Nauru

Satto v. Nauru Lands Committee and Others

Supreme Court
Donne C.J.
23 June 1988

Administrative law—judicial review—whether a superior court which does not have a specialist jurisdiction can review by certiorari *an inferior tribunal which has an exclusive specialist jurisdiction.*
Administrative law—prerogative writs—order of certiorari*—whether Supreme Court can review Nauru Lands Committee.*
Pleading and practice—Crown practice—order for certiorari*—whether superior court can issue order for* certiorari *for removal of proceedings from lower court with exclusive, specialist jurisdiction.*
Customary law—land law—specialist land tribunal concerned with customs and usages—staffed only by native residents as arbiters of custom—whether such customary dispute resolution should be subject to review by certiorari *issuing from superior court.*

The applicant, Domingko Satto, was the alleged owner of an estate in land known to him as Yenumwar. On three occasions—in 1938, 1958, and 1970—the Nauru Lands Committee published decisions regarding the ownership of land registered as Aminwen 59. In 1982, the applicant learned that the land known to him as Yenumwar was also the land registered as Aminwen 59 and ownership ascribed to others. It is now accepted that Yenumwar is a distinct parcel of land, and that Yenumwar was mistakenly included in the registration of Aminwen 59. The applicant now seeks an order of *certiorari* to quash the 1958 decision of the Nauru Lands Committee, thereby restoring applicant's rights to Yenumwar.

As the Nauru Lands Committee has exclusive jurisdiction to resolve disputes concerning Nauruan lands, the capacity of the Supreme Court to review decisions of that Committee arose as a preliminary question.

HELD:

(1) Before a superior court can issue an order for *certiorari*, it must itself have original jurisdiction to deal with and determine the matter in issue.
(2) The Nauru Lands Committee is a specialist tribunal, administering local customary land law, a jurisdiction not enjoyed by the Supreme Court.
(3) The Supreme Court cannot issue an order of *certiorari* to the Nauru Lands Committee.

Other cases referred to in judgment:

Dibebe Beijouw v. *Deireragea and Others* Land Appeal No. 20 of 1970
Longbottom v. *Longbottom* (1852) 8 Ex. 203, 155 E.R. 1320
R. v. *Chancellor of St Edmundsbury and Ipswich Diocese, ex p. White* [1948] 1 K.B.

195; [1947] 2 All E.R. 170 (C.A.) affirming [1947] 1 K.B. 263; [1946] 2 All E.R 604
R. v. *Electricity Commissioners* [1924] 1 K.B. 171
R. v. *Secretary of State for the Environment, ex p. Ostler* [1977] Q.B. 122; [1976] 3 W.L.R. 288; [1976] 3 All E.R. 90; 75 L.G.R. 45
Watson v. *Clarke* (1688) Carth. 75, 89 E.R. 494

Legislation referred to in judgment:
Constitution, article 48(2)
Nauru Lands Committee Ordinance 1956–1963

Other sources referred to in judgment:
de Smith, *Judicial Review of Administrative Action* (4th. ed.)
Halsbury, *Laws of England*, 1, (4th. ed.), paragraphs 147, 150, and 152

Counsel:
R. Kaierua for the applicant
K. Adeang for the respondents

DONNE C.J.

Judgment:

This is an application for an order of *certiorari* to quash the decision of the Nauru Lands Committee recorded in the *Government Gazette* No. 34 of 1958 relating to land described therein as "Aminwen 59" in Anabar district.

The background to this claim is obtained from a perusal of records and reports of the Nauru Lands Committee which are in the court records. The land "Aminwen" was registered in 1928. In 1938, in the *Nauru Gazette* No. 37, there was published a decision of the Nauru Lands Committee involving the land and fixing the owners. It was described as "Aminwen 58 and 59 Ijuw/Anabar". In 1958, a further gazette notice published a decision relating to "Aminwen 58" and "Aminwen 59" and referred to *Gazette* 37/38. In 1970, a decision was published relating to "59 and 58 Aminwen p. 1. Anabar". The applicant took no part in any of these proceedings. He claims he was unaware they related to the land "Yenumwar" which he claims is his. He said he was unaware they related to this land as it was not specified in the various *Gazette* notices. It is now evident that the land "Yenumwar" is in fact what has been described as "Aminwen 59". The Nauru Lands Committee in its report to the Court acknowledges that it is so and admits that the previous Committee has made an error in including it in the area described as Aminwen.

It is alleged:

1. the decision of the Committee was arrived at by a mistake, in fact in that it included in the registration and investigation of the land "Aminwen 59" land which was not part thereof but was land known as "Yenumwar";
2. that the applicant had no way of knowing and/or understanding from the *Gazette* publication that "Aminwen 59" could have been "Yenumwar 59";
3. that the Committee acted *ultra vires* and lacked jurisdiction in making its decision and failed in its duty to make full inquiry into the matter;
4. that the decision was a nullity in that the applicant was deprived thereof of his right to be heard on the decision.

By way of preliminary point, the question has been raised as to whether the Supreme Court has jurisdiction to hear this application. The jurisdiction of this Court is conferred by article 48(2) of the Constitution which reads:

> 48(2). The Supreme Court has, in addition to the jurisdiction conferred on it by this Constitution, such jurisdiction as is prescribed by law.

In relation to questions arising between Nauruans as to the ownership of, or rights in respect of land, there is conferred on the Nauru Lands Committee the power of determination thereof by virtue of clause 6(1) and (2) of the Nauru Lands Committee Ordinance 1956–1963 (hereinunder called the ordinance) which reads:

> 6. — (1) The Committee has power to determine questions as to the ownership of, or rights in respect of, land, being questions which arise —
>
> (a) between Nauruans or Pacific Islanders; or
>
> (b) between Nauruans and Pacific Islanders.
>
> (2) Subject to the next succeeding section, the decision of the Committee is final.

Since the decision of the Committee is final, it follows that the jurisdiction of the Committee is exclusive. The intention of the ordinance is clear: that is, to place the responsibility of hearing and determining all questions in relation to Nauruan land as between Nauruans in the hands of Nauruans. The Nauru Lands Committee must consist only of Nauruans (clause 3 of the ordinance). That is understandable since matters affecting land in Nauru are concerned primarily with the customs and usages of Nauru and it is proper that the arbiters of custom should be those specially qualified to apply it.

The granting of this exclusive jurisdiction means that in no forum other than the Nauru Lands Committee can proceedings in respect of Nauruan land ownership or rights thereto be taken and decisions thereon given. This finality of decision is subject to one check only. That is by the right of review of the Committee's decision by way of appeal only under clause 7(1) of the ordinance which reads:

> 7. — (1) A person who is dissatisfied with a decision of the Committee may, within 21 days after the decision is given, appeal to the Central Court against the decision.

The extent of the appellate court's special jurisdiction is fixed by clause 7(2) and (3), the former of which reads:

> (2) The central Court has jurisdiction to hear and determine an appeal under this section and may make such order on the hearing of the appeal (including, if it thinks fit, an order for the payment of costs by a party) as it thinks just.

(Upon independence, the Supreme Court of Nauru under the Constitution supplanted the Central Court.)

In my opinion, the jurisdiction of the Supreme Court in these land matters is limited to clause 7 to hearing and determining appeals only from the decisions of the Nauru Lands Committee. The Supreme Court has no original jurisdiction under the ordinance to hear and determine any of the questions to which clause 6 relates. It cannot initiate any proceedings relating thereto. The appellate jurisdiction conferred in the court allows it only to affirm or reverse the decisions which have been made by the Committee. It cannot quash a decision or proceeding. In other words, all

decisions in relation to Nauruan land on matters under clause 6 are decisions of the Nauru Lands Committee. They can be affirmed or reversed on appeal, but they are notwithstanding, still the Committee's decisions.

In this case, the applicant seeks relief by way of the common law remedy of *certiorari*. This ancient writ enabled a superior court to control the action of an inferior court and for that purpose, to bring into the superior court the decision of the inferior court for inquiry into it. Atkin L.J., in a dictum, often quoted with approval, explained its purpose and that of the other ancient writ of prohibition in the case of *Rex* v. *Electricity Commissioners* [1924] 1 K.B. 171. He said, at page 204:

> Both writs (of prohibition and certiorari) are of great antiquity, forming part of the process by which the King's courts restrained courts of inferior jurisdiction from exceeding their powers. Prohibition restrains the tribunal from proceeding further in excess of jurisdiction; certiorari requires the record or the order of the court to be sent up to the King's Bench Division, to have its legality inquired into, and, if necessary, to have the order quashed.

There is, I consider, no question but the Nauru Lands Committee with its limited jurisdiction is a statutory tribunal of inferior jurisdiction. In cases where it exceeds its jurisdiction, it could be stopped further from doing so by a writ of prohibition. That involves no review of the decision except to the extent of ascertaining whether jurisdiction has been exceeded. *Certiorari* proceedings, on the other hand, require the Court to take over the proceedings, review them, and, if it considers it proper, quash them. The scope of *certiorari* is limited. It is defined in 1 Halsbury's *Laws of England* (4th. edn.) paragraph 147 at page 150:

> 147. *The nature of certiorari*: Certiorari lies, on the application of a person aggrieved, to bring the proceedings of an inferior tribunal before the High Court for review so that the Court can determine whether they shall be quashed, or to quash such proceedings. It will issue to quash a determination for excess or lack of jurisdiction, error of law on the face of the record or breach of the rules of natural justice, or where the determination was procured by fraud, collusion or perjury.

There is no basis for a finding that the Nauru Lands Committee in 1958, when it made the decision complained against, lacked the jurisdiction to make it. However, there is no question that the decision, if it means that "Yenumwar" is part of "Aminwen", is based on an error of fact admitted by the Committee and is manifestly wrong. But the fact that the decision is the result of the Committee's mistake of fact does not mean that the proceedings of the tribunal were irregular. It does not render the decision void; it renders it liable to correction on appeal (clause 7(1) of the ordinance). But in order for the relief of *certiorari* to be available, the error must be an error of law. There may, of course, be instances where error of facts which are manifestly wrong can be characterized as erroneous in point of law. It has not been suggested to me that this is the case here and, for the reasons later appearing, it is not necessary for me to consider the matter further.

There are, however, three matters in this case which I feel must be mentioned. The first is the applicant's allegation that he had no way of knowing, from the 1958 gazette notification of the decision, that his land was included in it. The notice herein refers to "Aminwen 58"—*Gazette* No. 37/38 and "Aminwen 59"—*Gazette* No. 37/38.

The *Gazette* No. 37/38 records "Aminwen" as "Aminwen 58 and 59". The applicant or his predecessors would know that his land "Yenumwar" was lot 59 in Ijuw/Anabar, and this fact could allow a contention that he should have been alerted to the mistake in 1958 by perusing the *Gazette* and examining the authority given therein for the declaring of "Aminwen 59". In this respect, Mr. Adeang stressed that the procedures of the Nauru Lands Committee have always been well-known by all Nauruans and that in 1928 when "Aminwen" was registered and in 1938, when it was described in the *Gazette* as comprising lots 58 and 59, the chiefs of Nauru according to custom would have called all Nauruans together to hear the decisions. He submitted that, at those times, the forebears of the applicant would have been aware that the area being considered was in the vicinity of their land. On being present, they would have had the opportunity to have any error in decision rectified, but no objection was then made. Likewise, he contended the 1958 *Gazette* notice with its reference was sufficient to put the applicant on alert. These submissions have substance. However, no evidence has been called and, as these matters are evidentiary ones, before a decision could be made on them I feel it would be necessary for the case to proceed to a hearing.

It is further argued that the applicant has allowed a delay of twenty-six years to elapse before taking any steps to being his claim to court. This question of delay is a substantial one. The applicant seeks to excuse the delay by reasons of the fact he had no way of knowing until 1982 that his land had been wrongly held to be that of the respondents. Assuming that contention is upheld, the question is whether it can justify re-opening the case some twenty-six years after the decisions complained of have been given. On this point, Thompson D.J. in a Land Appeal in this Court, *Dibebe Beijouw* v. *Deireragea and Others* (Land Appeal No. 20 of 1970) said:

> In this present case, the applicant alleges that the proceedings before the Nauru Lands Committee were irregular because she was not given any opportunity to attend and present her case to it. She says that she did not know which portions belonged to Meta and that the Nauru Lands Committee would not tell her.... If this Court were to regard the proceedings of the Nauru Land Committee as irregular whenever some one or more persons who subsequently alleged that he had an interest at the time of the proceedings, the door would be open to many people to challenge old decisions of the Committee on which the people concerned have based their affairs for years. The stability and certainty which the Nauru Lands Committee Ordinance is intended to provide in land matters would be shaken, if not destroyed.

I accept the approach of the learned Chief Justice in such cases which would require a re-opening of old decisions of the Nauru Lands Committee. The present case is one. The decision is now thirty-two years old. It is true the Committee has admitted now that the decision is wrong. But this is not a case where the applicant—when the decision was made in 1958—was deprived by it of his right to be heard. His inability to be heard was due to his being unaware of the deliberations affecting his land. Whether the delay here is excusable must depend upon whether, considering the customary procedure for dealing with land questions and the notification of the decisions of the Committee, the applicant can avail himself of such an excuse bearing in mind that the Ordinance fixes a limitation of twenty-one days for the disputation of them by appeal (clause 7(1)).

The third problem here is that the law fixes the sole alternative remedy of appeal. In some circumstances, the prescription of an alternative remedy available in the Supreme Court may effectively exclude the right to apply for *certiorari*. This would be the case whereby there was a statutory procedure which is intended to supply a complete code for judicial review and excludes the common law right to impugn the making of such an order by *certiorari*: de Smith's *Judicial Review of Administrative Action* (4th. edn.) page 427; *R.* v. *Secretary of State for the Environment, ex p. Ostler* [1977] Q.B. 122. It is arguable that the Lands Committee Ordinance was intended to provide a certainty and stability in the settlement and decision in matters concerning Nauruan land; that to that end, the Nauru Lands Committee was given exclusive jurisdiction to deal with all questions relating thereto; that to ensure such certainty and stability, the ordinance provided that the decisions of the Committee should be final (clause 6(2)) subject to challenge in the Supreme Court by way of appeal only made within twenty-one days of the decision, with the requirement that the judgment on appeal is final. In other words, the ordinance creates a forum which is a specialist forum given the exclusive jurisdiction to administer land laws which are primarily based upon custom and in clauses 6 and 7 thereof, has created a complete code of review thus excluding the common law right of *certiorari*.

These matters abovementioned would be of relevance in the consideration of whether *certiorari* would lie in this case. I do not, however, intend to pursue them further since I am satisfied on other grounds that this Court does not have the jurisdiction to entertain a writ of *certiorari* in the circumstances. There are two reasons for this conclusion.

Firstly, before a superior court can issue an order for *certiorari*, it must itself have original jurisdiction to deal with and determine the matter to be removed to it. In 1 Halsbury's *Laws of England* (4th. edn.) at page 153, it is stated in paragraph 150:

> *Where matter is not within jurisdiction of High Court:* the order can only be issued in respect of matters which are within the jurisdiction of the High Court of Justice, for proceedings will not be removed into the superior court unless they are capable of being determined there.

This rule is well-established. In the case of one *Gassock* v. *Hill* (1656), referred to in *R.* v. *Chancellor* of *St. Edmundsbury and Ipswich Diocese, ex p. White* [1948] 1 K.B. 195 at 213, Glyn C.J. said that the King's Bench would grant a *certiorari* and remove a cause before judgment, if the inferior court had no jurisdiction or does not proceed therein according to the rules of common law, but if an inferior court has jurisdiction and the superior court has not, no *certiorari* ought to be granted. In *Longbottom* v. *Longbottom* (1852) Ex. 203 at page 208, Pollock C.B. said:

> In this case, we think that a certiorari ought to issue. Looking at the particulars of the plaintiff's demand, we are of the opinion that the amount in question is claimed as a debt, and not as a legacy. If this were a pure case of a matter of equity, neither this Court nor the County Court would have any jurisdiction over it. If it were a claim to a legacy the County Court would have jurisdiction and this Court would not, and therefore we certainly should not interfere.

In the *St. Edmundsbury* case (*supra*), the question was whether the Court of King's Bench Division should entertain an application for a writ of *certiorari* to remove

from an ecclesiastical court to that court a faculty (i.e., order) for the purpose of quashing it. Wrottesley L.J., at pages 214 and 215 said:

> The King's Bench was always careful not to endeavour to interpret ecclesiastical law, which was either civil or common law except in a case where it had to do so in order to exercise its jurisdiction to prevent Courts of limited jurisdiction from straying beyond these limits. . . . Asked, therefore, for a writ of certiorari to an eccelesiastical court, the King's Bench would refuse it for the reason that it would remove into the King's Bench proceedings not capable of being determined there. It was this salutary line of arguments which determined the practice of the court of King's Bench since certiorari first began to be used, and nothing has happened to make an alteration in the practice desirable. To remedy any grievance which the appellant may be suffering, the writ of prohibition will lie if the circumstances warrant its issue, provided that the eccleslesiastical court has exceeded its jurisdiction.

As I have stated above, the Supreme Court cannot entertain a suit to settle disputes relating to Nauruan land. That jurisdiction is given by clause 6 of the ordinance to the Nauru Lands Committee. It is an exclusive jurisdiction possessed by the Committee. To remove a decision of the Committee to this Court would mean the removal of a decision to a forum in which the matter could not be initiated originally because the court has no jurisdiction to deal with it. Clearly that cannot be done.

Secondly, it is my view that the Nauru Lands Committee is a specialist tribunal and in administering the land laws of Nauru it is administering local customary law which is peculiar to the own forum. The Supreme Court does not possess that special jurisdiction. Its role here is an appellate one only. In 1 Halsbury's *Laws of England* (4th. edn.) paragraph 152, at page 152, it is stated:

> 152. *Local custom etc.*
> Where an inferior court is one of civil jurisdiction, but by particular matter, and so possesses to this limited extent a jurisdiction which the superior court does not possess, certiorari will not issue to remove proceedings which come within that special jurisdiction.

See *Watson* v. *Clarke* (1688) Carth. 75; 89 E.R. 494.

I am therefore of the firm view that *certiorari* cannot lie from the Supreme Court to the Nauru Lands Committee and I so hold.