VATUWAQA TRANSPORT CO LTD & ANR

v

THE TRANSPORT CONTROL BOARD

[COURT OF APPEAL 1994, (Tikaram JA), 8 February]

Civil Jurisdiction

Courts-Court of Appeal-judicial review-whether the Court has jurisdiction to grant leave to move for-Court of Appeal Act (Cap 12) Section 20.

The High Court refused the appellants leave to move for judicial review. On application for leave being made to a single justice the Court of Appeal HELD: the Fiji Court of Appeal does not have jurisdiction to grant leave to move for judicial review.

No case was cited.

Application for leave to move for judicial review in the Fiji Court of Appeal.

H. Nagin for the Applicants
G.P. Lala for the 2nd Respondent

Tikaram J.A:

On 31st March, 1993 Byrne J. refused the Applicants' request for leave to apply for a Judicial Review. He did so after an inter partes hearing wherein he had the benefit of considering written submissions on the contested application. He then gave a reserved written decision refusing the application. On 21st April, 1993 the Applicants filed a notice of motion for leave to apply for Judicial Review before a single judge of the Court of Appeal. Alternatively they asked that leave be granted to appeal against Judge Byrne's refusal of 31 March, 1993. Both applications have been opposed by the 2nd Respondent.

With regard to the first application I have had the benefit of considering the written submissions filed by both parties including those submissions made in response to certain questions raised by me. Both parties have made reference to the practice in England in order to deal with the questions raised by me. At least there is one issue on which they agree. Both say it is unclear whether a single Judge of Appeal in England has power to grant leave to apply for Judicial Review.

I for my part also have considerable doubt in mind that a single Court of Appeal judge in England sitting as a Judge of Appeal has power to grant leave to apply for Judicial Review. Whether I am right or wrong in entertaining this doubt, I am now satisfied that not much help can be derived by looking at the English authorities or the English Practice with regard to the issue confronting

this Court. I say this for at least three reasons -

A

1. The English Court structure or system is in significant respects different from ours.

2. We do not have a provision similar to Section 9 of the English Supreme Court Act 1981 whereby a Lord Justice of Appeal can sit as a High Court judge to deal with Judicial Review matters where necessary.

B

3. In England an application to a High Court judge for leave to apply for Judicial Review is required to be made ex parte whereas in Fiji such an application had to be, at least until 1/12/93, an inter partes application except in exceptional circumstances. (It is to be noted that the present proceedings were initiated in October 1991.)

C

In his written response of 26th January, 1994 counsel for the 2nd Respondent maintains that since he had not questioned the jurisdiction of a single judge of the Court of Appeal to hear an application for leave to apply for Judicial Review, the questions raised by this Court about a single judge's jurisdiction has been an unnecessary time consuming academic exercise. Far from being an academic exercise the question raised is of fundamental importance. A single judge can only grant such leave if he has jurisdiction to do so. And jurisdiction is a preliminary issue exercising my mind.

D

The 2nd Respondent's counsel however goes on to concede that "The jurisdiction of a single judge of the Court of Appeal therefore might have been wrongly assumed in the light of the submission above".

E

As the Fiji Court of Appeal is a creature of statute I now proceed to examine the statutory powers of a single judge to see if he has jurisdiction to hear an applicant to grant leave to apply for Judicial Review.

Counsel for the Applicants maintains that in Fiji a single judge has power to deal with the first application before it, under Section 20 (a) and (g) of the Court of Appeal Act.

F

It will be useful to quote hereunder the whole of Section 20 because it spells out all the powers of a single judge -

"20. The powers of the Court under this Part-

(a) to give leave to appeal;

G

(b) to extend the time within which a notice of appeal or an application for leave to appeal may be given or within which any other matter or thing may be done;

(c) to give leave to amend a notice of appeal or respondent's notice;

(d) to give directions as to service;

(e) to admit a person to appeal in forma pauperis;

(f) to stay execution or make any interim order to prevent prejudice to the claims of any party pending an appeal;

(g) generally, to hear any application, make any order, or give any direction incidental to an appeal or intended appeal, not involving the decision of the appeal,

may be exercised by any judge of the Court in the same manner as they may be exercised by the Court and subject to the same provisions; but, if the judge refuses an application to exercise any such power or if any party is aggrieved by the exercise of such power, the applicant or party aggrieved shall be entitled to have the matter determined by the Court as duly constituted for the hearing and determining of appeals under this Act."

As to Section 20(a) this has relevance to the alternative application, i.e. leave to appeal and I will deal with it later.

As to Section 20(g) the power given thereunder can only be exercised "incidental to an appeal or intended appeal, not involving the decision of the appeal,"

Clearly the first application before me is in no sense "incidental to an appeal or intended appeal". The application is really a request to exercise original concurrent jurisdiction.

If the first application is granted it will not be in any way incidental or linked to the alternative application either. Therefore, no appeal, intended or pending, will be involved because the 2nd appeal will become redundant. Both applications are aiming to achieve the same objective - i.e. obtain leave to apply for Judicial Review. But they are mutually exclusive and that is why the 2nd application is termed an "alternative" application. If the 1st application is granted the matter will go back to the High Court for the hearing of the substantive Judicial Review hearing. The question of any appeal to the Fiji Court of Appeal at that stage will cease to exist.

I have no hesitation in ruling that the first application is not incidental to an appeal or intended appeal. I, therefore, hold that I have no jurisdiction to hear the application, let alone grant leave to apply for Judicial Review. The first application is, therefore, struck out for want of jurisdiction.

I now turn to the alternative application, i.e. leave to appeal. Whilst I do have power to grant leave to appeal, this power should be exercised subject to Rule 26(3) of the Court of Appeal Rules-

Sub Rule (3) says -

> "Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below."

Section 12(2)(f) of the Court of Appeal Act provides that no appeal shall lie "without the leave of the judge or of the Court of Appeal from any interlocutory order...." The only reason why the Applicants are asking for leave to appeal is because they consider Judge Byrne's refusal to be an interlocutory one.

If the refusal is not interlocutory in nature then there is no need to seek leave to appeal.

I share both counsel's concern that the High Court (Amendment) (No. 2) Rules 1993 which amended Rule 3 of Order 53 and which enables a party to reapply for leave for Judicial Review after its refusal, does pose some problems. However, this is not a matter I am called on to resolve. The Applicants, having failed to apply to the Court below in the first instance, cannot have its application heard before me. Even if I had the discretion to deal with the application without the Applicants having complied with Rule 26(3) I would not have in this instance exercised that discretion in the Applicants' favour. This is because Rule 26(3) is an eminently useful and desirable Rule particularly in the circumstances of the present case.

Should the Applicants succeed in obtaining leave to appeal from the Court below I would then be prepared to consider an application for leave to appeal out of time. In the meantime the alternative application is also refused. The orders of the Court are therefore as follows:

(i) The application for leave to apply for Judicial Review is struck out for want of jurisdiction.

(ii) The alternative application for leave to appeal is refused as there has been a failure to comply with Rule 26(3) of the Court of Appeal Rules.

(iii) Costs awarded to the 2nd Respondent and they are to be taxed if not agreed upon.

(Applications dismissed.)