PONSAMI

v.

DHARAM LINGAM REDDY

[SUPREME COURT, 1996 (Tuivaga P, Cooke of Thorndon, Mason JJSC) 12 September]

Civil Jurisdiction

Landlord and tenant- native land- agricultural tenancy- whether a declaration of an ALTA tenancy by an agricultural tribunal is subject to the consent of the NLTB- central agricultural tribunal- declaration that tenancy null and void- whether valid. Agricultural Landlord and Tenant Act (Cap. 270) Sections 4, 5, 18(3) and 59; Native Land Trust Act (Cap. 134) Section 12 (1).

The Supreme Court reaffirmed that an agricultural tribunal has the power to declare the existence of an agricultural tenancy over native land notwithstanding failure to obtain the consent of the Native Land Trust Board to the creation of the tenancy. The Court however pointed out that the tribunal's power to declare a tenancy to be null and void and to award compensation is conditional upon the existence of an unlawful act either by the landlord or by the tenant.

The Court once again warned the legal profession that non compliance with rules of Court may be fatal to an appeal.

Cases cited:

Azmat Ali v. Mohammed Jalil (1982) 28 FLR 31
Craig v. South Australia (1995) 69 ALJR 873
Re Azmat Ali (1986) 32 FLR 30
Reg v. Hull University Visitor ex parte Page [1993] A.C. 682
Venkatamma v. Ferrier - Watson (1996) 41 FLR 258

G.P. Shankar for the Appellant
V.M. Mishra for the Respondent

Judgment of the Court:

This is an appeal from a decision of the Court of Appeal (Ward, Thompson and Dillon J.J.A.-FCA Reps 96/41) which arises out of proceedings in the agricultural tribunal and, subsequently, in the central agricultural tribunal relating to six acres of land being one half of the land comprised in Native Lease No. 13196 at Tagitagi.

A On 12 December 1973 the respondent entered into a share farming agreement with one Ponia Kutti to cultivate the land for three years. After Kutti died before the expiration of the three years the respondent continued to farm the land, in accordance with the agreement, until 1981 when he received a notice to quit from Kutti's administrators who included the present appellant.

B On 9 February 1981 the respondent applied for a reference to an agricultural tribunal and, on 16 April 1981, issued a statement of claim seeking:

> (a) assignment of one half of Native Lease No. 13196 under s.18(2) of the Agricultural Landlord and Tenant Act (Cap. 270) ("ALTA");
> (b) in the alternative a declaration of a tenancy under
C s.5(1) and s.22 (sc. s.23) of ALTA; and
> (c) compensation for improvements under s.21 and s.42(2).

On 3 September 1985 the agricultural tribunal ruled in favour of the respondent's claim under paragraph (b). The tribunal made the following declaration:

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> "I therefore declare that the tenancy created on the 12 December, 1973 shall be deemed to be a contract of tenancy for a period of ten years in accordance with Section 6(a) of [ALTA]. I further declare that the applicant is entitled to an extension of this tenancy to a further period of twenty years commencing from the 11 December 1983 in accordance with
E Section 13 of [ALTA]"

Section 6(2) of ALTA provides that a contract of tenancy created after the commencement of ALTA but before 1 September 1977 shall be deemed to be a contract of tenancy for a term of not less than 10 years.

F The administrators appealed to the central agricultural tribunal. On 13 November 1986 that tribunal ordered

> "The decision of the Agricultural Tribunal will be varied to the extent that the tenancy presumed under Section 4 of the Act, the presumption of which the Appellants are unable to
G rebut will be declared null and void and an order made for compensation under Section 18(2) of the Act."

In deciding to order compensation rather than an assignment of the tenancy, the tribunal took into account various considerations, including the fact that Ponia

Kutti's family were then of sufficient age to undertake the farming of the land themselves. The tribunal made no finding that the tenancy was unlawful; nor did it make any reference to any aspect of the tenancy being unlawful, whether by virtue of the land being native land or otherwise.

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On 29 January 1987 the respondent applied for leave to seek judicial review and for a stay of the central tribunal's order. On 11 February 1987 leave and a stay were granted.

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Thereafter nothing happened until April 1992, when Scott J. refused to grant judicial review by reason of the respondent's delay in prosecuting his application. The Court of Appeal allowed an appeal against that refusal and directed the High Court to deal with the application for judicial review.

On 28 March 1995 Byrne J. delivered judgment on the application for judicial review granted certiorari to quash the decision of the central agricultural tribunal and ordered the administrators to pay the present respondent's costs of the proceedings. Byrne J. held that the central tribunal was wrong in law in substituting its discretion for that of the agricultural tribunal on the question whether a tenancy should be declared in the respondent's favour under ss. 5 and 23(3) of the Act or whether he should receive an award of compensation under s. 18(2), when neither party was relying on the contract of tenancy, arising from the share - farming agreement. His Lordship also considered that the central tribunal had denied natural justice to the respondent in assessing the compensation to be awarded to the respondent at $8,552.00 by taking into account certain material provided to it by the Fiji Sugar Corporation without informing the parties of what it proposed to do and without giving the parties an opportunity to cross-examine officers of that Corporation on the material so obtained. On the view which we take of the case, this aspect of it can be put aside.

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On appeal, the Court of Appeal held that the agricultural tribunal had declared a tenancy under s.5 of ALTA and that the central tribunal had not cast any doubt on the basis for finding the existence of that tenancy. The Court of Appeal concluded that the central agricultural tribunal was in error in making an order that the tenancy was null and void and in awarding compensation, in the absence of any finding that there was a breach of the law. Accordingly, the central tribunal lacked jurisdiction to make an order for compensation under s.18(2) with the result that the appeal from the orders made by Byrne J. was dismissed and the appellant was ordered to pay the respondent's costs of the appeal.

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The appeal to this court

The respondent's counsel has drawn our attention to a number of irregularities in the presentation of the appeal to this Court. Certain parties to the early proceedings

who were joined with the appellant are not parties to the appeal. In addition, neither the agricultural tribunal nor the central tribunal have been joined as parties, notwithstanding that the validity of their decisions are in question. A notice of appeal was filed within time but it differs in a number of respects from a subsequent notice of appeal which was filed but was not served within the 42 days after judgment prescribed for filing the notice of appeal by Rule 5(4) of the Supreme Court Rules, 1992. Indeed, a copy of the subsequent notice of appeal, which is the notice of appeal included in the record, was not served until four months after the judgment appealed from. This sorry catalogue of irregularities, coupled with the gross delays which have marked the history of this case, is a matter to which we shall refer later.

The case for the appellant and the statutory provisions

The principal submission by counsel for the appellant is that the absence of consent by the Native Land Trust Board, as provided for by s.12 of the Native Land Trust Act (Cap. 134), makes the initial contract of tenancy and the declaration of tenancy illegal and void. That section provides

> "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 sub-lease or any in any other manner without the consent of the [Native Land Trust] Board as lessor or head lessor first had and obtained. The granting or witholding of consent shall be in the absolute discretion of the Board, and any sale, transfer, sub-lease, or other unlawful alienation a dealing effected without such consent shall be null and void ...."

ALTA was introduced in 1966 in order "to provide for the relations between landlord and tenants of agricultural holdings and for matters connected therewith". Sections 4(1) and 5(1) provide as follows:

> "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
> .....

> 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."

Section 22 sets out the general functions of an agricultural tribunal. It is unnecessary to refer to them.

Sections 4 and 5 particularly s.5(1), must be read with s.23(3) which provides

> "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 to do so, declare that an agricultural tenancy under the provisions of this Act exists, and direct that an instrument of tenancies be entered into by the landlord and the tenant in a form pursuant to the provisions of this Act."

In the light of these provisions, it is plain enough that the agricultural tribunal, on receipt of the respondent's reference under s.5, proceeded to apply s.4 (1) and then to make a declaration that a tenancy existed pursuant to s.5(1) and s.23(3). The tribunal did not direct its attention to s.18(2) as there was no contention before the tribunal that the landlord or the tenant was relevantly in breach of any law.

Section 59 of the Act is of critical importance in the present case. Sub-sections (2) and (3) of that section provide:

> "(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."

In 1967, ALTA was amended to include s.18(2) and 18(3). Section 18(2) provides:

> "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... null and void and may order such amount of compensation... paid, as it shall think fit, by the landlord or

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> 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..."

When attention is given to the provisions of s.18(2), it is clear that the central tribunal, in making a declaration that the respondent's tenancy was null and void and in ordering the payment of compensation, was making orders of a kind
B authorised by that sub-section and not by ss.4,5 and 23(3). However, essential to the making of orders of that kind under the sub-section was a conclusion that the landlord or the tenant was in breach of the law, a matter not dealt with by the central tribunal.

In passing we note that s.18(3) authorises the making of an application for a
C declaration, for compensation or for an assignment or other order or determination under subsection (2), notwithstanding the provisions of s.59(3).

The authorities

The operation of these provisions and the relationship between s.12 of the Native
D Land Trust Act and the provisions of the Act have been considered in two decisions of the Court of Appeal to which we should refer. The first was Azmat Ali v. Mohammed Jalil (1982) 28 FLR 31. In that case, the Court of Appeal set aside an order for possession made against a person who claimed to be a tenant of agricultural land comprised in a Native Lease, in order to enable that person to make an application under s.18(2) of the Act for relief. The judge of the Supreme
E Court, whose order was set aside, had held that the failure to obtain the consent of the Native Land Trust Board to a share farming agreement said to constitute a contract of tenancy was a breach of s.12 of the Native Land Trust Act rendering the agreement null and void (see p.34). In the course of its judgment, the Court of Appeal explicitly remarked that it was not disagreeing with the Judge's finding that the agreement, in the absence of consent of the Board, contravened s.12 (see
F p.34).

The second and more important decision was Re Azmat Ali (1986) 32 FLR 30. In that case, the principal issue was whether, in relation to native land, tribunals under the Act could make an award without making it subject to the consent of the Native Land Trust Board. The Court of Appeal answered the question in the
G affirmative. The agricultural tribunal had made a declaration of tenancy and an order of assignment, affirmed by the central tribunal, in favour of the tenant. The agricultural tribunal had found that the applicant's tenancy was unlawful by reason of the absence of consent of the Board and declared it to be void and had gone on to order assignment and a declaration of tenancy. In the Supreme Court

in proceedings by way of judicial review, Dyke J. declared null and void the award made by the agricultural tribunal on the ground that "the award of the tribunals can only be made subject to the consent of the Native Land Trust Board and the absence of such consent will make the award null and void" (see p.34), a view which the Court of Appeal rejected.

The Court of Appeal pointed out, correctly in our view, that a person who occupies and cultivates land under an unlawful agreement may qualify for a declaration of tenancy if he satisfies the requirements of s.4 of the Act. In that event, he applies under s.5. Neither s.4 nor s.5 conditions the making of a declaration on the existence of a lawful contract of tenancy.

Earlier in its judgment, the Court of Appeal said (at p.37) in a passage with which we agree,

> "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 occupying 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."

That passage was relied upon Byrne J. and by the Court of Appeal in the present case.

The appellant submits that Re Azmat Ali was wrongly decided. The decision has stood unchallenged for ten years and has authoritatively established the relationship between the Native Land Trust Act and ALTA, that being a matter of very great importance in Fiji where much of the land is native land. On that score alone we would be reluctant to overrule Re Azmat Ali.

In any event, we consider that the decision was correct, as was the reasoning on which it was based. Section 59(2) of the Act makes it clear that the provisions of the Act are to prevail over s.12 of the Native Land Trust Act with the consequence that the declaration of a tenancy by a tribunal under the Act pursuant to ss.5 and 23(3) is not subject to the consent of the Native Land Trust Board. Because an

applicant who seeks a declaration of tenancy under ss.5 and 23(3) relies on his occupation and the presumption for which s.4 provides, not on his contract of
A tenancy, s.59(3) does not apply to render an application for such a declaration invalid.

Section 5(1) contemplates an exercise of discretion by the tribunal. The words "if the tribunal makes such a declaration" import such a discretion, as do the words "if it is satisfied that it is just and reasonable to do so" in s.23(3). The
B consequence is that, on an application under ss.5 and 23(3), the Board is at liberty to make submissions to the tribunal with reference to any contravention of the Native Land Trust Act and what should be done about any such contravention. It is then for the tribunal to consider such submissions and to exercise its discretion as it thinks appropriate.

C The purpose of s.18(2) is less clear. It is a general provision conferring power on a tribunal which may be exercised on application to the tribunal and perhaps in proceedings in which it otherwise has jurisdiction. It may be designed to provide some protection to tenants, as was suggested in Re Azmat Ali. The presence and terms of s.18 (3) lend support to that notion.

D Disposition of this appeal

In the light of what we have said, it follows that the absence of the Board's consent to the original contract of tenancy did not invalidate the respondent's application under ss.5 and 23(3) of the Act. Nor did the absence of consent preclude the agricultural tribunal from making the declaration and order which it
E made. On the other hand, the central agricultural tribunal's order declaring the tenancy null and void and its order for payment of compensation were erroneous in law because the power to make such orders was conditioned on the existence of an unlawful act by the landlord or the tenant. No such act was identified by the tribunal.

F Two matters remain to be considered. One is the availability of judicial review in relation to the decision of the central tribunal. The other is the irregularities associated with the appeal.

Judicial review

G The appellant argued that certiorari did not lie because any error on the part of the central tribunal was an error within jurisdiction. The appellant relied on the recent decision of the High Court of Australia in Craig v. South Australia (1995) 69 ALJR 873 where the Court drew a distinction between errors of law going to jurisdiction and those within jurisdiction. In that respect, the law in Australia differs from the law as it has been enunciated in England in Reg v. Hull University Visitor ex parte Page [1993] A.C. 682 where the House of Lords accepted that

the distinction between error of law going to jurisdiction and error of law in the exercise of jurisdiction is no longer material to the availability of certiorari. According to their Lordships, the remedy will go to correct any error of law made by an administrative tribunal or inferior court which is relevant to the decision under challenge, except in some circumstances where the decision is sufficiently protected from challenge by a privative clause. On that approach, since followed by the House of Lords in R v. Bedwelty Justices unreported; judgment delivered on 24 July 1996, we consider that the grant of relief by way of certiorari was correct subject to the possible application of s.61 of ALTA. That section contains a privative clause.

In any event, we would have no difficulty in describing the error of the central tribunal as an error of law going to its jurisdiction, thereby falling within the principle as enunciated in Craig v. South Australia. Under s.18(2), the central tribunal exceeds its jurisdiction if it declares a tenancy null and void and makes an order for compensation in the absence of a finding of unlawful conduct. Moreover, by dealing with the case under s.18, instead of s.5, the central tribunal acted outside its jurisdiction. In the case of a tribunal, as distinct from an inferior court, there is simply no occasion to interpret the relevant statute as conferring power to make an order unreviewable for error of law.

Because the error of law goes to jurisdiction, certiorari was properly granted whether the question be approached via the House of Lords decision in Page of the High Court of Australia decision in Craig. We point out that, in Venkatamma v. Ferrier - Watson (1995) 41 FLR 258, we held that s.61 cannot protect an order made in excess of jurisdiction.

Procedural irregularities

In Venkatamma v. Ferrier - Watson, we drew attention to the importance of compliance with the Rules. We said

> "We now stress, however, that the rules are there to be obeyed. In future practitioners must understand that they are on notice that non-compliance may well be fatal to an appeal; in cases not having the special combination of features present here, it is unlikely to be excused."

No such combination of features is present here. Indeed, the warning in Venkatamma should have alerted the profession to the dangers of non-compliance. Had it been necessary to do so, we would have been disposed to dismiss the appeal on the ground of non-compliance with the Rules, more particularly in the light of the very considerable delays that have occurred in the course of this

litigation for some of which the respondent has been responsible.

A In the result, the Court of Appeal was correct in upholding the orders made by Byrne J. The order of the Court is:

Appeal dismissed with costs.

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