

SUPREME COURT

R. v. AGRICULTURAL TRIBUNAL
Ex parte MOHAMMED JALIL AND THE NATIVE LAND TRUST BOARD

[SUPREME COURT (Dyke J.)—Lautoka—1 November 1985]

Civil Jurisdiction

Native Land—decision of Central Agricultural Tribunal—application for Judicial Review thereof—Supreme Court had jurisdiction to make such Review—Award of Tribunal opposed by Native Land Trust Board—absent such consent by Board, null and void.

M. S. Sahu Khan for the Applicants
K. Govind for Respondent
H. A. Shah for Attorney-General

Application by Mohammed Jalil and the Native Land Trust Board (NLTB) for Judicial Review of a decision of the Central Agricultural Tribunal (Tribunal) delivered on 14 April 1984.

The first applicant Jalil was the registered lessee of Native Land comprised in Native Lease No. 12261 issued by the NLTB. One Azmat Ali applied to the agricultural tribunal for a tenancy of 25 acres of the land. This was granted though the Board not only did not consent but strongly opposed it.

There had been prior dealings between the applicant Jalil and the respondent tribunal whereby the applicant purported to transfer the 25 acres to Azmat Ali who had gone into occupation and cultivated the land for 3 years before the application to the tribunal. But they had omitted to obtain the prior consent of the NLTB whereby that agreement was unlawful and the purported transfer of the land null and void under Native Land Trust Act (NLTA) S.12(1).

However, the tribunals, recognising that the purported agreement was unlawful, treated the claim of Azmat Ali as falling within the terms of S.4 of the Agricultural Landlord and Tenant Act (ALTA) and ordered the NLTB to issue a tenancy agreement to Azmat Ali.

Both the applicant Jalil and the NLTB sought an order of certiorari to quash the decision of the tribunal.

It was argued for the Tribunal that Judicial Review would not lie in respect of a decision of an agricultural tribunal nor against the central Agricultural Tribunal although there had been many cases previously where such applications had been entertained both by the Supreme Court and the Fiji Court of Appeal.

A Counsel referred to S. 61 (1) of the ALTA. Clauses of this nature have never deterred Courts from entertaining actions for Judicial Review of tribunal proceedings or decisions where there had been an excess of jurisdiction or a breach of natural justice. Such decisions could not be the subject of appeal: tribunals have powers not possessed by the Courts, but the proceedings can be quashed and the case sent back for re-hearing.

B Counsel for the agricultural tribunal argued that S. 62 of the Act indicated that if a tribunal decided wrongly there was no remedy; but if there were, it would not be by reference to the Supreme Court; it could only be to the Court of Appeal. But first applicants would have to exhaust these remedies—judicial review could only after the matter had been dealt by the central agricultural tribunal.

C It was noted that in England the High Court had powers of review over all inferior Courts of Tribunals. Similarly in Fiji both the agricultural tribunal and the central agricultural tribunals are inferior to the Supreme Court.

The issue remaining was whether the tribunals can dispense with the consent of the Board, exercising their own discretion as to whether or not to grant a tenancy. The dicta by D Spring J.A. in the case of *Dharam Lingam v. Ponsami and Others* (28 FLR 69) indicated clearly that the consent of the Board could not be dispensed with.

Held: The Constitution S. 89 confers unlimited original jurisdiction and S. 189 the Supreme Court Act provided that the Supreme Court shall exercise the jurisdiction of the High Court in England.

E In spite then of the provisions of S. 62 (5) of ALTA, judicial Review lay to the Supreme Court against decisions of the tribunals.

F In this case the tribunal and central agricultural Tribunal had purported to make an award ordering assignment of a parcel of Native Land without the consent of the Board and despite the objections of the Board. S.12(1) of NLTA made unlawful the alienation or dealing with land by a lessee without the consent of the Board.

The award of tribunals could only be made subject to the consent of the Native Land Trust Board. In the absence of such consent the award was null and void.

G Cases referred to:

Dharam Lingam v. Ponsami and Others (28 FLR 69)
Chalmers v. Pardoe (1963) 3 All E.R. 552; 1963 1 W.L.R. 1498

H DYKE J. :

Judgment

A

This is an application for judicial review of a decision of the Central Agricultural Tribunal delivered on 14/4/84. The applicants are Mohammed Jalil (hereinafter called the applicant) and the Native Land Trust Board (hereinafter called the NLTB).

The first applicant is the registered lessee of native land comprised in native Lease No. 122261 issued by the NLTB. One Azmat Ali (hereinafter called the respondent) applied to the agricultural tribunal for a tenancy of 25 acres of the land and was granted it in spite of the fact that the NLTB not only did not consent to it, but strongly opposed it. B

There had been some dealings between the applicant Jalil and the respondent whereby the applicant purported to transfer the 25 acres to the respondent, Azmat Ali and the respondent had gone into occupation, and had been in occupation cultivating the land for over 3 years before the application to the tribunal. But they had omitted to obtain the prior consent of the NLTB, hence that agreement was unlawful and the purported transfer of the land null and void under section 12(1) of the Native Land Trust Act (hereinafter called NLTA). C

But in the event the tribunals, recognising that the purported agreement was unlawful, treated the respondent's claim as falling within the terms of section 4 of the Agricultural Landlord and Tenant Act (hereinafter called ALTA) and ordered the NLTB to issue a tenancy agreement to the respondent. D

Both the applicant and the NLTB now seek an order of certiorari to quash the decision of the tribunals.

What counsel for the respondent has argued is that judicial review will not lie against an agricultural tribunal, nor against the Central Agricultural Tribunal although there have been many cases previously where such applications have been entertained both by the Supreme Court and the Fiji Court of Appeal. E

In the first place there is section 61(1) of the Act which reads as follows:

"61.—(1) The proceedings, hearing, determination, award, certificates or orders of the central agricultural tribunal or of a tribunal shall not be called in question in any court of law nor shall any person appointed as the central agricultural tribunal or as a tribunal be sued in respect of any act lawfully ordered to be done in the discharge of his duties under this Act". F

But clauses such as this have never deterred the courts from entertaining actions for judicial review of tribunal proceedings or decisions where there has been excess of jurisdiction or where there has been a breach of natural justice. The decision itself cannot be appealed against and in case tribunals have powers not possessed by the courts, including powers to assign land which is the subject of an unlawful tenancy (see section 18 (2)), but the proceedings can be quashed and the case sent back for hearing. G

However counsel for the respondent has referred to section 62 of the Act and this is now set out in full. H

"62.—(1) The central agricultural tribunal or a tribunal shall take judicial notice of all matters of which a court of law would take judicial notice.

- A (2) Subject to the provisions of section 34, all awards, certificates, determinations or orders of the central agricultural tribunal or of a tribunal purporting to be signed by the person appointed as the central agricultural tribunal or as a tribunal shall be admitted in evidence in any court of law or before a tribunal as prima facie evidence of the facts contained therein.

B (3) A tribunal shall not entertain any application for adjudication upon any issue which has been decided between the same parties by any court of law.

- C (4) Where proceedings have been instituted in any court of law in relation to any matter submitted for adjudication to the central agricultural tribunal or a tribunal, the central agricultural tribunal or a tribunal, as the case may be, may refuse to adjudicate or may stay or adjourn the matter as it shall think fit.

(5) The central agricultural tribunal or a tribunal may, at any stage of any proceedings, refer any question of law—

- D (a) in the case of the central agricultural tribunal, to the Fiji Court of Appeal; or
in the case of a tribunal, to the Supreme Court, and the Court of Appeal or the Supreme Court, as the case may be, shall have power to hear and determine every such question.

- E (6) Where any reference has been made to the Fiji Court of Appeal or to the Supreme Court under the provisions of subsection (5), the central agricultural tribunal or a tribunal, as the case may be, shall not make any award, determination or order, or issue any certificate, except in accordance with the determination of the said question by the Court of Appeal or the Supreme Court, as the case may be.

(7) Any reference to the Fiji Court of Appeal or to the Supreme Court under the provisions of this section shall be made in accordance with rules of court.

- F This section is headed "Avoiding Conflict" meaning conflict between the courts and the tribunals, and one thing that does emerge clearly from the section is that, in spite of certain matters in which the tribunals can do things that the courts cannot, the intention appears to be to give precedence to court decisions, particularly where those decisions involve questions of law.

- G And several very significant questions arise from the wording of the section, particularly when taken together with section 61(1). For instance subsection (2), states certificates, determinations or orders of tribunals are only prima facie evidence (nor conclusive evidence) in the courts. In subsection (3) tribunals may not entertain applications requiring adjudication on issues that have already been decided by a court, although otherwise tribunals have powers not possessed by the courts.

- H Perhaps the most puzzling provision is subsection (5). What for instance is the significance and effect of the provision whereby although agricultural tribunals may refer questions of law to the Supreme Court the central agricultural tribunal refers questions of law to the Fiji Court of Appeal, which normally, except for certain matters in the Constitution, only hears appeals from the Supreme Court?

Why is the Supreme Court not permitted to determine all questions of law in the first place, when there may always be a subsequent appeal to the Fiji Court of Appeal? A

Where there has been a reference to the Supreme Court or the Fiji Court of Appeal under this section, the tribunals are by subsection (6) said to be bound to comply with the decision—or interpretation given. But supposing the tribunal does not comply with the interpretation handed down or another tribunal for some reason does not follow it, what then? Supposing the tribunal does not even refer the question of law to the appropriate court and decides on it in its own way, and decides it wrongly, what then? B

According to counsel for the respondent there is no remedy. Furthermore he argued that even if there were a remedy it would not be by reference to the Supreme Court. And of course if it were not to be by reference to the Supreme Court, there could be no remedy at all. There is no provision in the laws of Fiji whereby application for judicial review may be taken straight to the Fiji Court of Appeal. C

Counsel argued that section 62 (5) indicates that even if there were to be reference to the courts there could only be reference to the Courts of Appeal. And of course it is true that before there could be reference to the courts, applicants would have to exhaust all their remedies under the Act by appealing first to the Central Agricultural Tribunal, so as in this case, judicial review could only follow after the matter had been dealt with by the Central Agricultural Tribunal. Does this mean that there can be no judicial review of determinations by the agricultural tribunals? D

This is a matter of considerable importance, involving as it does important questions of principle and law, so I invited the Attorney-General to assist as *amicus curia*. I am grateful to him for offering the services of Crown Counsel.

Now section 89(1) of the Constitution confers on the Supreme Court unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law. And section 18 of the Supreme Court Act provides that within Fiji, the Supreme Court shall possess and exercise all the jurisdiction powers and authorities which are for the time being vested in or capable of being exercised by Her Majesty's High Court of Justice in England. E

There can be no question that in England the High Court has powers of review over all inferior courts or tribunals, and there is no tribunal that is not inferior to the High Court, and no court that is not inferior except the Court of Appeal and the House of Lords. F

Similarly there can be no question that in Fiji both the agricultural tribunals and the central agricultural tribunal are inferior to the Supreme Court. The fact that the qualifications for appointment to the post of central agricultural tribunal might be the same as or even higher than those required for appointment to the post of judge is not sufficient reason to argue that tribunals are not inferior to the Supreme Court. G It is to be noted that the powers of tribunals and the central agricultural tribunal are by section 18 of ALTA stated to be those exercised by magistrate's courts, and there is no power given for enforcing awards or decisions of tribunals except in so far as this is covered by section 57 of the Act and by reference to the courts.

In spite therefore of the strange complications provided by section 62(5) of ALTA judicial review will lie to the Supreme Court against decisions of the tribunals. H

- A The question at issue in this case is that the agricultural tribunal and the central agricultural tribunal purported to make an award ordering assignment of a piece of native land without the consent of the Native Land Trust Board and in spite of objections by the board.

Section 12(1) of the Native Land Trust Act provides—

- B “Except as may be otherwise provided by regulations made hereunder, it shall not be lawful for any lessee under this Act to alienate or deal with the land comprised in his lease or any part thereof, whether by sale, transfer or sublease or in any other manner whatsoever without the consent of the Board as lessor or head lessor first had and obtained. The granting or withholding of consent shall be in the absolute discretion of the Board, and any sale, transfer sublease or other unlawful alienation or dealing effected without such consent shall be null and void;

- C Provided that nothing in this section shall make it unlawful for the lessee of a residential or commercial lease granted before the twenty-ninth day of September, 1948, to mortgage such lease”.

- D And there are numerous authorities of which I need only mention *Chalmers v. Pardoe* which clearly show how the courts interpret section 12 in the normal run of cases. But the tribunals clearly are of the view that this does not apply to them, though they seem not to have taken the precaution of seeking legal opinions in accordance with section 62 (5) of ALTA, which would have been the wisest course to have taken, particularly in view of the statements made by Spring J. A. in the case of *Dharam Lingam v. Ponsami and others* 28 FLR 69. But this action is not about whether they sought legal opinions or not, but whether they were correct in their own assumptions that they were not affected by the lack of consent by the NLTB, or by the disapproval of the NLTB.

- F At first it might seem rather odd that though the NLTB is by statute vested with the sole responsibility for administering and controlling native land, the tribunals consider that they are empowered to grant leases over native land without first obtaining the consent of the Board, and in fact in face of the specific disapproval of the Board. But then it was argued how else can sense be made of section 59(2) of ALTA which reads as follows—

“(2) The provisions of sections 7, 8, 9, 10, 11 and 12 of the Native Land Trust Act and of all regulations made thereunder shall be subject to the provisions of this Act”.

- G Can it be that the reference to section 12 of the Native Land Trust Act must be interpreted to mean that in declaring or granting a lease over native land the tribunals are not restricted by the lack of consent of the NLTB whether it be prior or subsequent consent. The whole tone of section 59 (2), referring as it does to sections 7, 8, 9, 10, 11 and 12 of the Native Land Trust Act, indicates that so far as those sections are concerned the tribunals can, where they feel it is necessary, replace the Native Land Trust Board. If this is so it must be rather disconcerting for the Board and perhaps also for the native owners, but after all ALTA is a rather unusual piece of legislation intended to fulfil a special purpose. Tribunals can grant leases in situations where the courts certainly can't grant them, and are these then just other examples of the special powers tribunals possess, that were conferred on them by Parliament? However counsel for the applicant has pointed to section 59 (3) which states—

"59.—(3) Nothing in this Act shall be construed or interpreted as validating or permitting an application to the tribunal in respect of a contract of tenancy which was or is made in contravention of any law". A

The question that then presents itself is: how can this provision possibly be reconciled with section 18(2) and section 59(2) of the Act. If the tenancy is unlawful to start with how can an application in respect of it be entertained by the tribunals in the first place? But then comes section 18(3) which provides— B

"(3) Any application to a tribunal for a declaration, for compensation or for the ordering of the making of an assignment or other order or determination under subsection (2) may be made notwithstanding the provisions of subsection (3) of section 59, but nothing contained herein shall be deemed to permit the ordering or making of an assignment in breach of the provisions of the Subdivision of Land Act or which would otherwise be unlawful". C

Well, we are not concerned here with the Subdivision of Land Act and without having to go further and determine exactly what the meaning of section 59(3) is, it seems that the application to the tribunals was properly made and dealt with. After all section 12(1) of the Native Land Trust Act only says that it is unlawful for a lessee of the Board to deal with land without the prior consent of the Board and that the resulting transfer is null and void (not that the transferee has been acting unlawfully). And in this case the tribunals dealt with the application on the basis that the respondent had been occupying and cultivating the land for over 3 years and thus acquired a possible tenancy under section 4 of ALTA. D

The situation was more or less the same as in *Dharam Lingam's* case, and in that case the Fiji Court of Appeal decided that the application was properly dealt with by the tribunals. E

So the only issue remaining is whether the tribunals can dispense altogether with the consent of the Native Land Trust Board and exercise their own discretion as to whether or not to grant a tenancy, whether or not this is in the interests of the native owners. It is perhaps surprising that this point has not cropped up before, probably because either the NLTB has always given its consent before, or the tribunals have never before decided to ignore the wishes of the NLTB. The point does not seem to have been argued in *Dharam Lingam's* case, and presumably in that case the NLTB was content to give its consent. F

Because the point did not arise and was not fully argued in *Dharam Lingam's* case the tribunals have concluded that they could decide the matter for themselves and in fact decided that they are not bound by the NLTB's lack of consent, or the NLTB's disapproval. G

It is surprising that the tribunals did not avail themselves of the provisions of section 62(5) of ALTA to refer the point to the Supreme Court or the Fiji Court of Appeal for determination, and instead decided the point for themselves. It is even more surprising when one considers that in *Dharam Lingam's* case on no less than three occasions Spring J. A. indicated quite clearly that the consent of the NLTB could not be dispensed with. For instance he said after dealing with the purport of section 18(2), "There is no suggestion that consents required from the Native Land Trust Board or the Director of Crown Lands could be dispensed with by the tribunal". H

- A Although this point was not the subject of full argument in *Dharam Lingam's* case, nevertheless the firm opinions expressed by Spring J. A., seemingly making the decision in the case subject to the consent of the NLTB, cannot be disregarded by this court, nor should it be disregarded by the tribunals. It is certainly of very strong persuasive power if not actually binding, and it would be very unwise to ignore this.
- B Indeed to decide as the tribunals have done raises many difficult questions. How for instance would the decision of the tribunals be implemented? How could the NLTB be ordered to grant tenancy to the respondent? This could only be effected if at all through the courts, and the NLTB might well say "But we have been vested by Parliament with power to administer native land for the benefit of the native owners. We cannot surrender that power or discretion to anyone else. And in our opinion what you are ordering is not in the best interests of the native owners, and we cannot consent to it". This would seem to be an effective argument.
- C

Therefore in accordance with what Spring J. A. said in *Dharam Lingam's* case, the award of the tribunals can only be made subject to the consent of the NLTB and in the absence of such consent will make the award null and void.

The applicant will have his costs to be taxed if not agreed.

- D *Application granted. Order for Certiorari*

(Editor's Note: Overruled: *RE Azmat Ali* 32 FLR 30)