarterly he is an academic of some note whose views are to be respected. He deals with the case of *Trethowen* v. *Peden* (1930) 31 S.R. (N.S.W.) 183 setting out the arguments of Dr. Evatt and then mentioning other cases. The argument that to grant declarations would involve the court in an interference with the powers, immunities, and privileges of parliament to control its internal proceedings and would therefore constitute contempt of parliament, was rejected by two members of the court, Martin J. and O'Brien J., but O'Brien J. said, "If the relief sought against responsible Ministers of the Crown were an injunction to restrain them from giving certain advice, the court might well as a matter of discretion refrain from granting such a injunction unless it were clear that the responsible Ministers of the Crown intended to act contrary to law, which I could hardly imagine the case would ever be".

An injunction was again refused in *Hughes and Vale Pty. Ltd.* v. *Gair* (1954) 90 C.L.R. 203 where various Queensland politicians, including the Premier and the Attorney-General, were defendants. Dixon J said: "We do not think it [the injunction] should be granted on this occasion or later on in any case".

That was an application to restrain officers from presenting a Bill for the Royal Assent. The article continued:

> These two recent cases have served only to increase the doubts raised by Long Innes J. in *Trethowan* v. *Peden* as to the propriety of judicial interference with parliamentary process even where the legislative has itself pointed to the act of presentation as the illegal act. Such a form of drafting might be thought to invite judicial intervention at that stage. Yet if the view put forward by Dixon C.J. in *Hughes and Vale Pty* v. *Gair* prevails, so that even in such a case a court will refuse to intervene, it would seem to follow that no conceivable form of drafting can empower the courts to intervene by injunction (or presumably by declaration)at this stage of the parliamentary process. ((1955) 71 L.Q.R. 336, 341)

Clayton and Others v. *Heffron and Others* (1960) C.L.R. page 214, cited by the State Advocate, was a case when the Australian courts again considered the issue of an injunction. It is not necessary to go into the facts in detail, but the plaintiffs sought an injunction against Ministers of the Crown, the Chief Secretary, and the Treasurer of the Legislative Assembly of New South Wales, to restrain them from taking certain steps to authorize the application of public monies, and for the Electoral

Commissioner to be restrained from taking any steps to submit the Constitution Amendment (Legislative Council Abolition) Bill to a referendum. The motion was dismissed initially and, on appeal, special leave to appeal was refused. Dealing with the application for an injunction the court, in the judgments of Dixon C.J., McTiernan, Taylor, and Windeyer J.J., said:

> How it is possible to support a claim for equitable relief of this nature it is difficult to understand. Indeed the Constitution of the suit as a whole strikes me as an experiment against the success of which law, equity, and wisdom combine.

They distinguished the case from *Attorney-General.* v. *Trethowan* where an injunction was granted. However in *Clayton*'s case it was conceded for the purpose of argument that an injunction could be granted against the Crown. No ratio relating to the issue of injunctions can be extracted from it. The preponderance of judicial opinion seems to be to the effect that injunctions ought not to issue against Ministers of the Crown where judicial interference in the parliamentary process is sought.

For these reasons it must be doubted if there is power in law to grant an injunction in this matter. Even if this view of the law is incorrect, I am fortified by the opinion expressed by Dixon C.J. in the *Hughes & Vale Pty. Ltd.* v. *Gair* case that an injunction ought not to be granted to interfere in parliamentary process.

In addition to the above authorities the English cases of *Ebrahimi* v. *Westbourne Galleries* [1972] 2 All E.R. 492 and *Bentley Stephens* v. *Jones and Others* [1974] 2 All E.R. 653 support the view that an injunction will not issue on an interlocutory basis in respect of irregularities which can be cured by going through the proper process. In the instant case the matters complained of could be cured by the Attorney-General taking the oath at any time. Considering the law in relation to such cases, Plowman J. in the *Bently Stephens* case observed:

> In my judgment even assuming the Plaintiff's complaint of irregularities is correct, this is not a case in which an interlocutory injunction ought to be granted. I say that for the reason that the irregularities can all be cured by going through the proper process and the ultimate result would be the same. In *Browne* v. *La Trinidad* (1887) 37 Ch. D. 1 Lindley J. said, "I think it most important that the Court should hold fast to the rule upon which it has always acted, not to interfere for the purpose of forcing companies to conduct their business according to the strictest rules, where the irregularity complained of can be set right at any moment". It seems to me that the motion before me falls within the principles stated by Lindley J.

As above noted, the cause of the complaint herein is the Attorney-General's failure to take the oath. This he can cure at any time by taking the oath. Applying the principles above ennunciated, it would seem wrong for a court to order an interlocutory injunction to issue. I therefore refuse the application.

If I am mistaken in refusing the application on the above basis then I would still refuse it on application of the general principles relating to granting of interlocutory injunctions.

The general principles on which interlocutory injunctions are granted are set out in the Rules of the Supreme Court, Order 29 Rule 1, and the notes A to N inclusive. The leading case is *American Cyanamid Co. Ltd.* v. *Ethicon* [1975] A.C. 396 in which,

according to O'Hare and Neil, in their book *Civil Litigation* (2nd. ed.) at page 238, the court held that as long as an action was not frivolous or vexatious the only substantial factor the court takes into account is the balance of convenience. They suggest that the court would ask itself: "Would it hurt the Plaintiff more to go without the injunction pending trial than it would hurt the defendant to suffer it?"

In addition to the *American Cyanamid* case there is other applicable law including the factors which a court ought to consider which are set out in Halsbury's *Laws of England* (4th. ed.) vol. 24 at page 536, paragraph 953. In considering whether to grant an interlocutory injunction, the first hurdle the applicant has to overcome is that he must show a clear case free from objection on equitable grounds, and that the court ought to interfere to preserve property without waiting for the right to be established. The right to relief must be clear. It is not necessary for the court to find a case which would entitle the plaintiff to relief at all events. It is sufficient if there is a substantial question to be investigated, and that matters ought to be preserved in *status quo* until that question can be finally disposed of. The applicants are asking me to change the *status quo* which has endured for some years.

I have to consider what apprehended or threatened injury is likely to occur to the applicant, and whether it is of an overwhelming nature, and the results of failing to grant the interlocutory relief.

Secondly, the applicants must show there is a serious question to be tried. In my view the applicants have shown this, and as the substantive claim remains to be considered I make no further comments on the merits of the applicant's case.

Thirdly, the applicant must show that an injunction until the hearing is necessary to protect him against irreparable injury. Mere inconvenience is not enough.

Fourthly, there is the question of the balance of convenience. It must be borne in mind that the defendant may also suffer damage. The burden of proof in relation to this is on the plaintiff to show greater inconvenience to himself.

Fifthly, the conduct of the parties must be considered before the application as this is an equitable matter founded on equitable jurisdiction.

Sixthly, the acquiesence of the applicant if any must be considered.

Seventhly, there is the question of delay. An applicant must be able to show that he has not been guilty of improper delay in applying to the Court for an interlocutory injunction.

Now, applying these criteria to the facts of this case as set out in the respective affidavits of the parties, I note that the cause of this complaint arose with the summoning of the Parliament or Maneaba ni Maungatabu consequent upon the election held in March 1987. This is the most favourable interpretation which can be put on events so far as the applicant is concerned. If the respondent's affidavit is accepted then the matter has gone on for years before that.

Plainly the application is a political one. The Government may rely on the vote of the Attorney-General in the Maneaba and it is this vote which the applicant seeks to restrain.

Simply because the application may be political does not mean it cannot have merit. All other things being equal, the political nature of the application must not affect it. A court should not refuse to deal with a matter simply because it has political overtones and may cause political difficulties. The Court must apply purely legal considerations and those considerations are the ones outlined above.

As the remedy is equitable it follows that the person seeking the remedy must himself observe equitable principles. This is expressed in the maxim "he who seeks

equity must do equity". One matter that has always been fatal to equitable claims is unexplained delay. The maxim concerning this is "delay defeats equity". Unexplained delay is fatal to this claim for an injunction for it is clear that such a claim ought to have been advanced immediately on the refusal of the Speaker to deal with the matter if indeed there has been such a refusal. I cannot see any way in which the delay can be explained away and it is fatal to the granting of an injunction.

Furthermore the applicant has failed to satisfy me that he would suffer any irreparable damage as a result of the injunction being refused, and has also failed to satisfy me on the balance of convenience test.

It seems to me more just that the *status quo* be preserved pending the trial of this matter than that the Attorney-General should be restrained. It is possible that the applicant's substantive claim may fail. It is true that he has established a serious case in at least some respects, but that does not guarantee him victory in the trial of the substantive issue. If the respondent can show that he is covered by parliamentary privilege, the applicant's case will fail.

In these circumstances, therefore, I have to refuse the injunction as the applicant has not established equitable basis for it and consequently this motion must be dismissed. The applicant must await the outcome of the trial of the substantive issue. Costs to the respondent.

[No names of counsel were included.]