Privy Council Appeal No. 101 *of* 1946

Attorney-General of the Colony of Fiji - - - - *Appellant*

v.

J. P. Bayly Limited - - - - - - - - *Respondent*

FROM

THE SUPREME COURT OF FIJI

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 15TH DECEMBER, 1949

Present at the Hearing:

LORD SIMONDS
LORD OAKSEY
SIR LIONEL LEACH

[*Delivered by* LORD SIMONDS]

In this appeal, which is brought from a judgment of the Supreme Court of Fiji of the 19th September, 1946, their Lordships have very reluctantly come to the conclusion that it would not be proper for them to determine the important question of law involved in the judgment.

The respondents are the registered proprietors of certain freehold land known as Wainadoi in the district of Veivatuloa on the Island of Viti Levu in the Colony of Fiji, containing 2,900 acres, through which a stream known as the Wainadoi Creek flows to the sea. The stream is not tidal at any point relevant to the proceedings out of which this appeal arises.

On the 14th March, 1944, the respondents preferred a claim against the appellant, the Attorney General of the Colony, to which the Governor in Council gave the proper consent, making allegations and claims which in view of later developments must be stated in some detail.

By their statement of complaint the respondents, after stating the facts already set out, pleaded as follows:—

> "6.—(A) On the said land adjacent to the said stream are large deposits of gravel.
>
> (B) Such said deposits lie upon both sides of the said stream and at varying distances therefrom.
>
> 7.—(A) The Director of Public Works of the Colony of Fiji through his agents, servants and workmen upon sundry occasions entered upon the said land and removed and took away and continues to remove and take away from the said land large quantities of gravel without the permission of the plaintiff or any person on its behalf.
>
> (B) The said gravel has been removed as aforesaid from parts of the said land other than from the bed of the said stream."

Then, after stating the complaint made to the Director of Public Works and his reply, the statement of complaint proceeded as follows:—

> "10.—(A) The plaintiff admits that all streams and the beds thereof belong to the Crown, but

(B) The plaintiff says those parts of the said land from which the said gravel has been removed as aforesaid do not form part of the bed of the said Wainadoi Creek.

* * * * *

Wherefor the plaintiff claims:—

(A) A declaration that the said deposits of gravel are upon the land of and belonging to the plaintiff.

(B) A declaration that the land from which the said gravel has been removed as aforesaid does not form part of the bed of the Wainadoi Creek.

(C) A declaration that it is entitled to compensation under section 14 of the Roads Ordinance No. 6 of 1914 of the Colony of Fiji," and other relief as therein set out.

To this statement of complaint the appellant put in a defence by which (*inter alia*) he admitted that there were large deposits of gravel in the bed of the stream but denied that any part of such gravel deposits as were in dispute in the action were on the land of the respondents and alleged that such deposits lay in the bed of the stream and further pleaded that under section 5 of the Rivers and Streams Ordinance, 1880, all streams with the bed thereof belonged to the Crown, and that all gravel removed by the Director of Public Works was removed from the bed of the Wainadoi Creek and that at no material time had he removed gravel from the land of the respondents.

Upon these pleadings issue was joined and it is plain from the learned Judge's notes of the argument of counsel and of the evidence that two matters only were in dispute, viz., the matters put in issue by the pleadings, (*a*) where was the gravel in question taken and (*b*) was the place from which it was taken the "bed" of the stream? The learned Judge himself visited the *locus in quo* in order to appreciate the situation.

The hearing having been concluded on the 16th August, the learned Judge reserved his judgment, but on the 21st August, 1946, he directed the Registrar of the Supreme Court to write a letter to the parties intimating that he would appreciate the benefit of argument on two questions of which only the following is now material, viz.:—

"Does section 5 of the Rivers and Streams Ordinance (or any other provision outside the Roads Ordinance) give the Crown the right to remove portions of the bed of a stream *ex situ* for purposes not connected with the stream?"

Accordingly further argument was on the 30th August, 1946, heard upon this question and it appears from the learned Judge's note that counsel for the respondents submitted an elaborate argument to the effect that this question must be answered in the negative. But his note contains no reference to any argument on this point by the appellant nor does it record any objection by him to the question being raised. It is therefore necessary to supplement his note by the statement made by the appellant in his formal case in this appeal, paragraph 13 of which is as follows:—

"The learned Judge's note of the argument on the 30th August, 1946, does not record the appellant's argument on the first question at all. The argument was based on the assumption (which in the appellant's submission was the only proper assumption) that Thomson J. was of opinion that a consideration of the two questions would help him to resolve the issues in the case. On the first question the appellant submitted that the court had no jurisdiction in the present proceedings to entertain or decide whether the taking of gravel from the bed of a stream infringes the rights of the public: that the respondent was not claiming damages for anything done to the stream bed but was founding his whole case upon the allegation that the Director of Public Works had removed gravel from places which are not in law part of the bed of the stream: that an action

to restrain the Crown from infringing the rights of the public in the stream could only be brought by the Attorney General or by a member of the public at the relation of the Attorney General [*sic*] ; and that provided the Crown did nothing to interfere with the rights of the public and subject to well-known limitations the Crown could do what it liked with property which the law said belonged to the Crown."

Their Lordships must accept this account of the proceedings given in a case signed by learned counsel upon the instructions, as their Lordships were assured, of the appellant.

But notwithstanding the objection thus taken the learned Judge proceeded without any amendment of the pleadings to consider a question which was not only not in issue but which the respondents were by their own express admission precluded from arguing and on the 19th September, 1946, delivered a judgment in which, after an examination of the Rivers and Streams Ordinance and other relevant matters, he directed that the respondents should be given a declaration in these terms, viz.: "That all deposits of gravel forming part of the land described and comprised in Certificate of Title, Volume IX/05, Folio 226, are upon the land of the plaintiff subject to this that the ownership of the plaintiff of so much of the land as forms the bed of the Wainadoi Creek is subject to the right of the Crown to exercise such rights over the bed of the said creek as are necessary to ensure that the said creek shall be perpetually open to the public for all purposes for which streams may be enjoyed."

Their Lordships cannot doubt that, unless with the assent of the appellant, it was not competent for the learned Judge to determine this question, and that that assent was not given is plain.

The appellant forthwith applied for leave to appeal and it has been matter for comment that (at least so far as appears from the Record) he did not include in his grounds of appeal the plea that the order was made without jurisdiction. But such an omission (if there was an omission) could not preclude the appellant from taking the point upon the appeal to this Board: at the most it might have some bearing on the question of costs. In fact he took it, and placing it in the forefront of his case, urged as the first of his formal reasons why the declaration should be set aside, that "the declaration made by the Supreme Court was based on the determination of a cause of action or issue not raised by the statement of complaint but expressly disclaimed by paragraph 10 thereof", and as the second of his reasons that "at no stage of the proceedings was the cause of action or issue upon which the declaration was based raised in the action nor were the parties given an opportunity to lead evidence relative thereto".

It was urged by counsel for the respondents that the objection was a purely technical one to which effect should not be given, and that, particularly after so long an interval, the Board should not decline to determine a question which had in fact been argued in the Supreme Court and had been fully considered and decided by the learned Judge.

Their Lordships cannot entertain this view. A so-called technical objection may go to the root of the matter and, whether it be called technical or not, an objection which is based upon the fact that a decision rests on an issue not raised in the action, must be given effect to, if justice is to be done. As already stated, their Lordships cannot but regret that so much time and expense has been wasted upon a fruitless appeal. But, apart from the appellant's objection, to which they feel bound to give effect, they are impressed by the fact that the question arising upon section 5 of the Rivers and Streams Ordinance may be of far-reaching importance, affecting not only the Wainadoi stream, but every other stream in the Colony, and also perhaps affecting the rights of the Crown and riparian owners in respect of the waters to which section 2 of the Ordinance applies. Where such issues are involved, it is essential to their proper determination that the pleadings should state with par-

ticularity the claims made by the one side and the other and that the court should be fully seised of all the facts relevant thereto. For example, in the present case it might well be important to have a full knowledge of the setting in which the Ordinance must be viewed, the system of land tenure at and before its date, the nature and terms of the grant under which the land in question was held and other matters which it is unnecessary to elaborate.

In the circumstances their Lordships, without expressing any views upon the construction of section 5 of the Ordinance, are of opinion that the decree of the 19th September, 1946, so far as it contains a declaration must be set aside, but they do not think fit to disturb the order made as to costs. It is possible that the parties may after this long time come to some arrangement, but, in case they should not do so, it appears to their Lordships that the proper course is to remit the case to the Supreme Court in order that the issues already raised in the pleadings, so far as the parties now wish to have them determined, and such further issues as that Court may allow to be raised by proper amendment of the pleadings, may be heard and determined. There will be no order as to the costs of this appeal.

(67164) Wt. 8084—42 100 1/50 D.L. G. 338

In the Privy Council

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DELIVERED BY LORD SIMONDS

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