

IN THE FIJI COURT OF APPEAL  
Civil Appeal No. 25 of 1985.

Between:

NAITASIRI-TAILEVU NORTH DRAINAGE BOARD

Appellant

- and -

RAM PHAL

Respondent

Mr. Chauhan for the Appellant  
Mr. H. M. Patel and Mr. J. Singh for the Respondent.

Date of Hearing : 17th July, 1985

Delivery of Judgment: 8<sup>th</sup> November, 1985.

JUDGMENT OF THE COURT

SPEIGHT, VP

The appellant Board originally commenced proceedings in the Magistrate's Court at Nausori claiming from the Respondent \$175.03 allegedly due to it in respect of work done on land owned by him within the Board's drainage area. The Respondent defended, stating that the alleged liability arose pursuant to the Drainage Ordinance Cap. 122 and that the relevant section of that Ordinance did not comply with requirements of Article 8 of the Constitution of Fiji. In particular it was pleaded that section 9(f)(ii) was ultra-vires and consequently the claim based on work done under the authority of that subsection was unlawful and charges were unenforceable.

As this raised questions of constitutional matters not within the jurisdiction of the Magistrates Courts, the matter could not be determined in that Court. Proceedings were adjourned or withdrawn, the record does not show which. However the Appellant Board then quite properly issued an originating summons seeking a Declaration, asking the following question namely :

" Whether having regard to the provisions of Sections 2 and 5 of the Fiji Independence Order, 1970, the provisions of Section 9(a) to (j) of the Drainage Act Cap. 122 Ed. 1967 are ultra vires or inconsistent with or in contravention of the provisions of Sections 2 and 8(1) (a) to (f) of the Constitution of Fiji."

The matter came before Kermode J. He concluded:

- (a) that the provisions of section 9 of the Drainage Act were not ultra vires;
- (b) that Section 9 did not however empower the Board to compulsorily acquire a right to property by going on land without consent or approval of the owner to construct a drain thereon.

The Respondent appealed against the first finding and the Board appealed against the second.

It is necessary, before proceeding further, to set out the relevant provisions of section 9 of the Drainage Act in so far as applicable to this case and the relevant portions of Article 8 of the Constitution.

Section 9 of the Drainage Act (as far as is relevant) reads:

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"9. Every Board shall within its own drainage area have power to do all things necessary to carry out its functions under this Ordinance and in particular shall have power -

- (a) to maintain drainage works;
- (b) to improve any drainage works;
- (c) to construct new drainage works;
- (d) with the prior consent of the Controlling Authority to enter into contracts in connexion with drainage works:

Provided that a Board enter into a contract involving a sum not exceeding ten thousand dollars without such consent;

- (e) to control livestock so as to prevent damage to drainage works;
- (f) to enter at any time, by means of any member, officer, servant or agent, any lands within its area for the following purposes:-
  - (i) to do all acts necessary to ascertain whether any drainage measures are necessary or desirable;
  - (ii) to construct, maintain and improve drainage works;
- (g) in connexion with its functions under this Ordinance to hold title to land and, with the prior consent of the Controlling Authority, subject to the provisions of section 18 of this Ordinance, to acquire such land as it deems necessary for those purposes;"
- (h) .....
- (i) .....
- (j) .....

Article 8 of the Constitution provides (inter alia)

"8.(1) 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 under the authority of a law that -

- (a) requires the acquiring authority to give reasonable notice of the intention to take possession of, or acquire the interest in or right over, the property to any person owning the property or having any other interest or right therein that would be affected by such taking of possession or acquisition;
- (b) requires the acquiring authority to apply to the Supreme Court for an order authorising such taking of possession or acquisition or to apply thereto within thirty days of such taking of possession for such an order as aforesaid;
- (c) requires the Supreme Court not to grant such an order unless it is satisfied that the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning, or utilisation of any property in such a manner as to promote the public benefit;"

Some further provision follow in the same Article, one of which will be referred to later in this judgment.

We deal first with the second finding, that is the one appealed against by the Appellant ; namely that section 9 simpliciter does not empower the Board to compulsorily acquire. We think the matter is easily disposed of. The answer is that section 9 does not per se empower compulsory acquisition. The powers which section 9 purports to authorise in so far as they may take an interest in land without consent can only be exercised if done in accordance with a statutory provision which observes the compulsory acquisition restrictions contained in Article 8 set out above, for the Constitution

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is the supreme law of Fiji and any other law inconsistent with it is, to the extent of the inconsistency, void (Article 5).

This briefly stated conclusion can be best understood by an examination of an earlier judgment of this Court - Criminal Appeal No. 28/80 Nadi Drainage Board v. Ram Prasad Gosai. That had been a criminal prosecution in a Magistrate's Court against a farmer who had interfered with drains constructed by a Board on his land; thereby so it was alleged, committing an offence against the Drainage Act. Similar issues to those raised here were before the Court as to the lawfulness or otherwise of the drainage work. The farmer was convicted. On appeal Williams J. quashed the conviction. He said that by creating a drain on the appellant's land and draining off surrounding land through it, the Board was acquiring an interest in his land; and as this had been done without consent it amounted to compulsory acquisition and he held that such action breached the requirements of Article 8, and he accordingly held that section 9(f)(ii) was ultra-vires the Constitution and the drain had not been lawfully established.

We digress to note that there seems to be some overlapping of the concepts in sub-paragraphs (a), (b), (c) on the one hand and sub-paragraph (f) on the other. It seems to have been suggested in the Magistrates Court at Nadi and in Williams J's decision that the actions there were taken under subsection (f)(ii). We point out however that that sub-paragraph deals with "entry" with the intention of constructing, maintaining or improving. The power to construct, maintain or improve are in subsections (a), (b) and (c). Entry alone may not amount to compulsory acquisition but merely a licence to authorise persons to go on land in circumstances which would otherwise amount to trespass. The action which could constitute acquisition would more properly be described as falling under subsections (a), (b) or (c). This may be a distinction without a difference, or it may be important in a given case.

To resume : The appeal by the Board against the quashing in the Nadi case was dismissed, but in delivering the judgment of this Court Henry J.A. limited the decision to much narrower grounds than those adopted by Williams J. He said (at pages 5 and 6 of the judgment) -

" Two further questions arise. First, was the right exercised by appellant to construct and maintain the said drain over the property of respondent "a right over property of any description" within the meaning of Article 8(1). Such a right so to use the land of respondent diminished his unlimited right to sole possession and use of his land. It imposed a burden which would encumber his title and which would affect the title which he could pass on to a purchaser or lessee. We have no doubt but that it was a "right over property" within the true meaning of Article 8(1).

Next was it compulsorily acquired. The only evidence is that of respondent who said he objected to the drain throughout. This appears to relate to its construction as well as all subsequent steps to maintain it. The prosecution called no evidence on this question. The Magistrate found :

"From the time when the Board put in this drain, the defendant and his sons have objected to its presence and have hindered the Board in its attempts to maintain this drain."

The burden was not on respondent to prove that the said right was compulsorily acquired, it was on the Board to prove that the acquisition did not come within Article 8 once that question was raised by the defence. The proper findings on the evidence are that the right claimed over the land of respondent was a right over property within the true meaning of Article 8(1) and that the Board's purported acquisition of that right came within the words "compulsorily acquired" upon their true construction and further that the Board has failed to prove that such acquisition was under the authority of a law which complied with the requisites laid down by Article 8. Accordingly the respondent has proved that the actions of the Board in purporting to acquire such rights prima facie deprived him of the protection which was extended by reason of Article 8 of the Constitution."

Nothing could be clearer than this exposition of the position on the demonstrated facts of that case, and we endorse the reasoning of the learned Justice of Appeal.

Turning to the other issue however, as to questions of ultra-vires, the same Court declined to make a ruling adverse, in that case, to the validity of subsection (f) (ii) of Section 9. (It will be noted that in present proceedings an even more ambitious attempt is made to have the whole of section 9 declared ultra-vires). In dealing with the narrower point which had been determined by Williams J. the judgment of the Court went on to say -

" The learned Judge on appeal held that Section 9(f)(ii) of the Drainage Act was ultra-vires the Constitution. In the Magistrates Court respondent raised the defence of protection by reason of Section 8 of the Constitution and also a claim of right under Section 8 of the Penal Code. Each point was rejected without any examination of the relevant law. On appeal to the Supreme Court Williams J. dealt in some length with Section 8 of the Constitution and made the finding above set out. Judgment was delivered by the Magistrate on September 13, 1979 and the Supreme Court on March 28, 1980. The case on appeal to this Court was listed for the sittings in September 1980 but it was taken from the list by the parties.

It appeared to this Court at the present hearing that an important question arose on the effect of the provisions of the Fiji Independence Order 1970 relating to "existing laws". The Drainage Act came within the definition of "existing laws". Neither counsel adverted to these provisions but the Court raised the point at the conclusion of respondent's argument. Some submissions were then made by counsel for respondent. Counsel for appellant made no submissions in reply. The matter is one of importance, and, after due consideration this Court considered that it was not in a position to make a proper determination without full argument but such argument would have to be postponed until its next sittings."

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and later :

" We consider the proper course is to dispose of the proceedings at this stage by dismissing the present appeals. The question of the validity of Section 9(f)(ii) of the Drainage Act can be determined in appropriate proceedings."

Consequently no binding determination was then made on the other question now before the Court. As we see it Kermode J's conclusion was that section 9 did not of itself purport to empower the Board to compulsorily acquire without more, and consequently he did not make a pronouncement in favour of the ultra-vires submission.

From the recital of the provisions already set out it will be seen that the Board has many powers. Some are quite minor such as giving a Board employee<sup>a</sup> licence to make a temporary entry. Others are more sweeping. The pivotal question in a given case is whether the action taken by the Board has amounted to compulsory acquisition. In the Nadi case it did; hence the quashing of the conviction on the facts of that case; substantial drains deprived the land owner of the unrestricted exercise of his indefeasible rights. But it must be clear from the Judgment of Henry JA that the decision was related to the facts of that case, and that was all that was decided. No pronouncement of general invalidity was made and we point out that we are not here deliberating on the size of the work in this case, nor on the degree of interference with the respondent's property rights, for we do not have any facts before us showing the extent of the drainage work. The question is much broader - namely the interaction of Article 8 upon the Drainage Act. The restrictions spelled out in article 8 obviously govern compulsory acquisition if that is what the Board is contemplating, acting in exercise of its powers under section 9. Although subsections (a) (b) and (c) do not specify on what land the work is to be done, by implication it obviously includes private land within the drainage area.



As already pointed out the powers of the Board can vary from one extreme to the other. Subsection (c) will empower the construction of works which could exclude or restrict the owner's right over property, as was held on the facts in the Nadi Drainage Board case (Crim. App. 28/1980). On the other hand subsection (f)(i) would empower a Board's surveyor to step onto private land for a brief period to make an observation or take a measurement and depart. The former example would infringe upon the rights preserved by Article 8, the latter would not. And there will be a variety of other actions by a Board in pursuance of its powers which fall part way between these two extremes.

The question here asks for a blanket declaration that all these powers are ultra-vires. But under Article 5 of the Constitution the existing laws (including the Drainage Ordinance) continue to operate. Before a court would be justified in pronouncing any law to be ultra-vires there must be a conclusive and unequivocal breach of the Constitution. Not merely a doubtful and argumentative implication. In discharging this task the Court must read the statute in question as a whole to give it such sense as will assist the continuation of the administration of all the laws of the land consistent with the protection of the rights secured by the Constitution.

Dealing with land acquisition it will be noted that section 9(g) gives the Board power to secure land pursuant to section 18, which in turn provides the method for compulsory acquisition - this to be in accordance with the procedures in the (then) Crown Acquisition of Lands Ordinance. Since Independence that Ordinance has been replaced by the Crown Acquisition of Lands Act (Cap. 135) with some changes from the previous provisions. In particular it will be seen that the Act now conforms in every respect with the requirements of Article 8, and from its wording one can conclude that it was drawn

to harmonise with it; and, as has already been stated, its provisions are imported into the Drainage Act. It would be doing violence to legislative intention and to the draftsmanship of the Constitution itself to suggest that due regard has not been paid to the entrenched rights provided.

We can conclude on this aspect by saying that whether or not any action of a Drainage Board in pursuance of its powers amounts to compulsory acquisition will be a matter of fact. If it does, then Article 8 and Section 18 dictate what steps must be taken. If the works contemplated are such as to fall within the concept of the acquisition of land, or an interest or rights in land, as discussed in the Nadi case, and if those steps are not taken, then the action will be illegal and will give rise to claims founded in trespass. If the action taken does not amount to such an acquisition then a particular Board's actions will be lawful without more.

We turn to the specific findings of Kermode J. and the challenge to them by the parties to the appeal.

The learned Judge discussed the decisions of Williams J. and of the Court of Appeal in the Nadi case and it will be remembered that in that case there was specific evidence of the extent of the works done - it was a 10 foot wide permanent watercourse excavated by the Board which of course deprived the owner of the use of the underlying land.

Kermode J. also discussed the difference between the various powers under Section 9 as we have done.

He then went on to say (at page 10):

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" Provisions of a power merely to enter on land could not in my view be in conflict with section 8(1) of the Constitution as a statutory right of entry by itself would not in my view deprive the landowner of any interest or right he had in his property.

The construction of drainage works on the land after entry (section 9(c)) could be ultra-vires the Drainage Act or the Constitution and it is this provision which Williams J. and the Court of Appeal should have been asked to consider.

Once the Board has legally acquired a right to construct drainage works the maintenance of that drainage would not necessarily involve any further acquisition by the Board of an interest in the land. Improvements to the drainage might however result in acquisition of a larger interest in the land dependent or whether improvements involved a bigger drain or resiting elsewhere on the land.

The Court of Appeal held that the entry on the land and establishment of a drain on the land was the acquisition of a right over property as referenced to in section 8(1) of the Constitution. The court did not consider the entry in isolation."

and at page 12 :

" If the consent or approval of a land owner is not forthcoming then the provisions of the Act providing power to compulsorily acquire a right over property (i.e. land) must comply with the exceptions" (i.e. requirements) "in Article 8(1) of the Constitution (a) to (b) inclusive."

He then repeated this conclusion but in different words on page 13 of the judgment:-

" Section 9 of the Act does not empower a Board to compulsorily acquire a right to property by going on land without consent or approval of the owner to construct a drain thereon".

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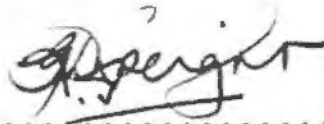
It is this wording which the Board appeals against. For reasons we have endeavoured to set out we are in agreement with the learned Judge for he was expressing in another way the effect of the conclusions of this Court in the Nadi case. Perhaps the appellant Board has misunderstood the true meaning of the words used. In effect the judgment says that Section 9 per se does not authorise compulsory acquisition by entry, or by carrying out works. The position is we think further clarified by examining the other aspect of the appeal - that taken up by the Respondent in submitting that Section 9(a) - (f) is ultra vires. Kermode J. held it was not and for the reasons already discussed the Court agrees. Some of the powers may be exercised without conflicting in any way with Article 8. Other powers, in so far as they may involve acquisition without consent, will have to be exercised with due regard to Article 8 by using the machinery in Section 18 and in the Crown Acquisition of Lands Act (Cap. 135). But the necessity to observe these procedures on some occasions does not invalidate the Section. Accordingly the Respondent's cross-appeal is also dismissed.

It may be helpful if we say something of the practical consequences of the foregoing findings. A Board will in some cases be in a dilemma as to how to proceed - depending upon whether it assesses its contemplated action as involving the deprivation of part of the owner's interest in his land - and we commend the observations of Henry JA on this topic. We cannot lay down tests to cover hypothetical cases - but if the work will permanently deprive an owner of an interest in land as there discussed, and if an owner does not consent, then acquisition will become necessary unless

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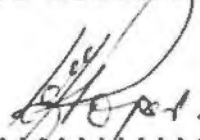
the Board can bring itself with the exceptions in Article 8(5)(i)(a)(vii) - i.e. work of soil or natural resource conservation or agricultural development or improvement which the owner or occupier has been required and has failed to do. But as far as Drainage Board powers are concerned these are limited by Section 20 to which attention is drawn.

Appeal and cross-appeal are each dismissed. Each party will bear its own costs.



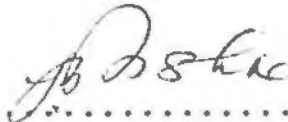
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Vice-President



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Judge of Appeal



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Judge of Appeal