Havea v Tu'i'afitu, Kava and Minister of Lands

Privy Council
App 2/1977

24 February 1978

Land - grant of allotment - principles on which grant will be set aside by the courts

Land - grant of allotment - not invalid if grantee was not lawfully resident in the tofi'a in which the allotment was granted

Havea applied for a grant of two allotments of land previously held for life by a widow who was related to him. He then discovered that the tofi'a holder had endorsed the application of another person in respect of the two areas and a grant of them had been made to that person. Havea appealed to the Land Court, but the Land Court rejected his appeal.

Havea then appealed to the Privy Council.

HELD:
Dismissing the appeal.

(1) The courts will only cancel a grant if it is established that the Minister acted on wrong principles i.e. contrary to a statute, or in breach of the rules of natural justice, or in breach of a clear promise by the Minister and the tofi'a holder, and this had not been established in this case;

(2) Even if the person to whom the land had been granted was not shown to have been resident in the tofi'a before the grant this did not cause the grant to be invalid under s50(a) Land Act.

Statutes considered
Land Act s50(a)

Cases referred to
Lisiate Afu v Falakiko Lebas II Tongan Law Reports 167

Privy Council

Judgment

For a short summary of the facts which give rise to the present appeal we accept the summary given by the Chief Justice. There is no dispute but that second appellant had been issued with a deed of grant relating to two pieces of land called "Vaimu'a" and "Hehea" being plots 9 and 21 in Block 216/159. These were formerly held by Sione Hemaloto. On his death they passed to his widow for her life. Appellant was related to the widow. His evidence was accepted that he asked the tofi'a holder, the late Tu'i'afitu, if he could cultivate the land and he was allowed to do so. Appellant said that he got the impression that he would be given the land after the death of the widow. The Chief Justice found that there was nothing in writing and he did not consider any firm promise was made. The tofi'a holder did not sign any application form. Appellant waited for one year after the death of widow which took place on November 5, 1974 then he took his application to the Governor's office and left it there. He found that the tofi'a holder (the third respondent)had signed second respondent's application and that a grant had been made to him. Appellant sought to upset the grant to 2nd respondent but the learned judge refused his application and gave judgment for respondents. From this judgment the present appeal has been brought.

It is clear that appellant has failed to establish any right to a grant. The learned judge has found as a fact that no enforceable right was established and referred to the distinction between this case and the case of Lisiate Afu v Falakiko Lebas II Tongan Law Reports 167. Appellant is accordingly left only with his challenge to the validity of the grant to second respondent. The learned judge correctly stated the principle which must be applied when a grant is challenged. The Court will upset a grant only if the person challenging its validity establishes that the Minister has acted on wrong principles which means that the Minister has acted contrary to statute, or in breach of the rules of natural justice, or in breach of a clear promise by the Minister and the tofi'a holder. It was therefore for appellant to prove his case. During the argument counsel for appellant claimed that second respondent has failed to prove his right to the grant but the burden of proof rested on appellant to call sufficient evidence to show that the grant ought to be set aside upon an application of the principles we have set out above.

On the evidence in the case the only application made was that of second respondent. It was supported by the tofi'a holder. Appellant claimed that the learned judge was wrong in rejecting an application made by Appelant in 1966. This ground fails because, even if an application was made and none was produced, the widow held the estate until her death in 1974. The second ground of appeal is based on wrong facts and need not be further dealt with. The application of second respondent was regular and in order.

The remaining grounds of appeal turn upon the question whether or not the grant was in breach of Sec.50(a) of the Land Act (Cap.63). This section reads as follows:-

> Sec.50. Land for allotments shall be taken from the hereditary estates in accordance with the following rules:-

(a) an applicant for an allotment lawfully resident in an hereditary estate shall have his allotments out of land available for allotments in that estate;

A proviso is added, namely:-

"Provided that an applicant already resident on Crown Land shall where possible be granted the allotments from the particular area of Crown Land in which the applicant is resident".

To succeed on this ground appellant must show that the learned judge was wrong when he held that appellant had not established that second respondent was not lawfully resident on the tofi'a when the grant was made. The claim of appellant is first that he qualifies for the allotment in terms of Sec.50(a). The claim he has established. He further claims that second respondent resided at Pangai, Ha'apai, which is on Crown Land and therefore he does not qualify to take the grant.

Appellant claimed that the learned judge held that the only proof which was necessary to establish that second respondent was lawfully resident on the tofi'a was the transfer of the Poll Tax from Pangai to Makave. This is not a correct statement of the finding of the learned judge who held that it was proved that second respondent paid poll tax to the office for the area in 1974. The learned judge reviewed the claim by appellant's counsel that second respondent had not long been resident on the tofi'a; that he had no family connection. The learned judge continued his judgment on the basis that these matters were not proved but he held even if they were proved it would not be fatal to the case of second respondent. These facts which were alleged must now be taken to be not proved in accordance with the above finding. On the question of family connections the learned judge said there was no evidence on the point but stated, as he was entitled to do, that tofi'a being an expert on Land Law it was extremely unlikely that he failed to consider family custom.

The application of second respondent was properly made and the grant was regularly issued. The learned judge was correct when he held that appellant failed to establish any ground upon which the Court ought to upset a regular grant. The learned judge correctly applied the law to the evidence in the case and no ground has been shown for disturbing his findings.

The appeal will be dismissed without costs and the judgment in the Land Court is affirmed.