

DAVENDRA SINGH

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v.

ATTORNEY-GENERAL

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[SUPREME COURT, 1979 (Williams, J.) Lautoka 22nd November]

Civil Jurisdiction

*Agriculture—Import of fruit—entitlement of Minister to require it to have been fumigated and so certified.*

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*B. C. Patel* for Plaintiff

*J. R. Flower* for Defendant

Plaintiff claimed damages against the Minister for Agriculture (the Minister) (but as a matter of procedure, against the Attorney-General) for negligence by his officers in destroying a consignment of tomatoes imported from Australia. Facts found or not in dispute were:—

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- (i) Plaintiff had a permit to import a quantity of fruit and vegetables. It required "fruit" to be fumigated before export, but made no requirement as to vegetables.
- (ii) The consignment arrived on 11 February, 1978, accompanied by a certificate indicating there had been no fumigation.
- (iii) Since there was no fumigation, the Minister retained the tomatoes in quarantine and acquired the plaintiff to re-export or destroy them. Plaintiff failed to do so.
- (iv) The consignment (except for vegetables accompanying the tomatoes which were released, requiring no fumigation) was destroyed at the Minister's instruction.
- (v) Plaintiff claimed tomatoes were "vegetables", Dictionaries described them as fruit.

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The question for the court was whether Fiji Law permitted the Agriculture Department to require fruit and/or vegetables to be fumigated in the country of origin.

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Importation is governed by the Noxious Weeds, Pests and Diseases of Plants Ordinance (Cap. 133), of which s.3 allows the Minister inter alia, to allow importation of 'specified items' with or without conditions. By s.4(3) an importer who has been informed that plant material imported by him is prohibited must take such measures with regard to the material as are specified by an Inspector, or re-export it, failing which the Minister may destroy it. However, the Court referred to the terms of

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the Permit (Ex. 1), which required that the importation must be accompanied by a certificate that the material has been fumigated. The Judge considered that since the

- A Minister's power to control imports was absolute, there could be conditions attached. He referred also to Order 18/65 (made under Cap. 133) paragraph (b)(iii) which he considered showed the Minister's condition was not unreasonable.

*Held:* A condition (upon import) that fruit shall have been fumigated in the country of origin and so certified was not unreasonable.

- B Defendant had not acted in breach of any legal provision nor was there any breach of in the classification of tomatoes or in refusing to allow them to be fumigated in Fiji. Plaintiff's claim was dismissed.

WILLIAMS, J.

### Judgment

- C The plaintiff is an importer of fruit and vegetables. The defendant is really the Minister for Agriculture but in accordance with our procedure the Attorney-General is named as defendant. The Plaintiff's action is for damages arising from the alleged negligence of officers employed by the Ministry of Agriculture & Fisheries resulting in the destruction of a consignment of tomatoes which the plaintiff had imported from Australia. There is no dispute that the consignment arrived at Nadi Airport on 11/2/78 and that the 120 cartons of tomatoes were destroyed by the Ministry. The plaintiff alleges that this arose from the negligence of the Ministry in failing—

(a) to realise that tomatoes are classified as vegetables and did not need fumigation;  
and alternatively

- E (b) refusing to allow the plaintiff to fumigate the tomatoes at Nadi Airport.

No dispute arises over the quantum of damages and the issue was simply as to liability.

- F He had a permit Ex. 1, dated 6/2/78 to import a large quantity of various fruits and vegetables. The permit Ex. 1 requires fruit to be fumigated before export but imposes no such condition in regard to vegetables. The consignment which arrived on 11/2/78 only contained a few of the items mentioned on Ex. 1, namely tomatoes, lettuce, carrots and parsley. Accompanying the consignment was a printed form of Certificate of Health Ex. 4, dated 10/2/78, from the Australian Government, declaring the consignment substantially free from disease and pests. Ex. 4 provides space for particulars of fumigation to be inserted if this has been done but they are blank indicating that there had been no fumigation. Because the tomatoes had not been
- G fumigated at the country of origin the Ministry refused to allow them to be removed from quarantine and required the plaintiff to re-export them or to destroy them. Neither course was adopted by the plaintiff and on or about 18/11/78 the Ministry destroyed them. The vegetables accompanying the tomatoes were released as they required no fumigation. It seems that from that part of Australia only fruit needs fumigation.

- H The plaintiff complains that tomatoes are classified as a vegetable and require no fumigation; however, if they did require fumigation he says there was no reason why they should not have been treated at Nadi Airport and then released to the plaintiff.

He commenced importing fruit and vegetables in 1976 and hitherto had always had his tomatoes and fruit fumigated in the country of origin. He says that in conversation with Balram Singh, (D.W. 1), Chief Quarantine Officer at Nadi, he learned that it was only fruit and not vegetables which had to be fumigated. The plaintiff noticed at p. 12 of a book Ex. 7, entitled "Guide to Importers" and issued by the Ministry, that "tomatoes" appear under the heading or classification of vegetables. On the same page it shows that vegetables from Australia require an import permit and a phyto-sanitary permit, but there is no indication that vegetables from Australia have to be fumigated. He deduced that tomatoes being regarded as a vegetable would not require fumigation and he instructed the Australian exporter accordingly.

According to the plaintiff's import permit Ex. 1 it is only fruit which should be fumigated. The plaintiff argues that he was not in breach of the permit Ex. 1 because tomatoes are classified as a vegetable according to the Ministry's own booklet Ex. 7 and therefore did not need fumigating.

The dictionaries describe tomatoes as a fruit and the plaintiff does not contend that they are not a fruit. He claims that the booklet Ex. 7 classifies them as vegetables for the Ministry's purposes; he was misled by the Ministry in acting on that classification. P. 16 & 7 of Ex. 7 refers to "fruits". It does not list those plants which are fruits but indicates the precautions to be taken by an importer of fruits from various countries. The requirements for the same fruits differ from country to country but there is no suggestion that fruits require fumigation before being admitted to Fiji. Then why does the plaintiff's import certificate Ex. 1 require that the fruit imported from Australia be fumigated? In that respect the defendant points out that the book Ex. 7 is only a *guide* to importers as stated in para 3 of p. 1:—

"It is important that importers realise that these lists are a guide only and are not a legal interpretation of the relevant Ordinance and regulations."

The defendant contends that the booklet Ex. 7 carries no legal authenticity. I feel bound to concur in that respect to the extent that where the booklet is silent one cannot make assumptions based on a reference to the contents. On the other hand the booklet is a guide and one would not expect it to mislead. But if one looks at p. 14 it places avocado pears, pineapples, pawpaws, mangoes, passion fruit, and strawberries under the heading of fresh vegetables thus revealing that it makes no serious attempt to accurately classify plants as vegetables or fruit. One would hesitate before accepting Ex. 7 as defining what is regarded as fruit and what as vegetables.

The plaintiff had been importing fruit and vegetables including tomatoes for 2 years and on his own evidence he had fumigated tomatoes in Australia.

The plaintiff says that he had been under the impression that both vegetables and fruit had to be fumigated until Balram Singh, D.W. 1, told him that vegetables did not need to be fumigated. Then he referred to Ex. 7 and read that tomatoes are not fruit but vegetables and therefore he concluded that they did not need fumigation. I find that part of his evidence difficult to accept because the costs of fumigation in the past must have been charged to him by the exporter. He must have received accounts showing charges for fumigation against consignments of fruit but no such charge against vegetables. It is improbable that for 2 years he imported vegetables into Fiji without being aware that it was not necessary to fumigate them. He must have handled many import permits like Ex. 1 containing the requirement

that "fruit" required fumigation but imposing no like condition on vegetables. Exs. D1 & D2 are phyto-sanitary certificates issued in Australia relating to consignments of fruit and vegetables to the plaintiff. Ex. D1 dated 7/12/77 shows that only tomatoes out of a consignment of vegetables and tomatoes had been fumigated. Ex. D2 dated 15/12/77 refers to a consignment of vegetables plums and tomatoes and reveals that both fruits were fumigated but not the vegetables. Although Exs. D1 & D2 are handed to the Agriculture Department at Nadi and not to the plaintiff it is improbable that he would be unaware of the way in which his consignments had been treated prior to export.

He says that on learning that vegetables did not have to be fumigated he notified the exporter in Australia not to fumigate the tomatoes. Why did he not also instruct the exporter in Australia not to fumigate all the other vegetables? In my view the answer is that the plaintiff was aware that vegetables did not need fumigation. Relying upon his own interpretation of the non-legal document Ex. 7 he decided that tomatoes were vegetables. He was not entitled to rely upon Ex. 7 as a document tendering legal advice and he is not entitled to say that the Ministry misled him by reason of any misdescription in Ex. 7. In deciding not to fumigate tomatoes he was turning against an established practice and it would have been reasonable to mention this to the Inspector (D.W. 1) before relying upon his own judgment.

It now remains to be considered whether the law of Fiji permits the Agriculture Department to require fruit and or vegetable to be fumigated in the country of origin.

Importation of plants into Fiji is governed by "The Noxious Weeds, Pests and Diseases of Plants Ordinance", Cap. 133. By S.2 of the Ordinance vegetables and fruit are plants.

S.3 allows the Minister by Order to prohibit the import of plant material or to allow importation of "specified items" from any "specified place" with or without conditions or restrictions which may be imposed nor the kind or specie of plant to which they may be attached. The power is virtually absolute.

By S.4(3) an importer who has been informed that plant material imported by him is prohibited must take such measures with regard to the imported material as are specified by an inspector or export the plant material failing which the inspector may destroy it. It requires the importer to be given at least 14 days in which to comply with the inspector's requirements.

S.5(7) requires any importation of plants to be accompanied by a phyto-sanitary certificate, that is to say a certificate from the appropriate officer of the country of origin certifying that the plants are free from all forms of contamination.

There is nothing in the Ordinance itself which requires plants to be disinfected (fumigated) before export from the country of origin. But S.4(1) & S.5(2) & (3) provide that an inspector may require them to be fumigated in Fiji before being released from a quarantine area. S.8 empowers the Minister to make regulations for "preventing and regulating the importation of plant material which is liable to contamination".

Regulations promulgated by Order 18 of 1965 under S.3 (supra) controlling and prohibiting imports of plants appear on Vol. IX of the Laws at p. 5460. Para (a) prohibits the import of specific plants. Para (b) to which I will refer later restricts imports

of plants set out in clauses (i) to (vii) thereof by requiring the importer to be in possession of a written permit issued by the Director of Agriculture, Para (c) requires a phyto-sanitary certificate to accompany any plant imported into Fiji.

Those regulations on the face of them do not appear to help in resolving the dispute in question in that they make no reference to fumigation or powers to demand fumigation in Fiji of imported plants. But as I will indicate later they do provide the answer.

Other regulations exist under S.8(supra) and appear at p. 5466 Vo. IX of the Laws, Part II of those regulations is headed "Importation of Plants" and regulation 3 thereof provides that contaminated illegally imported plants can be fumigated or otherwise disposed of by an inspector. Regulation 7 which deals with fumigation reads as follows:—

"7(1). All plant material, or general cargo, which in the opinion of an inspector is required to undergo fumigation or other treatment shall be transported by the importer at his own expense to such place as may be directed by the inspector and under such conditions as may be imposed:

(2) The importer shall provide all necessary labour for the handling of the plant material or general cargo for the purpose of inspection, fumigation or other treatment thereof, and also for the return of the said plant material or general cargo after inspection, fumigation or other treatment to the custody of the Customs.

(3) For fumigation, dipping or spraying such fees as may be determined from time to time by the Director shall be charged."

The plaintiff contends that Regulation 7 intimates that plants requiring fumigation shall be fumigated in Fiji. There is some merit in the argument because no one can, on the face of it, say what the inspector's opinion is likely to be until the plants have arrived and he has seen them. Of course the consignment would have to have the phytosanitary certificate required by para (c) of the Order No. 18 made under S.3.

Nothing in the regulations requires an importer to fumigate produce in the country of export.

Although S.3 of the Ordinance empowers the Minister by Order to impose conditions and restrictions only Order 18/65 (supra) appears to have been issued. Para (b) thereof allows the Director of Agriculture to authorise in writing a person to import the plant material set out in clauses (i) to (vii) of para (b). But it does not specifically empower the Director to impose any conditions on the importer and the point for my determination is whether the Director's written permit may nevertheless impose certain conditions.

In the instant case the written permit of the Director is Ex. 1. It purports to be issued under Cap. 151. However, Cap. 151 is concerned with roads and is entitled the Roads Ordinance. Prior to 1966 the relevant Ordinance governing importation of plants was Cap. 151 but now the relevant Ordinance is Cap. 133 which come into force on 15/12/65. It is somewhat disturbing to note that the Ministry and the Department of Agriculture are fourteen years behind in drafting of such documents.

- A On the face of the permit Ex. 1 in large obvious block print, it states that it is issued subject to the conditions set out on the back. At the back of Ex. 1 appears the heading "CONDITIONS" and it states as follows—

"IMPORTANT. Importers should note that if the conditions below are not directly observed delivery of the plant matter listed in this permit may be refused.

- B \*(a) \_\_\_\_\_  
(b) \_\_\_\_\_  
(c) \_\_\_\_\_

(d) The importation must be accompanied by a certificate from a recognised authority that the plant material has been—

- C "(i) Fumigated with Methyl bromide"  
and then is written the following—  
"2lbs. /1000<sup>3</sup> ft. for two hours fruits only."

I have to consider whether the aforesaid condition was lawfully imposed by the Director.

- D Para (b) of the Proclamation/Order gives the Director the very wide power of simply saying "yes" or "no" to any application for the import of vegetables, fruit and other plants. Since he is dealing with H.M. subjects he has to exercise that discretion fairly once he undertakes to issue permits and he must deal with all applicants along similar lines. Since his power to control imports is virtually absolute I cannot see why he should not be able to say to all importers "I will allow you to import on condition that \_\_\_\_\_" and then set out the conditions to be complied with before the consignment will be allowed out of quarantine. Of course the conditions must be logical and must ensure that the provisions of Cap. 133 which seek to protect Fiji from agricultural disease and pests are not put to naught. I do not see why he should not give an absolute "No" or "Yes" or a qualified "Yes". It enables the Director's permits to keep abreast of sudden outbreaks in other parts of the world without being hampered by having to gazette the imposition or removal of restrictions. The importer is not placed at risk due to a failure to read any gazetted notice because the restrictions and conditions are prominently drawn to his attention in the permit itself before he orders his fruit and vegetable.
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The evidence of P.W. 1 Balram Singh the Chief Quarantine Inspector, shows that tomatoes are attacked by fruit fly and para (b)(iii) of Order 18/65 prohibits except under written permit of the Director all importation of:—

- G "(iii) fresh fruits, vegetables, and seeds bearing pulp which are susceptible to attack by pest species of fruit flies from any area where injurious exotic fruit flies occur."

In the light of para (b)(iii) one cannot say that the Director's condition that fruit be fumigated in the country of origin is unreasonable. It is to be noted that the Director's requirement is not that fruit shall be fumigated, or be fumigated on arrival but that they shall have been fumigated and so certified.

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I find that the defendants were not acting in breach of any legal provision connected with the importation by the plaintiff of tomatoes from Australia in requiring them to be fumigated before export. They failed in no duty to the plaintiff as to the classification of tomatoes or in refusing to allow them to be fumigated in Fiji. The plaintiff brought his troubles upon himself by following his own interpretation of the word vegetables to include tomatoes. A

The plaintiff's claim is dismissed, and the plaintiff will pay the defendant's costs. B

*Judgment for the defendant.*