IN THE FIJI COURT OF APPEAL

Civil Appeal No. 111 of 1985

Between:

AZMAT ALI
s/o Akbar Ali — Appellant

and

1. MOHAMMED JALIL
2. NATIVE LAND TRUST BOARD — Respondents

Mr. B.C. Patel for the Appellant
Dr. S. Sahu Khan for the 1st Respondent
Miss A. Rogan for the 2nd Respondent

Date of Hearing: 15th July, 1986

Delivery of Judgment: 23.7.86

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from a decision of Dyke J. in the Supreme Court's supervisory jurisdiction, declaring null and void an award made by the Agricultural Tribunal (tribunal) and upheld by the Central Agricultural Tribunal. The learned Judge held that "the award of the tribunals can only be made subject to the consent of the Native Land Trust Board (NLTB) and the absence of such consent will make the award null and void".

The grounds of appeal pose two questions :-

(1) Can the Supreme Court exercise supervisory jurisdiction over specially created judicial institutions like the two tribunals?

(2) Where native land is concerned, can the tribunals make an award without making it subject to the consent of N.L.T.B.?

The first question does not present any great difficulty and we concur with the learned Judge, for the reasons he has given, that, where the tribunals act beyond their powers, the Supreme Court can exercise its supervisory powers to control them. The origin of the jurisdiction was discussed by this Court in K.R. Latchan v. Sunbeam Transport & Others (45, 51, 57 & 61 of 1983) and limitations are further set out in Manoa Bale v. Public Service Appeals Board (23 of 1985).

The second question raises the important but vexed problem of comparing the powers vested in NLTB by the Native Land Trust Act enacted in 1940 and those vested in the two tribunals by the Agricultural Landlord and Tenant Act (ALTA) enacted in 1966.

The former Act takes away the power of the native owners of dealing with their land and makes NLTB solely responsible for controlling and administering native land for the benefit of the owners. Section 12 of that Act reads :-

> "12.-(1) 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:

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. (Substituted by 30 of 1945, s.8, and amended by 29 of 1948, s.3.)

(2) For the purpose of this section "lease" includes a sublease and "lessee" includes a sublessee. (Inserted by 35 of 1943, s.2)."

83% of the land in Fiji is native land and NLTB has leased much of it to tenant farmers under the provisions of the Native Land Trust Act and regulations made thereunder. Attempts have often been made by lessees to arrange for the cultivation and use of such land by other persons in contravention of section 12 giving rise to a great deal of litigation and, occasionally, some injustice.

In 1966 ALTA was enacted for the stated purpose "to provide for the relations between landlords and tenants of agricultural holdings and for matters connected therewith". Sections 4 and 5 and 23(3) of this Act are :-

"4.-(1) Where a person is in occupation of and is cultivating an agricultural holding and such occupation and cultivation has continued before or after the commencement of this Act for a period of not less than three years and the landlord has taken no steps to evict him, the onus shall be on the landlord to prove that such occupation was without his consent, and if the landlord fails to satisfy such onus of proof, a tenancy shall be presumed to exist under the provisions of this Act:

Provided that any such steps taken between the 20th day of June 1966, and the commencement of this Act shall be no bar to the operation of this subsection.

(2) Where payment in money or in kind to a landlord by a person occupying any of the land of such landlord is proved, such payment shall, in the absence of proof to the contrary, be presumed to be rent.

5.-(1) A person who maintains that he is a tenant and whose landlord refused to accept him as such may apply to a tribunal for a declaration that he is a tenant and, if the tribunal makes such a declaration, the tenancy shall be deemed to have commenced when the tenant first occupied the land:

Provided that rent shall only be recoverable where the tribunal is satisfied that it is just and reasonable so to order. (Substituted by 35 of 1976, s.3.)

(2) Where an agricultural holding is held by a Fijian according to native custom, he or a person authorised in writing by the Native Land Trust Board may apply to a tribunal for a declaration that a tenancy under the provisions of this Act exist and from a date specified in such declaration, which shall not have retrospective effect, the provisions of this Act shall apply to such holding and such rent as may be assessed and fixed by the tribunal in respect thereof shall be paid to the Native Land Trust Board."

"23.-(3) On a reference being made to it under the provisions of section 5, the tribunal shall, if it is satisfied that it is just and reasonable so to do, declare that an agricultural tenancy under the provisions of this Act exists, and direct that an instrument of tenancy be entered into by the landlord and the tenant in a form pursuant to the provisions of this Act."

Section 59(2) and (3) reads :-

"59.-(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.

(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."

By an amending Act the following provisions were added in 1967 :-

"18.-(2) Where a tribunal considers that any landlord or tenant is in breach of this Act or of any law, the tribunal may declare the tenancy or a purported tenancy granted by such landlord or to such tenant as aforesaid, null and void and may order such amount of compensation (not being compensation payable under the provisions of Part V) paid, as it shall think fit, by the landlord or by the tenant, as the case may be, and may order all or part of the agricultural land the subject of an unlawful tenancy to be assigned to any tenant or may make any determination or order that a tribunal may make under the provisions of this Act.

(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."

The status of a tribunal is akin to that of a magistrate and that of the Central Agricultural Tribunal (appellate in character) to that of a judge of the Supreme Court.

The tribunal has all the powers of a Magistrate's Court and determines its own procedure. In practice references to it are made on printed forms on which the applicant inserts the required information and the relief sought. Where native land is concerned NLTB is always made a party even where the dispute is between the

applicant and a lessee of NLTB's and NLTB is not directly involved.

The first respondent in this case holds 194 acres under a lease granted to him by NLTB. In 1975 he entered into an agreement with the appellant in contravention of section 12 of the Native Land Trust Act, under which the appellant was to cultivate an area of 25 acres for 10 years. He has given other lots to other persons under similar agreements and does not cultivate any part of the land himself. A dispute arose and he applied for an eviction order against the appellant who referred the matter to the tribunal. On the printed form he sought "declaration of tenancy and order of assignment" without further particulars. It became clear at the hearing, however, that he was seeking an order that would give him a tenancy over the 25 acres he had been cultivating since 1975.

The first respondent in his defence alleged that the appellant was a mere employee, not a tenant, under the agreement of 21st August, 1975, and that, in any case, the agreement was unlawful in that it lacked NLTB's consent. NLTB also filed a defence in which it denied all knowledge of the alleged agreement or any landlord-tenant relationship between itself and the appellant. In paragraph 3 it said :-

> "3. That should the applicant have been in occupation of the land for some time, then such occupation was (and is) without the NLTB's prior written consent, the NLTB objects to such occupation."

The tribunal found the first respondent to be an unscrupulous landlord who had exploited the appellant and made the following order :-

> " The Tribunal finds that the applicant is a tenant, albeit an unlawful one, because of lack of consent of the Native Land Trust Board. The applicant's tenancy is therefore declared void. It is ordered that 25 acres

> occupied and cultivated by the applicant be assigned to him. There will accordingly be a declaration that an agricultural tenancy under the provision of this Act exists, and it is directed that an instrument of tenancy be entered into by the landlord and the tenant in a form pursuant to the provisions of this Act."

At the hearing NLTB's objection to assignment was based largely on the uneconomic nature of the land in question if converted into an agricultural holding. The evidence of a field officer of Fiji Sugar Corporation which purchased sugar cane grown on this area, however, was to the contrary, he asserting that, if worked well, the land could produce 225 tons of cane per year.

An appeal from the tribunal's decision to the Central Agricultural Tribunal was dismissed. The latter tribunal held that the declaration of tenancy and order of assignment were correctly made and said :-

> "There will, therefore, be an order for assignment of the land comprised in the respondent's lease. The Board will issue to him an instrument of tenancy for his 25 years."

It is not for this court to consider whether correct orders were made under the appropriate provisions of ALTA, the sole issue here being whether it was within the powers of the tribunals to make the orders that they made without specifically making them subject to NLTB's consent that is to say, did they exceed their jurisdiction by making those orders outside the powers conferred upon them by ALTA?

The application was dealt with under section 18(2) of the Act and not under section (5) which, to us, seems odd. This is particularly so when there is no provision for a declaration of tenancy under section 18 the only

declaration available on application being that of nullity of a contract of tenancy granted by the landlord. It seems to us that neither party was relying on the agreement of 1975 or claiming anything under it, its sole purpose being to prove that the appellant had been occuplying and cultivating the land with the knowledge of the first respondent for more than 3 years for purposes of sections 4 and 5. In fact when the tribunal did come to declare a tenancy it did so exactly in terms of section 23(3) which relates only to a section 5 application. This was recognised by the learned Judge also when he said :-

> "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."

It is true that a person who is occupying and cultivating land under an unlawful agreement may nevertheless qualify for a declaration of tenancy if he satisfies the requirements of section 4 but he would then be applying under section 5, and not under the agreement, whose contents would be mere evidence to establish those requirements. In such circumstances section 18(2) and (3) would appear to have little relevance as it would be pointless to have declared null and void an agreement under which no claim is, or can be, made.

For instance, where an agreement to lease native land made in contravention of section 12 of the Native Land Trust Act which is void by statute is declared void under section 18(2) of ALTA, no compensation, assignment or relief of any other kind is possible if the period of occupation is less than three years. The right to relief arises from entitlement to a declaration of tenancy under section 4, not under the agreement, which being void can confer no rights. Its only relevance, as we have said, would be

evidentiary, to show if the requirements of section 4 have been satisfied. If, however, the agreement was one that would be valid but for some breach or illegality on the part of one party, claims might arise under the agreement itself after its avoidance by the other party to it, or by some other tenant having interest in the subject land.

A statute does not, as a rule, duplicate powers. In ALTA power to declare a tenancy on grounds of occupation and cultivation already existed when subsections 18(2) and (3) were added to it. Their purpose must, therefore, have been to deal with a situation for which no provision had been made in the Act as it then stood and the power conferred by them cannot be treated as aiming merely at declaring null and void what is already null and void by another statute. That would be a pure formality. Construction of these provisions as a whole indicate a contract capable of sustaining a claim unless declared invalid at the application of an interested party which may include the landlord, "the tenant" under the contract, or "any tenant". Among the possible situations it certainly envisages one where more than one tenant may have a claim over the whole or part of the subject land, for instance where the whole land is claimed by "the tenant" under the agreement produced, whole or part of it is claimed by someone claiming tenancy under some other agreement or whole or part of it is claimed by a person claiming a declaration of tenancy under section 4. There may, of course, be situations where there is only one tenant alleging breaches of the provisions (such as section 11(1) of ALTA itself) or of some other law which, if established, may avoid the contract. The power to make a variety of orders is clearly intended to meet claims of different kinds.

Where, on the other hand, a declaration of tenancy is made under section (5), no order can be made for

compensation, or for assignment of land. The tenant automatically becomes a tenant from the date he first occupied the land and the only order that is made under section 23(3) is for the landlord to enter into a contract of tenancy.

We have not attempted, nor do the issues before us call for, an exhaustive construction of these provisions and our comments are intended merely to express what appears to us to be the reason for enactment of section 18(2) and (3).

The issue in this appeal is a narrow one concerning solely the form of orders the tribunal is empowered to make viz whether they must in case of native land incorporate the words "subject to the consent of the Native Land Trust Board".

Sections 46 and 47 of ALTA provide :-

> "46. A tenant of an agricultural holding may, with the consent of his landlord, which shall not be unreasonably withheld, assign his contract of tenancy.
>
> 47.-(1) Where a tenant claims that his landlord has unreasonbly withheld consent to the subletting of his holding or the assigning of his contract of tenancy, such tenant may make application in writing to the tribunal for an order consenting to the subletting or assignment, as the case may be.
>
> (2) If the tribunal considers that the consent of the landlord has been unreasonably withheld the tribunal shall give its consent thereto and such order shall take effect as if it were the consent of the landlord."

NLTB is, by definition, landlord in respect of agricultural land for which it is entitled to receive rents and profits. Learned Counsel for NLTB concedes that by virtue of these provisions, the absolute discretion

vested in NLTB by section 12 of the Native Land Trust Act no longer applies to agricultural holdings but submits that section 47 can be brought into operation only by the tenant (in this case the first respondent) and that he has made no such application. The appellant, not being a tenant of NLTB's, cannot invoke the tribunal's jurisdiction under that section. Counsel for the first respondent supports this contention.

We accept the submission that section 47 is confined to cases where application is made by a tenant who has a contract of tenancy and wishes to sub-let. The right to sublet there arises under a contract which, like most such contracts, requires that the restraint placed on that right shall not be unreasonably enforced. Normally, in case of a dispute, courts would be the judges of reasonableness. In case of agricultural holdings, however, that power is taken away from the courts and vested in the tribunal. NLTB's absolute power under section 12 of Native Land Trust Act has also been, by the same provisions, subjected to the test of reasonableness. But the right in all such cases arise from contract.

A person seeking a declaration of tenancy under ALTA, however, has no contract and, therefore, no right so arising. His right to a tenancy is created not by any agreement but, under section 4 of ALTA, by Parliament itself, the ultimate repository of all power. The tribunal is merely the machinery to give effect to that right. Section 23(3) requires that it shall declare a tenancy and direct that a contract of tenancy be entered into, but only where it considers it just and reasonable so to do. For instance, it would not be obliged to give effect to that statutory right, if the application is tainted with fraud, collusion or an attempt to frustrate the intent of ALTA, the Native Land Trust Act, the Crown Lands Act or some other law.

When after a hearing the tribunal, the ultimate judge of reasonableness, does make a declaration the Parliament, in our view, must be taken to have intended that such a declaration of a statutory right be binding upon everyone including the Crown, NLTB, or any other holder of title.

Section 47 of ALTA places the lessee of native land on the same footing as the lessee of freehold land who may not sublet without the consent of the lessor. In neither case the consent may be unreasonably withheld. In that regard the difference between native land, Crown land and freehold land disappears and the requirements as to the orders made by the tribunal must, therefore, also be the same. It would be absurd, in our view, to suggest that it cannot make a declaration of tenancy in any case at all without making it subject to the consent of the lessor, or titleholder, for that would defeat the very purpose of Parliament in enacting section 4 of ALTA which envisages a sublease against the wishes of the landlord. The legal effect of a declaration under section 23(3) is to make, from that very moment, the presumed tenant under section 4 of the actual sublessee of the subject land be it native, Crown or freehold and no order for possession can thereafter be made against him on the basis of title.

The rest is mere machinery of documentation, section 8 requiring, the landlord, on pain of punishment, to give a valid registrable instrument of tenancy amounting to a sublease. In this regard, too, there is no difference between a lessor of native and that of any other land.

Learned Counsel for the first respondent refers to section 5 of the Native Land Trust Act which prohibits the native owners from alienating their land and provides in subsection (2) :-

"(2) All instruments purporting to transfer, charge or encumber any native land or any estate or interest therein to which the consent of the Board has not been first given shall be null and void."

This section, he says, has not been made subject to ALTA by section 59(2) of the Act and must, therefore, operate to invalidate the orders made by the tribunals.

We do not agree. Section 5 deals specifically with alienation of native land by native owners and has no relevance to restrictions imposed upon lessees of native land which is governed solely by section 12.

In respect of the order of assignment of land under section 18(2) counsel for the first respondent draws attention to section 18(3) wherein occur the words "nothing contained herein shall be deemed to permit the ordering or making an assignment in breach of the provisions of the subdivision of Land Act or which would otherwise be unlawful" and submits that an order of assignment without endorsement of NLTB's consent being in itself unlawful the tribunal was barred from making it in the form it did. We, however, accept the construction given to the words "which would otherwise be unlawful" by the Central Agricultural Tribunal viz. the order which would be unlawful but for the fact that section 59(2) of ALTA requires section 12 of the Native Land Trust Act to be read subject to its own provisions.

The need for making an order of assignment would, in our view, have been obviated if this case were dealt with entirely under sections 4 and 5 without recourse to section 18(2). The learned Judge held, and we concur, that the declaration of tenancy was based on entitlement under section 4. If so, the instrument of tenancy entered into by the landlord and tenant would in any case give the tenant the whole of 25 acres he was claiming making it unnecessary to make any other order.

Our attention has been drawn to the wording of the Central Agricultural Tribunal's order which names NLTB itself instead of the landlord (the first respondent) against whom the reference to the tribunal was made. In view of what we have said in the preceding paragraph the variation, if any, between the two orders does not appear to pose any real difficulty in the way of implementation. The matter however, lay entirely within the province of the two tribunals and does not call for adjudication from this court.

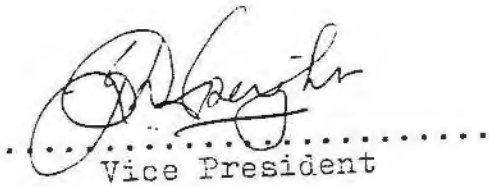
Reference was made both the tribunals, as well as by the learned Judge, to this court's judgment in Dharam Lingam v. Ponsami & Others (42 of 1981). All we wish to say is that in that appeal, argument was not directed to, nor adjudication sought on, the issue now before us, the sole question in that case being whether or not there was an arguable issue to go to the tribunal. The court there did not consider the extent, if any, to which the powers conferred by ALTA were restricted by the operation of the Native Land Trust Act.

There is one matter which, perhaps, needs mentioning. The learned Judge correctly held that the appellant's entitlement arose under section 4 of ALTA and the declaration of tenancy was, therefore, made pursuant to section 23(3) making the appellant a sub-lessee of the first respondent's. If the wording of the Central Agricultural Tribunal's order was intended to vary the tribunal's order so as to make the appellant a lessee of NLTB's, that, in our view, would be inconsistent with the intent of sections 4, 5 and 23(3) of ALTA.

This matter, however, falls outside the scope of this appeal and no order was sought in that regard. Any clarification, should it be necessary, can no doubt be sought from the tribunals themselves.

The appeal is allowed and the order of the Supreme Court declaring the tribunals' award null and void is set aside.

The appellant will have the costs of this appeal to be taxed in default of agreement.



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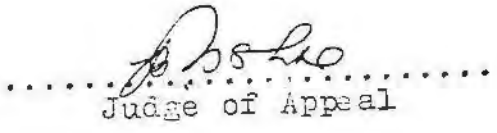
Judge of Appeal



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