

IN THE FIJI COURT OF APPEAL

Criminal Jurisdiction

Criminal Appeal No.28 of 1980

NADI DRAINAGE BOARD

Appellant

v.

RAM PRASAD GOSAI

Respondent

H.K. Patel for the Appellant
K.C. Ramrakha for the Respondent

Date of Hearing: 23rd March, 1981
Delivery of Judgment:

JUDGMENT OF THE COURT

Henry J.A.

Respondent was, together with his two sons, at all material times an owner of a freehold piece of land at Martintar, Nadi, being Lot 2 Development Plan 1026 and comprised in Certificate of Title Registered as No.18653. This land is situated in an area which has been duly declared to be a "drainage area" under the control of the Nadi Drainage Board by virtue of the provisions of the Drainage Act (Cap.122). In 1975 the Nadi Drainage Board (hereinafter referred to as "the Board") constructed a new drain across the said land with the object of draining surface water from a subdivision of land in the said drainage area known as "Mountain View Subdivision". Respondent was charged in the Magistrates' Court at Nadi with two offences the particulars of which were :

"

COUNT 1

PARTICULARS OF OFFENCE

RAM PRASAD GOSAI of Martintar, Nadi, Landlord on 7th day of April, 1978 at Martintar, Nadi in the Western Division interfered with Public Drainage works by refusing to remove the fence and allow the Nadi Drainage Board to carry out drainage works and thereby acted contrary to Section 21(a) of the Drainage Act, Cap. 122 of the Laws of Fiji.

COUNT 2

PARTICULARS OF OFFENCE

RAM PRASAD GOSAI of Martintar, Nadi, Landlord between January, 1978 and 7th April, 1978 at Martintar, Nadi permitted animals to stray upon the banks and side walls of public drain within the jurisdiction of Nadi Drainage Board and thereby acted contrary to Section 21(e) of the Drainage Act, Cap. 122 of the Laws of Fiji."

Respondent was convicted of both offences and fined \$100 on each count and ordered to pay \$50 for costs. An appeal was lodged. The Supreme Court quashed both convictions. The present appeal is confined to a question of law only: (vide Section 22(1) of the Court of Appeal Act).

Before the new drain was constructed across the respondent's land water was taken along respondent's northern boundary by a drain which connected with a drain along the eastern boundary and thence finally discharging into the Nadi River. These drains carried surface water from several cane farms in the vicinity. The evidence is not clear whether these drains dealt with surface water from the said subdivision. There is no evidence why these drains were not used, but it was found that the object of the new drain was, as earlier stated, for the benefit of the Mountain View subdivision. There is no claim that appellant's land required any drainage facilities other than those already in existence. The new drain is some ten feet

wide, at least in some places, and appears to be an unfenced open drain cutting across the land. Respondent and his sons have at all times objected to the construction of this drain and to its presence on their land. They have hindered the servants of the Board in its attempts to maintain the drain. Stock belonging to respondent were grazed on the said land. It was held that this stock had grazed in the drain and on its banks causing erosion. It is difficult to understand how this stock "strayed" since it was always on the land in the possession of respondent. In the view we have formed this is unimportant.

At the trial counsel for respondent raised, as a defence, a claim that the Board had no lawful authority to construct and maintain the said drain over the land of the respondent. The onus, of course, was on the Board to establish its authority. The nature of the right which the Board claimed must be carefully examined. It is to enter upon and establish on the land of respondent a drain in respect of which respondent was bound to receive and allow the flow of surface water from what appears to be higher land, namely, the land of the Mountain View Subdivision. Further that the Board had a lawful right to enter upon the land of respondent for various purposes including the maintenance, widening, clearing and other operations in respect of the said drain and also that respondent was liable if he suffered or permitted any of his animals to "stray" upon the banks or side walls of the said drain such drain being unfenced. This was a considerable burden imposed on the use of respondent's land unlimited as to time. If such a right to the use of respondent's land had been lawfully established by the Board then clearly the right of respondent to the sole possession and use of his land, guaranteed by a Land Transfer title, was eroded or diminished in a substantial manner and a substantial burden, unlimited as to time, was imposed.

The Board claimed that it had authority to impose that burden on respondent's title by virtue of the provisions of the Drainage Act. Counsel for respondent contended that such a burden was a deprivation of the rights vested in respondent as the owner in fee simple of the said land and that he was entitled to the protection of Article 8 of Chapter II of the Constitution and further that any such right as claimed was void by reason of Article 2 Chapter I of the Constitution.

Article 8, so far as it is necessary to cite it for the purposes of counsel's argument, provides :

"8.(1) No property of any description shall be compulsorily taken possession of, and no interest in or right over property of any description shall be compulsorily acquired, except under the authority of a law that -

- (a) requires the acquiring authority to give reasonable notice of the intention to take possession of, or acquire the interest in or right over, the property to any person owning the property or having any other interest or right therein that would be affected by such taking of possession or acquisition;
- (b) requires the acquiring authority to apply to the Supreme Court for an order authorising such taking of possession or acquisition or to apply thereto within thirty days of such taking of possession for such an order as aforesaid;
- (c) requires the Supreme Court not to grant such an order 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;"

Then follow very limited rights in respect of payment of damages, compensation and costs. It has not been

contended by counsel for appellant that the Drainage Act complies with these provisions - it plainly does not.

Two further questions arise. First, was the right exercised by appellant to construct and maintain the said drain over the property of respondent "a right over property of any description" within the meaning of Article 8(1). Such a right so to use the land of respondent diminished his unlimited right to sole possession and use of his land. It imposed a burden which would encumber his title and which would affect the title which he could pass on to a purchaser or lessee. We have no doubt but that it was a "right over property" within the true meaning of Article 8(1).

Next was it compulsorily acquired. The only evidence is that of respondent who said he objected to the drain throughout. This appears to relate to its construction as well as all subsequent steps to maintain it. The prosecution called no evidence on this question. The Magistrate found :

" From the time when the Board put in this drain, the defendant and his sons have objected to its presence and have hindered the Board in its attempts to maintain this drain."

The burden was not on respondent to prove that the said right was compulsorily acquired, it was on the Board to prove that the acquisition did not come within Article 8 once that question was raised by the defence. The proper findings on the evidence are that the right claimed over the land of respondent was a right over property within the true meaning of Article 8(1) and that the Board's purported acquisition of that right came within the words "compulsorily acquired" upon their true construction and further that the Board has failed to prove that such acquisition was under the authority of a law which complied with the

requisites laid down by Article 8. Accordingly the respondent has proved that the actions of the Board in purporting to acquire such rights prima facie deprived him of the protection which was extended by reason of Article 8 of the Constitution.

The learned Judge on appeal held that Section 9(f)(ii) of the Drainage Act was ultra vires the Constitution. In the Magistrates Court respondent raised the defence of protection by reason of Section 8 of the Constitution and also a claim of right under Section 8 of the Penal Code. Each point was rejected without any examination of the relevant law. On appeal to the Supreme Court Williams J. dealt in some length with Section 8 of the Constitution and made the finding above set out. Judgment was delivered by the Magistrate on September 13, 1979 and by the Supreme Court on March 28, 1980. The case on appeal to this Court was listed for the sittings in September 1980 but it was taken from the list by the parties.

It appeared to this Court at the present hearing that an important question arose on the effect of the provisions of the Fiji Independence Order 1970 relating to "existing laws". The Drainage Act came within the definition of "existing laws". Neither counsel adverted to these provisions but the Court raised the point at the conclusion of respondent's argument. Some submissions were then made by counsel for respondent. Counsel for appellant made no submissions in reply. The matter is one of importance, and, after due consideration this Court considered that it was not in a position to make a proper determination without full argument but such argument would have to be postponed until its next sittings.


It was the duty of appellant to satisfy the Court that the defences of respondent, namely, that he was protected by Section 8 of the Constitution and

that he had a claim of right were not tenable. Both questions were left in such an unsatisfactory state that the appeal could not be disposed of. Respondent is, as a matter of justice, entitled to the disposal of a prosecution which has been the subject matter of appellate adjudication since March 1980. The present position is no fault of his. The real issue is one of title, namely, has appellant lawfully acquired over respondent's property, the right to construct and maintain a drain to the detriment of respondent? There is ample civil jurisdiction for both parties to have this right determined so appellant cannot be prejudiced in any way if the present proceedings are now terminated by reason of its failure to meet adequately two substantial matters which it, as prosecutor, was called on to meet. We consider the proper course is to dispose of the proceedings at this stage by dismissing the present appeals. The question of the validity of Section 9(f)(ii) of the Drainage Act can be determined in appropriate proceedings.

Accordingly we dismiss the appeal.



.....
Vice President



.....
Judge of Appeal



.....
Judge of Appeal