IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0040 OF 1996
(High Court Judicial Review No. 8 of 1993)

BETWEEN:

LAKSHMI PRASAD — APPLICANT

-and-

GYAN PRAKASH — RESPONDENT

Mr. V. Mishra for the Applicant
Dr. Sahu Khan for the Respondent

Date and Place of Hearing : 12 August 1997, Suva
Date of Delivery of Judgment : 15 August 1997

JUDGMENT OF THE COURT

This is an application for leave to appeal against the decision of Sadal J. to refuse the applicant leave to apply for judicial review of a decision of the Central Agricultural Tribunal ("CAT"). A decision to refuse leave is an interlocutory decision (Charan v. Suva City Council (Civil Appeal No.29 of 1994)); consequently the applicant requires leave to appeal to this Court (section 12(2)(f) Court of Appeal Act (Cap.12).

The applicant has set out the grounds of appeal on which he will rely if leave to appeal is granted. They are as follows:-

> *"1. The learned judge erred in law and fell into (sic) in that he with respect failed to appreciate that both a Judicial Review and an Appeal dealt with errors of law and that there is an area of overlap or common ground between the two types of proceedings although the reliefs and remedies may differ.*
>
> *2. The learned judges (sic) erred in dismissing the application for leave to issue Judicial Review proceedings on the basis that the Central Agricultural Tribunal had dealt with the grounds stated in the Judicial Review when he considered the appeal to it and failed to consider whether the Central Agricultural Tribunal had made errors of law going to jurisdiction and whether there was breach of natural justice.*
>
> *3. The learned judge erred in placing heavy reliance on the quotation of Lord Scarman in R v. Inland Revenue Commissioner exparte Preston [1985] A.C. Page 835 at 852 and failed to consider and apply the principles in the local decisions Venkatamma and Sath Narayan v. Byran (sic)Charles Ferrier-Watson and others Supreme Court Appeal No. CBV0002 of 1992 and Azmat Ali v. Mohammed Jalil F.C.A Civil Appeal No. 111 of 1985 that the High Court of Fiji does have supervisory jurisdiction over the Central Agricultural Tribunal.*
>
> *4. The learned judges (sic) erred in law in not applying the principle that the purpose of the application for leave to apply for judicial review proceedings was to get rid of frivolous and/or vexatious applications and that the proper standard of whether to grant leave or not was whether there was any merit in the application.*
>
> *5. The learned judge erred in law in holding that certiorari only lies when there is a lack of jurisdiction or where there is an error on the face of the record.*

6. The learned judge erred in law in dismissing the application for leave on the grounds that the Appellant was trying to have the appeal re-heard and failed to take into account that the Appellant had good ground for Review on the following basis:- (sic).

7. The Central Agricultural Tribunal had made error of law in not allowing the Appeal on the basis that the Agricultural Tribunal had gone beyond his jurisdiction in allowing and granting a tenancy when the application was not the application of the First Respondent.

8. The Central Agricultural Tribunal had made error of law in not allowing the appeal on the basis that the Agricultural Tribunal had gone beyond his jurisdiction in allowing Income Tax Returns copies of the Respondent Mangaru in evidence in re-examination.

9. In not allowing the appeal to it when the Agricultural Tribunal did not made (sic) basic findings which directly affected the case of whether there was rental paid by Mangaru or not and thereby not considering the Exemption 2(a)(ii) and 5 of the Agricultural Landlord and Tenant legislation.

10. In allowing himself to be influenced by factors such as the appellant was prepared to deprive the First Respondent of the house his father has built on the land and that the appellant's wife could have given evidence denying rental."

In September 1990 the respondent's father, Mangaru, was alive. An application to an agricultural tribunal ("the tribunal") was made then under section 5 of the Agricultural Landlord and Tenant Act (Cap. 270) ("the Act") in Mangaru's name by the respondent. In 1991 Mangaru died. The tribunal heard the application in 1992; by then probate of Mangaru's will had been granted to the respondent. The applicant's father, Ram Narayan, had died in 1980 and in 1981 the applicant had obtained probate of his will. When the application was made to the tribunal, the applicant was trustee of Ram Narayan's estate.

When the application came on for hearing before the tribunal, the respondent presented it as executor of Mangaru's will; the tribunal expressly substituted him as applicant in the proceedings without objection by the applicant's solicitor. However, during the course of the hearing his authority to make the application in 1990 in Mangaru's name was challenged. The tribunal observed that the respondent's signing of the application might "not be fully in order" but treated the application as having been effectively made. He found on the evidence that the respondent was entitled to a tenancy of the land to the year 2000 and directed that an instrument of tenancy should be executed as provided for by the Act. The CAT dismissed the applicant's appeal against the tribunal's order.

The applicant then sought leave of the High Court to apply for judicial review of the CAT's decision. In a statement filed with the application for leave he stated as follows the reliefs which he would seek and the grounds on which he would rely if leave were granted:-

"3. The reliefs sought by the Applicant is (sic) for leave to apply for Judicial Review in the form of an order for Certiorari and/or Mandamus and/or Declaration as follows:-

(a) To remove the decision of the Central Agricultural Tribunal dated 30th September, 1993 into this Honourable Court and quash the same.

(b) An Order for mandamus directing the Central Agricultural Tribunal to allow the Applicants Appeal.

(c) Further and/or alternatively a declaration that:-

(i) decision was wrong in law and consequently is without lawful authority and was ultra vires the powers of the Tribunal.

(ii) the said decision was unfair and/or unreasonable and in breach of rules of natural justice.

(iii) the Central Agricultural Tribunal went beyond his powers and/or acted ultra vires and/or made errors of law and/or acted in breach of the rules of natural justice.

The Grounds on which the reliefs are sought are that the Central Agricultural Tribunal erred in:-

(a) Dismissing the Appeal to the Central Agricultural Tribunal of Lakshmi Prasad Pande after having held that he was correct in his plea that the Tribunal had erred in allowing the Income Tax Return copies of the first Respondent into evidence.

(b) Dismissing the Appeal of the Applicant when he accepted that the Tribunal was not prepared to disbelieve either witness and therefore accepted that the Tribunal had not made a decision on the exemptions pleaded.

(c) In not dealing with the failure of the Tribunal to make decisions or findings on important questions of fact and law.

(d) In holding that the Tribunal "...was more inclined to rely on the presumption of Tenancy and the extent on conferred by the act" ... when certain decisions on questions of fact on evidence adduced were essential before a declaration of Tenancy could be made.

(e) In allowing himself to be influenced by factors such as:-

(i) "... the Appellant was prepared to deprive the Respondent of the house his father last (sic) built on the land" when the Appellant was sitting as an Appellate Tribunal and had not heard the evidence first hand and thus erred in acting as a Tribunal of first instance.

(ii) Lakshmi Prasad Pande's wife could have given evidence denying that Gyan Prakash paid her rental when the Applicant did not know of this allegation until the actual hearing.

(iii) The Applicant did not do anything or raise the fact that the application for reference was not properly signed by Mangaru, when the Applicant did not know that Gyan Prakash did not have a Power of Attorney until the actual hearing.

(f) Not taking into account that if Lakshmi Prasad Pande could not be disbelieved then his evidence of rent-free agreement with Mangaru, would nullify any Tenancy made.

(g) In holding that 10 years extension under the original ALTA amendment applied and in not applying the law as it stands today."

At the hearing of the application for leave counsel for the applicant submitted that the tribunal and the CAT had lacked jurisdiction because the application to the tribunal had not been effectively made and that the CAT exceeded its jurisdiction by deciding an issue of fact, namely

whether or not rent was paid. In response counsel for the respondent submitted that, of the grounds on which the applicant intended to seek judicial review, only ground (c) raised a question of law and, even then, without particularising the alleged error. The applicant, he contended, was seeking to have his appeal to the CAT reheard by the Court.

In refusing leave, His Lordship accepted that submission. He observed that "broadly speaking" certiorari lay only where there was lack of jurisdiction or an error on the face of the record and that "there was nothing in the record to suggest that". He did not deal specifically with the submission of the applicant's counsel.

The grant of leave to apply for judicial review is a matter for the judge's discretion. Of course, that discretion must be exercised in a proper manner. Mr. Mishra submitted that leave should not be refused unless the application for judicial review was frivolous or vexatious. An application may be refused for either of those reasons; but it can properly be refused also if the grounds clearly lack merit.

Sadal J made his order refusing leave before the Supreme Court had given its judgment in Ponsami v Dharam Lingam Reddy (Civil Appeal No. CBV0001 of 1996; judgment delivered on 12 September 1996). He stated that certiorari could lie only where there was lack of jurisdiction or an error of law on the face of the record. In light of Ponsami that statement can no longer be accepted as correct. However, that does not of itself mean that His Lordship's discretion miscarried.

Sadal J was also led down a false path by Dr. Sahu Khan's submission that the applicant was trying to appeal against the CAT's decision. As a result he discussed, and set out a passage from, the House of Lords case of **R v Inland Revenue Commissioner, ex parte Preston** [1985] A.C. 835, which was concerned with the situation where a person who had a right of appeal attempted instead to apply for certiorari. That was not the situation in the proceedings before him. Again, however, the fact that he went down the wrong track in that manner does not of itself mean that his discretion miscarried.

He stated his reasons for refusing leave as follows:-

> ***"I do not consider this Court would on the facts stated in the application grant an order of certiorari and that being so leave to apply for an order should be refused."***

That is a sound reason for his exercise of the discretion to refuse leave.

Now we are asked to grant leave to appeal against the order made in the exercise of that discretion. If there is a reasonable prospect that his appeal would succeed on the grounds of appeal on which the applicant would rely if leave were granted, leave should be granted. But, if it is clear that he could not succeed on any of those grounds in showing that Sadal J's exercise of his discretion miscarried , the grant of leave is not justified and it should be refused.

He would no doubt succeed in establishing that His Lordship misstated the scope of the remedy which an order of certiorari can provide; however, unless the CAT committed an error of law *within the exercise of its jurisdiction*, as distinct from an error of law *going to jurisdiction*, the judge's error was immaterial. We shall consider shortly whether there is anything in the CAT's

statement of the reasons for its decision on which the applicant could rely as evidence that there was an error within the exercise of its jurisdiction.

The applicant would no doubt also succeed in showing that the judge's reference to Preston demonstrated that there was a defect in his reasoning. However, although His Lordship wrongly accepted Dr. Sahu Khan's submission that the applicant was trying to have his appeal reheard, his reason for refusing leave was that the facts stated in the application before him, if proved, would not warrant the grant of certiorari.

We turn, therefore, to consider those grounds of appeal which relate to those facts, namely grounds 7 to 10. Before us Mr. Mishra did not make any submissions directly related to the merits of ground 10; we find no merits in it. He dealt with grounds 8 and 9 together but failed to persuade us that he had any chance of succeeding on them if leave to appeal were granted. The Agricultural Tribunal allowed the respondent to give evidence, and tender copies, of income tax returns in the course of his re-examination. The CAT referred to that as "a mistake on the part of the Tribunal". That, however, does not mean that it was an error of law. It was, no doubt, an unusual course to permit that but that does not make it an error of law. The tribunal is not a Court; section 25(1) of the Act provides that it is "to proceed with the investigation", a phrase which distinguishes its function from that of a Court. Further, a Court may for good reason permit new evidence to be adduced in re-examination, although it usually will not. There is nothing in the statements of the tribunal and the CAT to suggest that the applicant could not have cross-examined the respondent further on the new evidence.

The exemption provided for in regulation 2(a)(ii) of the Agricultural Landlord and Tenant (Tribunal Procedure) Regulations, referred to in ground 9, has to be established by the landlord: the burden of proof rested on the applicant. As Mr. Mishra conceded before us, if a Court or a tribunal is unable to reach a conclusion whether or not a fact has been established, the party having the burden of proving that fact has failed to prove it. After some discussion we understood Mr. Mishra to concede that the situation in which an exemption is provided for by regulation 5 of the Agricultural Landlord and Tenant (Exemption) Regulations was not established in this instance; we are satisfied that it was not.

We come, therefore, to the remaining ground of appeal, ground 7. If the application made in Mangaru's name was a nullity, the Tribunal acted beyond its jurisdiction in hearing and determining it and the CAT erred in law in dealing with the appeal on the basis that it was from a decision made by the Tribunal in the proper exercise of its jurisdiction. It is the ground which needs the closest examination by us and for that reason we ensured that Mr. Mishra addressed us on it exhaustively. It relates to one of the grounds on which certiorari was sought in the High Court and which was therefore addressed by him in the High Court. The facts relevant to ground 7 have never been in dispute. The issue involved is one entirely of law; we are, therefore, as well placed to decide whether the ground has merit as we should be if we granted leave and heard the submissions afresh on the appeal.

In view of the inclusion of a tenant's executor in the definition of "tenant" in section 2 of the Act, the respondent could have recommenced the application in his own name after the death of Mangaru and there would then have been no doubt about the tribunal's jurisdiction to hear and

determine it. But he did not do so and, if the original application was a total nullity as distinct from only an irregularity in the way it was commenced, the tribunal made an error of law going to its jurisdiction in hearing and determining it.

It was a nullity only if the respondent could not, and did not, effectively make the application in his father's name. Section 5 of the Act provides for the person claiming to be a tenant to apply for a declaration of tenancy. However, that does not necessarily mean that he must make the application in person. In the Courts, proceedings can be commenced personally by the person making the claim or application or by a barrister and solicitor on his behalf. It would be most surprising if section 5, providing for application to an administrative tribunal, should be construed, more narrowly, as not permitting that. The nature and purpose of the Act, many of the beneficiaries of which are, from the nature of the situations for which it provides, unlikely to possess substantial financial means and some of whom are likely to be aged and infirm as Mangaru was, are such that, if there is no provision to the contrary, it would be reasonable to construe section 5 as permitting applications to be made on behalf of tenants by other members of their families as their agents at no expense to them and not only by barristers and solicitors to whom fees must be paid.

Mr. Mishra has referred us to regulation 3 of the Agricultural Landlord and Tenant (Tribunal Procedure) Regulations. It reads:-

> *"3. Where no provision is specified by the Act or by these Regulations for the procedure to be followed or the conduct of proceedings by the parties, their barristers and solicitors or agents before the tribunal, the provisions of the Magistrates' Courts Rules shall be followed with such necessary alterations as may be necessary to meet the circumstances of the case:*
>
> *Provided that the provisions of Orders V and XI of the said Rules shall always apply to proceedings before a tribunal."*

Orders V and XI are not material in these proceedings. Order VI r.2 of the Magistrates' Courts Rules is as follows:-

> *"2. The writ shall contain the name, place of abode and occupation of the plaintiff and of the defendant, so far as they can be ascertained, and the date (called "return day") and place of hearing; and there shall be endorsed on the writ particulars of the claim signed by the plaintiff or his barrister and solicitor which shall state briefly and clearly the subject matter of the claim and the relief sought."*

In regulation 3 and O.VI r.2 the word "shall" is used, a word which more often bears a mandatory connotation than a directory one. However, the provision made in both the regulations and the rule are of a procedural nature; the Courts have been more inclined to interpret "shall" as directory in such provisions than in provisions of a substantive nature. Moreover, the Magistrates' Courts Rules permit reference to the High Court Rules to supplement their provisions. As the CAT pointed out, O.2 r.1 of the High Court Rules indicates that failure to comply strictly with a rule of procedure will not of itself vitiate the proceedings.

Mr. Mishra referred us to Adams v London Improved Motor Coach Builders Ltd [1921] 1 K.B 495, a decision of the Court of Appeal. There Atkin L.J. (as he was then) observed that the commencement of an action by solicitors without authority would have been a nullity. In the present case, however, there was some evidence that the respondent had his father's authority to make the application. Having been informed that it had been made, Mangaru did nothing to repudiate the respondent's action. When the application came on for hearing, the applicant was substituted for his father as the applicant. If the application which he had made on Mangaru's behalf had been held to be a nullity at that point, or indeed at any later stage of the hearing, the respondent could, as we

have noted above, have made a fresh application then and there in his own name as executor of Mangaru's estate. Then instead of being substituted for his father in the original application he could have proceeded with his own application.

No injustice was done, therefore, to the applicant by the Tribunal hearing and determining the application. We should, we are satisfied, be slow to allow the proceedings between the parties to be protracted further by granting leave to appeal unless we are satisfied that the applicant may succeed on ground 7 to the extent of establishing that Sadal J's discretion miscarried. We have come to the conclusion that he cannot succeed to that extent; and that in the circumstances we should not grant leave to appeal.

Accordingly, in exercise of our discretion whether or not to grant leave to appeal, we refuse that leave and dismiss the application. The applicant is to pay the respondent's costs of to-day's application.

.....
Mr. Justice I. R. Thompson
Judge of Appeal

.....
Mr. Justice Savage
Judge of Appeal

.....
Mr. Justice J. D. Dillon
Judge of Appeal

C:\ABU0040U.96S.doc