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IN THE FIJI COURT OF APPEAL
Civil Appeal No. 21 of 1986

Between:

R. v. CENTRAL LIQUOR BOARD

Appellant

and

DEOKI NAIDU
d/o Gopalan Pillay

Respondent

Mr. S.P. Sharma & Mr. A. Ahmed for the Appellant
Mr. H. Patel & Miss S. Govind for the Respondent

Date of Hearing: 9th July, 1986

Delivery of Judgment: 18.7.86

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from a decision of Rooney J. granting an order of certiorari to quash the Central Liquor Board's refusal of the respondent's application for provisional approval of an off-licence and an order of mandamus requiring it to grant such approval.

The Liquor Act provides for two authorities the Central Liquor Board (Board) which functions at the national level and Divisional Liquor Tribunals (tribunals) which operate in various administrative divisions. Certain licences e.g. an aerodrome licence or a packet licence (in respect of vessels) are granted by the Board itself whereas other licences such as an off-licence or a publicans licence are granted, not by

the Board, but by the tribunal of each division after an enquiry which takes the form of a hearing. Before, however, it can conduct such an enquiry the applicant has to apply for, and obtain, the Board's provisional approval for such a licence. With regard to off-licences the total number in force at any one time must not exceed that prescribed by the Minister which in this case was three hundred.

The respondent applied for the Board's provisional approval for an off-licence in respect of his supermarket at Labasa, in the Northern Division. Appellant's counsel informs us that this application was advertised in terms of sections 13 and 14 of the Act and was dealt with, together with several other applications at a meeting of the Board on 28th August, 1985. The following appears in the minutes :-

"Deeki Naidu t/a Naidu's Supermarket

An application for a new Off Licence at Wailevu, Labasa. The applicant was present and submitted own submissions. Mr. Naidu submitted that he had applied continuously for the licence for the last 3 years and he could not know why his application was always unsuccessful each time. Mr. Naidu produced letters from Tui Wailevu and a member of the Advisory Council supporting his application. He stated that the need of the area is great that people have had to travel 3 to 4 miles to buy liquor and the grant of the licence will overcome the bootleggers in the area. Chairman asked Mr. Naidu to advise the Board if there was any radical changes when previous applications were earlier rejected. Mr. Naidu replied that Tui Wailevu has supported his application and therefore the Wailevu Villages supported his application. He added that he had spent \$16,000 in the Supermarket. Chairman said that according to the Northern District Administration report the premises is situated very close to Wailevu Village and village elders objected to the availability of liquor

close by which would create social problems in the village. During discussion Board noted Member Tikaram inspected the premises but was not impressed with the standard. He said that the premises needs improvements to make it suitable. Member Waqanivavalagi doubted the authority letter of Tui Wailevu whether it has the individual villagers agreement as such letter can be open for abuse. Board noted that Police and Commissioner Northern Division had objected to the application. Board agreed to reject the application on the grounds -

- (i) that the Board was not justified (sic) that the reasonable requirements of the neighbourhood would justify the provisional granting of an Off Licences; and
- (ii) that the Board could find no evidence that the situation has changed since previous applications."

On 9th October, 1985 the following letter was addressed to the respondent :-

" Re: Naidu's Supermarket - Wailevu, Labasa
Application for a new Off-Licence

Your application for provisional approval of the above licence was considered by the Board at its meeting on 28 August, 1985.

I am directed to advise that the application has been unsuccessful on the following grounds :

- i) that the Board was not satisfied that the reasonable requirements of the neighbourhood would justify the provisional granting of an Off-Licence.
- ii) that the Board could find no evidence that the situation has changed since previous applications.

Yours faithfully,

V.L. Uluinayau
Secretary
CENTRAL LIQUOR BOARD "

It was this decision that the respondent sought to have quashed by an order of certiorari. The main grounds were that the Board had acted unreasonably, failed to act judicially and denied natural justice to the respondent. The learned Judge considered the application misconceived but held it to be the result of the Board's own misconception of its powers and proceeded to consider the question of whether or not the Board had carried out its functions in accordance with the provisions of the Act. He answered it in the negative and found that, in failing so to do, it had usurped the functions of the Tribunal of the Northern Division. He, therefore, granted the two orders sought by the respondent.

In so far as they relate to this appeal functions of the Board are contained in section 4(1)(a) and (e) of the Act :-

- "4(1) The functions of the Board shall be -
- (a) to consider and if it thinks fit, grant provisional approval of applications for the grant of new publicans' licences, new off-licences, new private hotel licences and new restaurant licences;
 - (e) from time to time, if it thinks fit, to give to any Tribunal general directions, not inconsistent with the provisions of the Act or of any regulations made thereunder, for guidance as to the exercise of any powers, discretions, or functions under this Act or any regulations made thereunder; "

If provisional approval is refused the matter ends there. Section 51 of the Act reads :-

- "51.-(1) If the Board grants its provisional approval, application for an off-licence shall be made in writing to the Tribunal having jurisdiction in the Division where the premises intended to be licensed are situated, and shall be advertised.

- (2) The following objections may be made to the grant of a new off-licence :-
- (a) that the applicant is a person of drunken or dissolute habits;
 - (b) that any liquor licence held by him within 12 months preceding the date of the application has been cancelled;
 - (c) that the applicant has been convicted of any offence under the provisions of this Act or any Ordinance repealed thereby, or of selling adulterated liquor under the provisions of any law relating to pure food, within twelve months preceding the date of the application;
 - (d) that the premises do not contain a secure and suitable place for the storage of liquor;
 - (e) that the reasonable requirements of the neighbourhood do not justify the grant of such licence; or
 - (f) that any other licence under this Act is or will be in force on the premises intended to be licensed."

Sections 13 and 14 which contain requirements as to advertisement and notification govern only applications for a licence or a renewal of it there being no requirement for advertisement of an application for provisional approval.

Sections 3(5) and (8) provide :-

- "3.-(5) The Board shall hold its meetings in private and there shall be no right of audience before it, but nothing in this subsection shall prohibit the Board from hearing any person if it wishes to do so.
- (8) The Board shall cause proper records of its proceedings to be kept."

The only persons to whom copies of an application for a provisional approval and plans are required to be sent are the Commissioner of Police, senior police officer in the division and the Divisional Commissioner (section 15(1)). The material which the board would, therefore, have for consideration would be confined to the papers submitted by the applicant, reports from the Police and the Divisional Commissioner and any additional information the Board might of its own volition obtain under section 3(5) of the Act. These the Board would consider in private.

The learned Judge was, therefore, correct in holding that the consideration by the Board of an application for provisional approval is intended primarily to be an administrative, not a judicial, act.

The functions of the tribunal are, however, very different. Every application to it for an off-licence, as well as the date and place of hearing, has to be advertised.

Section 7(b), (c), (d) and (e) provide :-

"7. Subject to the provisions of this Act, a Tribunal shall have power, in respect of the Division for which it is constituted -

- (b) to exercise all the powers of a magistrates' court in its summary jurisdiction under the Criminal Procedure Code of summoning and enforcing the attendance of witnesses, examining witnesses on oath and enforcing the payment of costs and the production of document;
- (c) to admit any evidence, whether written or oral and whether or not such evidence would be admissible in civil or criminal proceedings;

- (d) to exclude any person if necessary to do so in order to ensure the due conduct of the proceedings or to preserve order;
- (e) to award costs."

Section 6(6) reads :-

"6. (6) A Tribunal shall cause proper records of its proceedings to be kept which shall include a sufficient note of any evidence given or legal submission made, and its reasons for any decisions."

The powers conferred upon the tribunal are, therefore, clearly judicial and they come into operation only after provisional approval has been administratively granted by the Board. The intention of the legislature is clearly to give the Board firm administrative control over distribution and consumption of liquor in the country, leaving it to the local tribunals to determine the suitability of applicants and their competing claims after hearing them and the objectors. The Board, therefore, misconstrued its functions in advertising the application and treating it as though it were a hearing before a tribunal.

The learned Judge went on to consider the Board's functions under section 50 of the Act which reads :-

"50. Before an off-licence may be granted, application for provisional approval thereof shall be made in writing to the Board enclosing a plan showing the boundaries of the premises intended to be licensed and the boundaries of the proposed liquor store. The number of off-licences in force in Fiji at any one time (wholesale licences converted to off-licences under the provisions of section 103 not counting as off-licences for this purpose) shall not exceed such number as shall be specified from time to time by the Minister by notification in the Gazette."

He concluded :-

"If the number of applications is such that if all or any are approved the off-licences would exceed the permitted total, the Respondent Board cannot grant the required approval. If, on the other hand, the prescribed number of existing off-licences is not exceeded the Respondent Board's function is to grant the provisional approval and leave it to the appropriate Tribunal to decide whether the off-licence is to be granted having regard to the matters specified in section 51.

The requirement that the application for provisional approval shall be in writing enclosing a plan showing the boundaries of the premises intended to be licensed and the boundaries of the proposed liquor store is inserted in the Act for the purpose of ensuring that the applications are genuine and are not made from ulterior motives."

With respect, we disagree. Copies of the application and plans are required to be sent to the Commissioner of Police and the Divisional Commissioner whose reports would be available to the Board. The former would be the best qualified person to advise on matters relating to over-all supervision and control, and the latter on the position generally within the whole of the division under his jurisdiction. The Board would have to give consideration to these reports before coming to a decision. Nor do we consider the Act to require an automatic grant of provisional approval if the number of off-licences in Fiji remains within the specified limit. To do so would be to deprive of all meaning the provisions of section 4(1)(a) which empower the Board to grant provisional approval only "if it thinks fit". In our view it is this section which confers the power, not section 50 which merely places a limitation upon its exercise.

We, therefore, dismiss the appeal in so far as it affects the order of certiorari but allow it against the order of mandamus which is set aside.

The application goes back to the Board for consideration in compliance with the provisions of the Act as explained in this judgment.

There will be no order for costs.

G. H. Hays
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Vice President

J. P. Roche
.....
Judge of Appeal

C. D. Halloran
.....
Judge of Appeal

IN THE FIJI COURT OF APPEAL

Civil Appeal No. 23 of 1986

Between:

MUTHUSAMI
s/o Ram Swamy

Appellant

and

NAUSORI TOWN COUNCIL

Respondent

Mr. R. Patel for the Appellant

Mr. R. Chand for the Respondent

Date of Hearing: 1st July, 1986

Delivery of Judgment: 4.7.86

JUDGMENT OF THE COURT

Mishra, J.A.

This is an appeal from an order of Rooney J. giving immediate vacant possession to the respondent of a market kiosk operated by the appellant under an agreement dated 1.12.83 which gave him a two year lease.

Among the conditions of the agreement were :-

"6. PROVIDED the Sub-Lessor does not then require the said premises for its own use the Sub-Lessor will upon the written notice of the Sub-Lessee made not less than 3 (three) calendar months prior to the expiration of the said term and

PROVIDED that there shall not at the time of such request be any existing breach or non-observance of the terms conditions and covenants herein contained on the part of the Sub-Lessee a renewal of the said Lease for a further period of 2 (two) years from the expiration of the term hereby created at a rental to be mutually agreed upon or failing agreement to be determined by Arbitration according to the provisions of the Arbitration Ordinance and subject to the same covenants and conditions as are herein contained except for this option to renew clause.

7. It is hereby expressly agreed and declared between the Sub-Lessor and Sub-Lessee that the sum of \$2405-00 (TWO THOUSAND FOUR HUNDRED AND FIVE DOLLARS) presently due and owing being for arrears of rent under the previous tenancy shall be paid to the Sub-Lessor by way of regular monthly instalments of \$165.00 (ONE HUNDRED AND SIXTY FIVE DOLLARS) and the first of such payment shall be from the 1st day of September, 1983 and thereafterwards as the end of each and every month and in case of default of any such payment the whole balance amount then due and owing shall fall due for payment immediately.

8. It is hereby expressly agreed and declared between the Sub-Lessor and the Sub-Lessee and in case of default is made on any monthly instalment payment of \$165.00 (ONE HUNDRED AND SIXTY FIVE DOLLARS) the Sub-Lessor may re-enter upon the demised premises or any part thereof in the name of the whole and take possession of the demised premises and thereupon this Agreement shall determine but without prejudice to any rights or powers of the Sub-Lessor hereunder in respect of any rent or other moneys due to the Sub-Lessor. "

By a letter dated 9th August, 1985 the respondent advised the appellant that he was in breach of several conditions of the Agreement including conditions 7 and 8, that the rent in arrears must be paid in full by 15th August, 1985 and that the kiosk was to be put out to tender at the expiration of the lease. Tenders were invited by advertisement in the Fiji Times on 14th and 18th September 1985 and among those who put in tenders in response to the advertisement was the appellant himself. His was not successful and on 30th December, 1985 he instituted proceedings in the Supreme Court seeking a declaration that he was by virtue of clause 6 of the agreement, entitled to a new two-year lease of the kiosk. To this claim a defence was filed by the respondent.

On 20th February, 1986 the respondent took out a summons under section 169 of the Land Transfer Act to seek an order for possession. The appellant's counsel resisted the application on the grounds that proceedings relating to the kiosk were already pending before the Supreme Court and that the case involved a dispute which could only be resolved properly by evidence in open court.

The learned Judge decided, quite correctly in our view, that mere institution of proceedings by writ did not by itself shut out a claim under section 169 of the Land Transfer Act in a proper case. It was for the appellant to show, on affidavit evidence, some right to remain in possession which would make the granting of an order under section 169 procedure improper.

There was before the learned Judge evidence that the appellant had rarely paid his rent promptly but, the lease having expired, that was no longer a crucial matter.

His right to a new lease depended entirely on the option granted to him under the agreement which had to be exercised by written notice before the end of August, 1985. Had he exercised it? If he had and the respondent was denying him his right under the option clause, there would certainly be a serious matter in dispute. But the appellant had first to show that he had done what he was required by the agreement to do. There was nothing before the learned Judge to show that. Instead, there was evidence to show that he was content to take his chance with others when the call for tenders came in September 1985.

The learned Judge was, therefore, correct in holding that the appellant had failed to show cause why the order sought by the respondent should not be made.

The order made by the court below was for the appellant to give possession forthwith. He now asks, should his appeal fail, for time to remove his things, a request which has not been opposed by the respondent's counsel. We, therefore, vary the order and allow him 14 days from the date of this judgment to give vacant possession.

Apart from that, the appeal is dismissed with costs to be taxed in default of agreement.

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G. D. Cochrane
 Vice President

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J. P. [Signature]
 Judge of Appeal

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J. D. Lee
 Judge of Appeal