DHARAM LINGAM REDDY

v

VELIAMA & OTHERS

[COURT OF APPEAL, 1993 (Helsham P, Tikaram, Kapi JJ.A.), 21 May]

Civil Jurisdiction

Procedure (Civil)- Judicial Review- whether the High Court has an inherent power to strike out a motion for judicial review on the grounds of delay.

The High Court struck out a motion for judicial review on the ground of delay following the filing of the motion. On appeal the Fiji Court of Appeal HELD: In these circumstances the High Court had no inherent power to strike out the motion.

No cases were cited.

V.N. Mishra for the Appellant
Dr. S.D. Sahu Khan for the 1st Respondents
M. Gago for the 2nd Respondent

Appeal against interlocutory decision of the High Court.

Judgment of the Court:

The appellant entered into a share farming agreement with one Ponia Kotti on 12 December 1973 to cultivate twelve acres of native land in Tagitagi. The agreement was for 3 years. Ponia Kotti died a year before the three year contract ran out. The appellant was allowed to remain on the land by the first respondents even after the three year period expired. The first respondents took steps to evict the appellant from the land. This prompted the appellant to make an application to the Agricultural (Landlord and Tenant) Tribunal seeking relief under s. 18(2) of the Agricultural Landlord and Tenant Act (Cap. 270). Whilst this matter was pending, the first respondents took out an action in the then High Court for possession of the land under s. 169 of the Land Transfer Act (Cap. 131). The High Court ordered the appellant to give up the possession of the land. The appellant appealed against this decision and the Court of Appeal set aside the order for possession and further adjourned the matter until the application before the Agricultural Tribunal was dealt with.

The Tribunal dealt with the application and gave its decision on the 3rd September, 1985. The Tribunal declared as follows:

> "that the tenancy created on the 12th December, 1973 shall be deemed to be a contract of tenancy for a period of ten years in accordance with s. 6(a) of the Agricultural Landlord Tenant

> Act ..... further declare that the applicant is entitled to an extension of this tenancy to a further period of twenty years commencing from the 11th December 1983 in accordance with s. 13 of the Agricultural Landlord and Tenant Act."

The first respondents appealed to the Central Agricultural tribunal under s. 48 of the Agricultural Landlord and Tenant Act Cap. 270. The grounds of appeal relied upon were as follows:

1. THAT the learned tribunal erred in law and in fact in holding that the respondent was a tenant of the appellants.

2. THAT the learned tribunal erred in law and in fact in not exercising his discretion in granting compensation in lieu of assignment of the subject land and/or did not consider the relevant principles in exercising his discretion.

3. THAT the verdict and findings of the learned tribunal are unreasonable and cannot be supported having regard to the evidence as a whole.

4. THAT the learned tribunal erred in law and in fact in taking irrelevant and extraneous matters into account and omitted and/or gave less weight to the relevant and essential matters.

The Central Agricultural Tribunal heard the appeal and gave its decision on the 13th November 1986 and declared the tenancy to be null and void and awarded compensation of $8552.52.

The appellant sought judicial review of the decision of the Central Agricultural Tribunal in the High Court. It is not necessary to set out fully the grounds of review as the matter was decided on a preliminary issue.

At the hearing of the application for judicial review, the trial judge raised two preliminary issues. The relevant issue upon which he subsequently decided not to grant the relief sought was based on O. 53 r. 4 of the High Court Rules. The trial judge put the issue in the following terms:

> "whether in view of the delays that had occurred it was proper for the Court now to proceed to hear the application at all."

The relevant facts relating to this issue are as follows:

> The Central Agricultural Tribunal handed down its decision on the 13th November, 1986. The Appellant commenced proceedings for

judicial review on the 29th January 1987. The leave to apply for judicial review under O. 53 r. 3 was granted by Mr. Justice Rooney on the 11th February 1987. The appellant filed an originating motion under O. 53 r. 5 of the High Court Rules on the same day. On the 13th March 1987, the matter was adjourned to the Chief Registrar to fix a date for hearing. After this point in time this matter was not set down for hearing. The trial judge had set out all the factors which attributed to the delay in setting this matter down for hearing. The matter was eventually listed for hearing on the 1st April 1992.

In addition to these matters, the trial judge had taken into account the fact that the land in question was transferred to third parties on the 4th April 1987. The respondents were no longer the registered owners of this land at the time of the hearing of the application.

The High Court concluded that the:

> "land in question no longer belongs to the Respondents but has been transferred to third parties whose title and right to quiet enjoyment must be presumed to be good and unimpeachable. In my view quashing the Order of the tribunal at this stage would in all likelihood have some or all of the results listed in Order 53 Rule 4(1). I am satisfied that in all the circumstances to allow the proceedings to continue would be to allow the procedure for Judicial Review to be abused."

The appellant has appealed against this decision. In essence, the appellant argued that the trial judge had erred in law in not allowing the application to proceed to trial on the merits of the case.

Application of O. 53 R. 4 of the High Court Rules

O. 53 r. 4 of the High Court Rules is in the following terms:

> "Delay in applying for relief.
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> 4. - (1) Subject to the provisions of this rule, where in any case the Court considers that there has been undue delay in making an application for judicial review or, in a case to which paragraph (2) applies, the application for leave under rule 3 is made after the relevant period has expired, the Court may refuse to grant-
>
> (a) leave for the making of the application, or
> (b) any relief sought on the application, if, in the opinion of the court, the granting of the relief sought would be likely to cause substantial hardship to, or

> substantially prejudice the rights of, any person or would be detrimental to good administration.
>
> (2) In the case of an application for an order of certiorari to remove any judgment, order, conviction or other proceeding for the purpose of quashing it, the relevant period for the purpose of paragraph (1) is three months after the date of the proceeding.
>
> (3) Paragraph (1) is without prejudice to any statutory provision which has the effect of limiting the time within which an application for judicial review may be made."

This rule is applicable where there in an undue delay in making an application for judicial review. Where the application is for an order for certiorari and the application for leave under O. 53 r. 3 is made outside the three months period stipulated under O. 53 r. 4(2), the Court may exercise the powers set out under O. 53 r. 4(1). This rule is clearly not applicable to the present case. The application for leave in this case was filed within the three months period and the substantive application was filed on the same day as the grant of leave.

The trial judge had directed his mind to this issue when he said:

> "Order 53 Rule 4 empowers the Court to refuse a grant of relief where there has been undue delay in applying."

However, in our view, he erred when he went on to say:

> "Although I have not been able to find any authority for the view that the Court can also refuse to grant the relief sought when the delay has occurred after the leave has been granted I cannot doubt that a Court may properly decline to allow the matter to proceed where delays have occurred after those specifically dealt with by Order 53 Rule 4."

In our view, where there is no delay in an application for an order for certiorari, O. 53 r. 4 is not applicable. Although the learned judge was cognisant of the fact that O. 53 r. 4 did not apply to this case, he went on to dismiss the application on the above basis, i.e. by analogy to matters that would be relevant to consider if the Order had applied.

Our researches have not led to the discovery of any inherent power in the High Court to take the action that the judge took, and we were not referred to any. It is quite clear that the judge was not aware of any such power.

Where a matter is not set down for trial, it may be dismissed for want of prosecution. This is provided for under O. 34 r. 1 of the High Court Rules.

That is a different matter altogether and no such application was made by the respondents to strike out the matter.

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In our view, the proper course would have been for the trial judge to proceed with the trial on the merits on the day of the trial. Whether or not an order for certiorari is granted is in the discretion of the Court. The court may refer to undue delay in the prosecution of this matter as one of many considerations in exercising the discretion whether to grant the relief or not. The judge in our opinion, correctly expressed this concept when he said:

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> "It is important to remember that the remedy of certiorari applied for is discretionary and therefore may be withheld if the Court sees fit. An Applicant may fail in his claim for relief if his own conduct has been unmeritorious or unreasonable."

C

We have little doubt that the trial judge, in taking the course that he did, considered that he was acting in the best interests of the parties in bringing this dispute, which had been going on since 1981 when the appellant applied for relief under the provisions of Agricultural Landlord and Tenant Act (Cap. 270), to an end in the belief that he was doing substantial justice between them; the course that he took would have preserved the award of compensation of the Central Agricultural tribunal. We also realise that in taking the course that we propose to take we are doing the very opposite. However, the appeal has been brought, and we must decide it according to law. We only hope that instead of pursuing a course which seems to have and endless vista of litigation as the outlook, we hope that the parties will be able to reach some compromise that will obliterate this ghastly prospect.

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Before we dispose of this appeal we wish to refer to certain submissions made by Dr. Sahu Khan counsel for the 1st respondents. He raised a number of points in support of his argument to uphold the lower Court's decision. We wish to refer to two of these. The first relates to the alleged failure on the part of the appellant to comply with the following order of Rooney J. dated 11 February 1987 incorporated in his order granting leave to apply for Judicial Review:

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> "AND IT IS FURTHER ORDERED that Central Agricultural Tribunal and Vellaidan and others as Administrators of the Estate of Ponia Kutti be made the Respondents."

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He argued that since no application was made to the High Court within the requisite time, "in terms of leave granted" the leave had lapsed. From our perusal of the High Court file it seems that this is the first time that this issue has been raised in these proceedings. We are, therefore, not persuaded that it should be dealt with here. Dr. Sahu Khan will have an opportunity in the

Court below to raise this issue as a preliminary point if he wishes to do so.

The other issue that he raised was that none of the grounds on which the appellant relied for certiorari were susceptible to Judicial Review. In support of this point he also referred to Section 61 of the Agricultural Landlord and Tenant Act Cap 270 which contains an ouster clause. It will be recalled that this matter also exercised the mind of the trial judge but he did not find it necessary to rule on it although both counsel had addressed the Court on this subject. It is open to Dr. Sahu Khan to raise this issue again in the High Court when the matter is heard de novo.

We would allow the appeal and vacate the orders of the trial judge as to dismissal of the action and costs and sent the matter back to the High Court and direct in absence of any settlement between the parties that the application for judicial review be dealt with according to law. We further order that the cost of this appeal be costs in the judicial review proceedings in the High Court.

(Appeal allowed)

(Editor's note: On 28 March 1995 Byrne J granted certiorari and ordered that the original decision of the Agricultural Tribunal be reinstated. On 16 February 1996 the Fiji Court of Appeal upheld the High Court (FCA Reps 96/41 and on 12 September 1996 a final appeal was dismissed by the Supreme Court (FCA Reps 96/539)).