

NADI TOWNSHIP BOARD

v.

1. SUKHRAJI, 2 NATIVE LAND TRUST BOARD

[SUPREME COURT, 1971 (Hammett C.J.), 30th March, 13th April]

Civil Jurisdiction

**C** Land—compulsory acquisition sought by Township Board—authority of Minister essential pre-requisite to application to Court—land sought to be acquired native land subject to lease—considerations arising therefrom—Crown Acquisition of Lands Ordinance (Cap. 119) ss.2, 5, 6—Townships Ordinance (Cap. 107) ss.46(1), 49(1)—Constitution (Statutory Amendments) Order 1970 ss.68(n), 78(h) (i)—Native Land Trust Ordinance (Cap. 115) ss.5, 12—Rules of the Supreme Court 0.29 r.1—Fiji Independence Order 1970 (Schedule) s.8.

**D** Local Government—Township Board seeking to acquire land for public purpose—authority of Minister a pre-requisite to application to court—land sought native land subject to lease—considerations arising therefrom—Crown Acquisition of Lands Ordinance (Cap. 119) ss.2, 5, 6—Townships Ordinance (Cap. 107) ss.46(1), 49(1)—Constitution (Statutory Amendments) Order 1970, ss.68(n), 78(h) (i)—Native Land Trust Ordinance (Cap. 115) ss.5, 12—Rules of the Supreme Court 0.29 r.1—Fiji Independence Order 1970 (Schedule) s.8.

**E** The plaintiff Board issued an Originating Summons seeking an order authorising the compulsory acquisition under the Crown Acquisition of Lands Ordinance (as applied by section 49 of the Townships Ordinance) of a parcel of native land vested in the second defendant and held by the first defendant under lease.

**F** Held: By section 49(1) of the Townships Ordinance the authority of the Minister for the Township Board to apply to the Supreme Court under the Crown Acquisition of Lands Ordinance for compulsory acquisition, is a pre-requisite to the applicability of the provisions of the last mentioned Ordinance; that authority had not been obtained.

**G** Semble: By section 12 of the Native Land Trust Ordinance the first defendant would be precluded from agreeing to the transfer of her leasehold land without the consent of the second defendant, and the effect of section 5 of the same Ordinance may be to prevent the acquisition by the plaintiff of a freehold interest in the land in question. Originating Summons for an order authorising compulsory acquisition of land by local authority.

K. Parshotam for the plaintiff Board.

F. M. K. Sherani for the first defendant.

**H** C. L. Jamnadas for the second defendant Board.

13th April 1971  
HAMMETT C.J.:

On 17th February, 1971, the Nadi Township Board issued this Originating Summons. In these proceedings it seeks an order of the Court authorising the Board compulsorily to acquire a part of the land comprised in Native Lease No. 8775 (Lot 5) known as "Vunativi 2" in Nadi Town of which the 1st Defendant is stated to be the lessee. The land is "Native Land" and the Native Land Trust Board has been joined as a co-defendant.

The Originating Summons is supported by an affidavit which was sworn by the Chairman of the Plaintiff Board on 3rd December, 1970. It is brought under the provisions of the Crown Acquisition of Lands Ordinance (Cap. 119) as applied by Section 49 of the Townships Ordinance (Cap. 107). Both these Ordinances have been substantially amended by the Constitution (Statutory Amendments) Order 1970 to bring their provisions into line with the overriding provisions of Section 8 of the Constitution. The land is stated to be required for drainage purposes in Nadi Township, which it is submitted is within the meaning of "public purposes" in Section 2 of the Crown Acquisition of Lands Ordinance (Cap. 119).

The 1st Defendant has filed an affidavit in reply and opposes the application on a number of grounds which appear to be as follows:—

Firstly: That the Plaintiff Board has never negotiated with the 1st Defendant to acquire the strip of land in question.

Secondly: That the Plaintiff Board has not obtained the authority of the Minister to make this application for compulsory acquisition, which authority is a condition precedent to such an application.

Thirdly: That it is not necessary for the Plaintiff Board to acquire the 1st Defendant's land for the purpose of drainage since it has land of its own, adjoining the 1st Defendant's land which could be used equally well for this purpose.

Fourthly: That the proposed construction of an open drain on the land the Board seeks compulsorily to acquire, would be 6 feet from the 1st Defendant's residence, would be unreasonable, unhygienic and would amount to a health hazard.

The 2nd Defendant, the Native Land Trust Board, had only recently been served with the summons, and its time for appearance had not yet expired. It did, however, appear by Counsel at the hearing and opposed the application. One of its grounds of opposition is that the Plaintiff Board is seeking an order for compulsory acquisition of Native Land for which the consent of the Native Land Trust Board has not been sought or obtained. By its Counsel, the Native Land Trust Board points out that from the wording of the summons it is not clear whether the Plaintiff Board is seeking to acquire compulsorily a freehold or a leasehold title to the land in question.

It was submitted at the hearing before me on 30th March, 1971, by Counsel for each of the two defendants that these proceedings were totally misconceived and should be dismissed. To this submission Counsel for the Plaintiff Board did not reply. I did therefore adjourn the hearing in order that I might examine closer, the rather involved statutory provisions under which this application is made.

**A** Under Section 46(1) of the Townships Ordinance (Cap. 107) a Township Board may acquire land by agreement. The relevant provisions read as follows :

“46(1) A board may for the purpose of any of its functions under the provisions of this Ordinance or of any other Ordinance, by agreement, acquire, whether by way of purchase, lease or exchange, any land, whether situate within or without the boundaries of the township.”

**B**

If a Township Board is unable to acquire by agreement land it requires, it is given certain limited powers of acquiring it compulsorily. These are set out in Section 49(1) of the Townships Ordinance as amended by Section 68(n) of the Constitution (Statutory Amendments) Order 1970, which reads as follows :

**C**

“49(1) If a board is unable to purchase by agreement and on reasonable terms suitable land for any purpose for which it is authorised to acquire land the board may represent the case to the Minister and if the Minister is satisfied, after such inquiry, if any, as he may deem expedient, that suitable land for the said purpose cannot be purchased on reasonable terms by agreement and that the circumstances are such as to justify the compulsory acquisition of the land for the said purpose and that the said purpose is a public purpose within the meaning of the Crown Acquisition of Lands Ordinance he may authorise the board as an acquiring authority to apply to the Supreme Court under the provisions of the Crown Acquisition of Lands Ordinance for an order authorising compulsory acquisition of the land in which case the provisions of the Crown Acquisition of Lands Ordinance shall apply.”

**D**

**E**

From these two sections it can be seen that before a Township Board applies to the Court for an order for compulsory acquisition of land, under the Crown Acquisition of Lands Ordinance it should first take the following steps :—

- (1) Attempt to purchase the land by agreement (Section 46(1) ) and
- (2) Upon its failure to purchase the land by agreement, it must satisfy the Minister that the land cannot be purchased by agreement on reasonable terms. It must then obtain the authority of the Minister to apply to the Court for an order authorising compulsory acquisition of the land under the Crown Acquisition of Lands Ordinance (Section 49(1) ).

**F**

**G**

It is only after the authority of the Minister has been obtained that a Township Board may commence proceedings for the compulsory acquisition of land under the provisions of the Crown Acquisition of Lands Ordinance (Cap. 119). The relevant provisions of this Ordinance are Sections 5 & 6 which as amended by Section 78(h) and (i) of the Constitution (Statutory Amendments) Order 1970 read as follows :—

- 5.(1) Subject to the provisions of section 8 of this Ordinance, whenever the acquiring authority determines that any lands are required for a public purpose, the acquiring authority shall give not less than thirty days written notice to every person having any interest in or right over such lands which would be affected by the taking of possession or acquisition of the lands that, upon the expiry of such period of notice, the

**H**

acquiring authority intends compulsorily to take possession of or to acquire such lands. **A**

- (2) The notice referred to in the last preceding subsection shall specify clearly the land intended to be taken possession of or acquired and shall further be published in the Gazette.
- 6.(1) The acquiring authority shall not compulsorily acquire any land unless he has applied to the Court and has obtained therefrom an order authorising such acquisition. **B**
- (2) In the event of an acquiring authority compulsorily taking possession of any land he shall within thirty days of so entering into possession apply to the Court for an order authorising such taking of possession. **C**
- (3) The Court shall not grant an order referred to in either of the last two preceding subsections unless it is satisfied that the taking of possession or acquisition is necessary or expedient in the interests of defence, public safety, public order, public morality, public health, town and country planning or utilisation of any property in such a manner as to promote the public benefit". **D**

The essential steps in this process are as follows:

1. The service of a "30 day" notice as provided in Section 5(1).
2. The publication of such notice in the Gazette (Section 5(2) ). **E**
3. Application to the Court for an order authorising the compulsory acquisition on any of the grounds set out in Section 6(3) and for the assessment of the compensation to be paid.

In this case there is no evidence that the "30 day" notice has been given or published in the Gazette. **F**

In addition, since the land sought to be acquired by the Plaintiff Board is Native Land, the 1st Defendant would by Section 12 of the Native Land Trust Ordinance be precluded from agreeing, effectively, to the transfer to the Township Board of any part of the land she holds under a Native lease without the consent of the Native Land Trust Board. This has not apparently been sought or obtained. This would be a further matter that would require consideration before any application to the Court is made under the Crown Acquisition of Lands Ordinance, by the Township Board. **G**

In this connection the provisions of Section 5 of the Native Lands Trust Ordinance are relevant. It is thereby provided that native land may only be sold to the Crown. The Plaintiff Board could not apparently acquire a freehold interest in this land, but only a leasehold interest. This is another point that does not appear to have been considered in making this application. **H**

**A** Finally, as was pointed out by Counsel for the 2nd Defendant, the affidavit in support of the motion was sworn well over two months before these proceedings were instituted. It would have to be resworn, or an undertaking given to this effect, before cognisance could be taken of it. (See R.S.C. Order 29 Rule 1/19).

**B** From what I have indicated above it is abundantly clear that the Plaintiff Board cannot succeed in this application on the evidence at present before the Court for a number of reasons. The chief of these is the absence of the authority of the Minister under Section 49(1) of the Townships Ordinance to institute these proceedings.

For these reasons, I dismiss the summons with costs to the 1st and 2nd Defendants which after hearing Counsel I shall assess.

**C** *Originating summons dismissed.*