

## ATTORNEY-GENERAL

v.

ARCHIBALD

[SUPREME COURT, 1963 (Hammett Ag. C.J.), 15th, 26th August]

Civil Jurisdiction

Statute—construction—effect of permissive provision—specific power unaffected—Fiji (Constitution) Order in Council 1963 ss. 37 (1) and (3), 42

Constitution—order by Governor *intra vires*—Fiji (Constitution) Order in Council 1963 ss. 1 (2), 63 (2)—Determination (Elected Members) (Seats) Order, 1963.

Legislative Council—vacation of seat—person certified to be insane—meaning and effect—Fiji (Constitution) Order in Council 1963 ss. 33 (1) (d), 34 (3), 37 (1) and (3)—Mental Treatment Ordinance (Cap. 128) ss. 16, 35, 39.

The respondent was certified to be of unsound mind and was admitted to a mental hospital on the 28th January, 1959. He was in the hospital for two short periods only and during all the relevant times was permitted to be absent from the hospital under s. 39 of the Mental Treatment Ordinance. On the 1st March, 1963, the Fiji (Constitution) Order in Council 1963, came into effect, and on the 27th April, 1963, the respondent was, at an election under the provisions thereof, elected as a member of the Legislative Council as European Elected Member for the Northern Constituency. On the 11th June, 1963, the respondent was formally discharged by the medical superintendent of the mental hospital under s. 35 of the Mental Treatment Ordinance. The Attorney-General brought a petition to the Supreme Court under the authority conferred by the Determination (Elected Members) (Seats) Order 1963, for the purpose of determining whether the seat of the respondent in the Legislative Council had become vacant by operation of law.

*Held.*—(1) That s. 37 (3) of the Fiji (Constitution) Order in Council 1963, is permissive and in no way limits the power given to the Supreme Court by s. 37 (1).

(2) That the Determination (Elected Members) (Seats) Order 1963, was not *ultra vires* the Governor in the exercise of his powers under s. 63 (2) of the Order in Council.

(3) Section 34 (3) of the Order in Council (whereby the seat of an elected member shall become vacant if any circumstance should arise which would disqualify him for election) and section 33 (1) (d) thereof (whereby a person certified to be insane or otherwise adjudged to be of unsound mind under any law in force in the Colony is so disqualified) apply so as to render vacant the seat of a person certified to be insane before his election, if that disqualification is not removed by his discharge or otherwise under the Mental Treatment Ordinance until after the election. The state of being "certified to be insane" is one which continues from day to day.

(4) The expression "certified to be insane or otherwise adjudged to be of unsound mind under any law in force in the Colony" in s. 33 (1) (d) of the Order in Council is wide enough to include a person certified to be a person of unsound mind under the Mental Treatment Ordinance.

(5) The respondent's seat was vacated by operation of law on the 28th April, 1963.

Case referred to:

*Smith v. Smith* otherwise Hand [1940] P. 179; [1940] 2 All E.R. 595.

*Petition by the Attorney-General.*

*Justin Lewis* (Attorney-General) for the petitioner.

*Marquardt-Gray* for the respondent.

The facts sufficiently appear from the judgment.

HAMMETT Ag. C.J. [26th August, 1963]—

This is a petition by the Attorney-General under the provisions of the Fiji (Constitution) Order in Council 1963, section 37, and the Determination (Elected Members) (Seats) Order 1963, to determine whether the seat of the respondent, who was elected to be the European Member of the Northern Constituency of the Legislative Council on 27th April, 1963, has become vacant by operation of law.

This is the first petition of this particular nature that has been brought before the Court and both counsel were first heard on the question of the most suitable and expeditious procedure to be adopted. I then consented to hear this petition summarily, without requiring the respondent first to file a written statement of the grounds upon which the petition was opposed, it being agreed that in this event the Attorney-General would be entitled to an adjournment if he was, as a result, taken by surprise.

The facts are not in dispute and I hold them to be as follows. On the 1st March, 1963, by a Writ of Election of that date His Excellency the Governor of Fiji commanded that election be made according to law for one member to sit and vote in the Legislative Council as the European Member for the Northern Constituency. The election was held and on the 27th April, 1963, the returning officer of the Northern Constituency declared that the respondent had been duly elected the European Elected Member for the Northern Constituency. The respondent subsequently took his seat as an elected member in the Legislative Council on the 15th May, 1963.

It is also not disputed, and I hold as fact, that over four years earlier, that is on the 28th January, 1959, an "order" was made for the reception of the respondent as a person of unsound mind as a patient into the mental hospital under the provisions of section 16 of the Mental Treatment Ordinance. This "order" was based upon two medical certificates given by registered practitioners dated 27th and 28th January, 1959, respectively. These certificates were in the form prescribed by the Second Schedule of the Mental Treatment Ordinance (Cap. 128), and were worded as follows:—

"I, the undersigned, being a registered medical practitioner of the Colony of Fiji, hereby certify that I on the 27th day of January, 1959, at Suva in the said Colony, separately from any other registered medical practitioner, personally examined Fred Archibald and that the said Fred Archibald is in my opinion a person of unsound mind and a proper person to be taken charge of and detained in a mental hospital under care and treatment . . ."

The respondent was admitted to what was formerly called the Public Lunatic Asylum, Suva, and is now known as St. Giles's Hospital, on the 28th January, 1959, as a person of unsound mind. On the 2nd February, 1959, he was permitted by two visitors of the hospital, under the provisions of section 39 of the Mental Treatment Ordinance, to be absent from the

mental hospital on trial. On the 17th February, 1960, the respondent was re-admitted to the mental hospital as a person of unsound mind for further care and treatment and he was detained as an in-patient there until the 4th March, 1960. On that date the respondent was again released on trial. He has not since been re-admitted as a patient. He remained absent from the mental hospital, still on trial, until the 11th June, 1963, when he was formally discharged by the Medical Superintendent of St. Giles's Hospital under the provisions of section 35 of the Mental Treatment Ordinance (Cap. 128).

On these facts it is the contention of the learned Attorney-General that the respondent's seat has become vacant by operation of law under the provisions of the Fiji (Constitution) Order in Council 1963.

The respondent has called no evidence to contradict the evidence of any of the witnesses of the petitioner; his counsel states that none of the facts deposed to by those witnesses are disputed. He does, however, oppose the petition on the following grounds:—

(1) That the Supreme Court has no jurisdiction to entertain this petition or to grant the relief sought;

(2) That the Determination (Elected Members) (Seats) Order 1963 was *ultra vires* the Governor who made it on the 22nd July, 1963;

(3) That, in any event, even on the facts admitted, the respondent's seat has not thereby become vacated by operation of law on a proper construction of the Fiji (Constitution) Order in Council 1963.

Section 37 subsections (1) and (3) of the Fiji (Constitution) Order in Council 1963 read as follows:—

" 37.—(1) Any question whether a person has become an elected member of the Legislative Council, or whether an elected member of the Legislative Council has vacated his seat therein shall be determined by the Supreme Court.

(3) A law enacted under this Order may make provision with respect to the persons who may apply for the determination of any question under this section, the circumstances and manner in which and the conditions on which any such application may be made, and the powers, practice and procedure of the Supreme Court in relation to any such application in respect of an elected member of the Legislative Council."

Section 42 reads:

" 42. Subject to the provisions of this Order, the Governor, with the advice and consent of the Legislative Council, may make laws for the peace, order and good government of the Colony."

The expression "a law enacted under this Order" in section 37 (3) means "a law made by the Governor with the advice and consent of the Legislative Council" under section 42 which is otherwise known as "an Ordinance". No Ordinance has been passed making provision for "the powers, practice and procedure of the Supreme Court" in relation to the exercise by the Supreme Court of the powers granted under section 37 (1). It is contended on behalf of the respondent that unless and until an Ordinance has been passed prescribing, *inter alia*, "the powers, practice and procedure of the Supreme Court" in such a proceeding as this, the Supreme Court may not exercise the jurisdiction given it under section 37 (1). With this contention I cannot agree. Section 37 (3) is a permissive section and authorises the making of the laws referred to therein but in no way restricts the power of the Supreme Court granted by section 37 (1) or makes the exercise of such powers

conditional upon the passing of an Ordinance prescribing, *inter alia*, the practice and procedure which the Supreme Court should follow in the exercise of such jurisdiction. The Supreme Court has inherent jurisdiction to prescribe its own procedure where no other procedure is laid down when exercising any jurisdiction which is granted to it.

The submission that the Determination (Elected Members) (Seats) Order 1963 is *ultra vires* the Governor who made it, is based upon the construction of section 63 (2) of the Fiji (Constitution) Order in Council 1963 which reads as follows:—

“ 63.—(2) The Governor, in his discretion, may, by order published in the Gazette, at any time within six months after the appointed day, provide that any existing law shall be read and construed with such adaptations and modifications as may appear to him to be necessary or expedient for bringing that law into conformity with the provisions of this Order or otherwise for giving effect or enabling effect to be given to those provisions; and any existing law shall have effect accordingly from such date as may be specified in the order.”

It is not disputed that the appointed day was, by Proclamation number 8 of 1963 of the Governor published in the Gazette, the 1st day of March, 1963, in accordance with section 1 (2) of the Order in Council. The Determination (Elected Members) (Seats) Order 1963 was made by the Governor on the 22nd July, 1963, and published in Gazette Supplement on the 26th July, 1963, and reads as follows:—

“ 1. This Order may be cited as the Determination (Elected Members) (Seats) Order, 1963.

2.—(1) Any question which may arise as to whether the seat of an Elected Member has become vacant, other than a question arising from the election of the Member, shall be determined by the Supreme Court on a petition presented by the Attorney-General.

(2) Where any such question has been decided by the Supreme Court, the Registrar of the Supreme Court shall certify the decision of the Supreme Court to the Governor and when the Supreme Court has decided that the seat of any Elected Member has become vacant, the seat of such Member shall become vacant on the date which shall be specified in such certificate.”

It is the contention of the respondent that section 63 (2) only empowers the Governor to make orders providing that an existing law shall be read and construed with such adaptations and modifications as may be necessary but does not authorise the Governor to make any order bringing into force any new provisions. In my opinion such a construction fails to give any effect whatever to the words in section 63 (2): “ or otherwise for giving effect or enabling effect to be given to those provisions ”.

In my opinion the material part of section 63 (2), in so far as it relates to the matters in issue in this petition, can only properly be read as follows:—

“ The Governor, in his discretion, may, by order published in the Gazette, at any time within six months after the appointed day, provide for giving effect or enabling effect to be given to the provisions of this Order in Council.”

This is precisely what the Governor has done by making the Determination (Elected Members) (Seats) Order 1963, in exercise of the powers to do so conferred upon him by the latter part of section 63 (2) of the Fiji (Constitution) Order in Council 1963 which is therefore *intra vires* the Governor.

The material provisions of section 34 (3) read:

"The seat of an elected member . . . of the Legislative Council shall become vacant . . . if any of the circumstances arise that, if he were not a member of the Legislative Council, would cause him to be disqualified for election . . . by virtue of paragraph . . . (d) . . . of subsection (1) of the last foregoing section."

The material part of section 33 (1) (d) reads:

"No person shall be qualified to be elected as an elected member . . . of the Legislative Council who is a person certified to be insane or otherwise adjudged to be of unsound mind under any law in force in the Colony."

It is the first contention of the respondent that the expression "if any of the circumstances arise" in section 34 (3) refers only to events that happen after an elected member is elected to be a member of the Legislative Council and cannot be made to refer to matters and circumstances that arose before he was elected a member.

At first sight there appears to be some merit in this contention because the whole of section 33 deals with the matters which disqualify a person from being elected as an elected member of the Legislative Council before he is in fact elected, whereas section 34 (3) deals with the circumstances under which the seat of an elected member shall become vacant after he has been elected. I cannot sustain this submission, however, for two reasons:

*Firstly—*

Because so to construe these two sections would be to support what can only be the absurdity that whereas a person under the disabilities set out in section 33 is not qualified to be elected nevertheless if he is in fact elected, notwithstanding the existence of such disqualifications he could continue thereafter to hold his seat; and

*Secondly—*

Because when a person is "certified to be insane" it is a state or condition which continues from day to day. A person who is "certified to be insane" continues day by day to be "certified to be insane" unless and until this disqualification is removed by his discharge or otherwise under the Mental Treatment Ordinance.

The second ground upon which this submission by the respondent is put forward is that section 33 (1) (d) refers to:

- (i) a person certified to be insane under any law in force in the Colony; or
- (ii) a person otherwise adjudged to be of unsound mind under any law in force in the Colony.

It is contended on behalf of the respondent that he has not in fact ever been "certified to be insane" but has merely been "certified to be a person of unsound mind" and that he has never been adjudicated by any tribunal to be of unsound mind under any law in force in the Colony.

The respondent is, therefore, drawing a distinction between "a person who is certified to be insane" and "a person who is certified to be of unsound mind". In my opinion this is a distinction without a difference.

In the first place it is conceded by both the petitioner and the respondent that there is no provision under any law in force in the Colony whereby a person may be certified "to be insane". I have examined the provisions

of the Mental Treatment Ordinance and the only certification referred to therein is to persons being of "unsound mind". If, therefore, the term "a person certified to be insane under any law in force in the Colony" is to be construed as not including "a person certified to be of unsound mind under any law in force in the Colony", it is an expression which is entirely meaningless and nugatory. Such a construction does not commend itself to me, and if the words are open to an alternative logical construction it is the duty of the Court to apply it.

The Shorter Oxford Dictionary gives the first meaning of the word "insane" to be:

"Of persons: not of sound mind, mad, mentally deranged."

It would appear, therefore, that the term "certified to be insane" is synonymous with the term "certified to be of unsound mind".

In the case of *Smith v. Smith* otherwise Hand [1940] P. at p. 181, Merriman, P., said:

"Quite rightly, however, in my opinion not only at the Bar but in the witness box any attempt to distinguish between unsoundness of mind on the one hand and insanity on the other has been disclaimed . . . I do not pretend to know why the one phrase is used in one part of the section and the other phrase in the other part but I agree with counsel and the doctors that it is impossible to distinguish between unsoundness of mind and insanity."

For my part I say, with the greatest respect, that I do not pretend to know or understand why section 33 (1) (d) is phrased in this particular way. It appears to me to be a section which is framed in loose and wide terms and certainly sufficiently wide for me to hold, as I do hold, that a person who is "certified to be of unsound mind under the Mental Treatment Ordinance" falls within the meaning of the words "a person certified to be insane or otherwise adjudged to be of unsound mind under any law in force in the Colony" within this section.

For these reasons I am unable to sustain any of the objections raised by the respondent to this petition.

From long before the date the respondent was declared to be elected the European Elected Member for the Northern Constituency, which was 27th April, 1963, until the 11th June, 1963, the respondent was a person falling within the meaning of the term "a person certified to be insane or otherwise adjudged to be of unsound mind under any law in force in the Colony".

Under these circumstances I hold that his seat was vacated by operation of law on 28th April, 1963.

Respondent's seat determined to be vacated.

*Solicitor-General* for the petitioner.

Solicitors for the respondent: *Marquardt-Gray & McNally*.