Privy Council Appeal No. 95 of 1939

Hoani Te Heuheu Tukino – – – – – – – *Appellant*

v.

The Aotea District Maori Land Board – – – *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 3RD APRIL, 1941

Present at the hearing:
THE LORD CHANCELLOR
LORD THANKERTON
LORD WRIGHT
LORD PORTER

[*Delivered by* THE LORD CHANCELLOR]

This is an appeal from an order and judgment of the Court of Appeal of New Zealand, dated the 22nd October, 1938, which dismissed an appeal from the judgment of the Supreme Court of New Zealand (Smith J.), dated the 2nd December, 1937, whereby judgment was entered for the defendant, the present respondent Board.

The appellant is the Chief of the Ngatituwharetoa, a Maori tribe, whose members own lands in New Zealand, which were charged by virtue of section 14 of the Native Purposes Act, 1935, with repayment to the respondent Board of a portion of a sum of £23,500 which had been paid by the latter in terms of the said section to the Egmont Company Limited. The appellant instituted the present proceedings on behalf of the tribe and as representing the owners of the said lands against the respondent Board in the Supreme Court of New Zealand.

Section 14 of the Native Purposes Act, 1935, which replaced a substantially similar provision in section 10 of the New Zealand Finance Act, 1934-1935, so far as here material, provided as follows:—

> " 14.—(1) The Aotea District Maori Land Board (hereinafter in this section referred to as the Board) is hereby authorised, empowered and directed to accept the offer of the Egmont Box Company Limited to release and discharge the Board and the native owners from all claims and demands of whatever kind arising out of a certain agreement made between the Tongariro Timber Company Limited and the said Egmont Box Company Limited dated the 23rd October 1919 (including all amounts which the said Egmont Box Company Limited claims to be entitled to set-off against royalties payable) in respect of timber-cutting and other rights on the lands known and described in the said agreement as Western Division A and B, in consideration of a sum approved by the Native Minister to be paid to the said Egmont Box Company Limited by the Board.
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> (2) (A) The sum approved by the Native Minister, together with all costs and expenses incurred by the Board in connection with its negotiations with the Egmont Box Company Limited and incidental hereto, shall be paid by the Board out of moneys in its account, and shall be deemed to be a loan to the owners, including the Crown, of the whole lands described and referred to in a certain deed of agreement bearing date the 23rd December 1908, and made between the Maniapoto-Tuwharetoa District Maori Land Board of the one part and the Tongariro Timber Company Limited of the other part, such deed being

the deed entered into in pursuance of section 37 of the Maori Land Laws Amendment Act 1908, excepting always, however, from such lands all such portions thereof as have been actually transferred to the Tongariro Timber Company Limited for an estate in fee simple.

(B) Upon payment of such sum as aforesaid the Board shall by virtue of this Act and as security for the repayment of such sum together with the other moneys mentioned in paragraph (A) hereof (all hereinafter in this section referred to as the loan-moneys) and together with interest thereon as hereinafter mentioned, be deemed to have a charge upon all the lands and the revenue therefrom referred to in paragraph (A) hereof, excepting any of such land or any interest therein acquired or owned by the Crown.

* * * * * * *

(8) The Board shall be entitled to charge and be paid interest at a rate not exceeding 5 per cent. per annum on the said loan-moneys until repayment thereof, such interest to be charged as from the respective dates each or any portion of such loan-money is paid out.

(9) The expenditure hereby authorised shall be deemed to be a proper investment by the Board of its funds and such investment is hereby approved.

(10) Upon payment to the Egmont Box Company Limited of the said sum, the agreement between the Tongariro Timber Company Limited and the Egmont Box Company Limited, dated the 23rd October, 1919, shall be deemed to be determined and cancelled, and any right title or interest acquired thereunder by the Egmont Box Company Limited shall pass to and vest in the Board.

(11) Upon payment of the said sum to the Egmont Box Company Limited, all moneys due and owing by the Tongariro Timber Company Limited to the Egmont Box Company Limited upon any account whatsoever, including moneys which the Egmont Box Company Limited has paid or may hereafter pay in respect of its liability as guarantor under debentures issued by the Tongariro Timber Company Limited for £26,000 shall be deemed to be due and owing by the Tongariro Company Limited to the Board, and the Egmont Box Company Limited shall, at the cost of the Board, assign to it all securities it may hold for the payment of any such moneys."

In accordance with these provisions the Egmont Company made an offer to accept the sum of £23,500, and the Native Minister approved this amount and directed the respondent Board to pay it, which they did upon the 25th June, 1935, and such sum thereupon became a charge upon the lands referred to in the agreement of 1908, other than those owned by the Crown, as provided by subsection 2 of section 14.

Thereafter the present proceedings were instituted by the appellant, and, as was clearly stated by his counsel, to whom their Lordships are indebted for a full and able argument, the whole purpose of the proceedings is to obviate the statutory charge imposed upon the lands of the native owners by the Act of 1935, and it is sought to attain that end by one of the two alternative contentions maintained before the Board. Counsel also stated that the native owners took the view that the Act of 1935 imposed a liability to the Egmont Company for which there was no justification, and their Lordships note that Smith J., who tried the case, says in his judgment, " Although I do not think there is any doubt about the legal position, counsel for the defendant agreed with counsel for the plaintiff that the natives represented by the plaintiff had cause to feel a sense of injustice." However, it is not within the province of this Board to criticise the policy of the legislature; the Board's duty is to construe and apply the enactments made by the legislature.

The first contention submitted by the appellant was that relied on in the statement of claim in its final amended form, dated the 2nd July, 1937, viz., that the respondent Board, as the statutory agent of the native owners, owed a duty to them to safeguard their interests, that the Board had acted in breach of that duty, and that, in consequence of that breach of duty, section 14 of the Act of 1935 had been enacted; the appellant asked for the appropriate declarations and for an order requiring the respondent Board to indemnify the native owners and their lands from and against the payment of the sum of £23,500 which the Board had paid to the Egmont Company, or any part thereof.

The alternative contention of the appellant challenged the validity of the charge imposed by section 14 of the Act of 1935, on the ground that such legislation was *ultra vires* of the Legislature of New Zealand, in so much as it derogated from the rights conferred on the native owners by the Treaty of Waitangi. This contention was not raised in the pleadings or before the Supreme Court, but it was heard and decided by the Court of Appeal, without objection. On the suggestion of their Lordships, counsel for the appellant has submitted an amendment to the prayer in the statement of claim in the following terms, " 2 (*a*) For a further declaration by the Honourable Court, that so much of section 14 of the Native Purposes Act, 1935, as imposes a charge on the lands of the natives is *ultra vires* the Legislature of New Zealand." Counsel for the respondent Board assents to the making of the amendment, and the scope of the argument presented before their Lordships is regularised by its allowance.

Before dealing with these contentions it will be convenient to give a brief outline of the events which led up to the Act of 1935.

In 1908 the Maniapoto-Tuwharetoa District Maori Land Board—the predecessors of the respondent Board—as authorised by section 37 of the Maori Land Laws Amendment Act, 1908, on behalf of the native owners of the lands in question, entered into an agreement with the Tongariro Timber Company Limited, under which the company was to buy the timber on the lands and pay royalties in advance on account thereof, and was also to build a railway for a distance of about 40 miles through the lands within certain prescribed periods. The Tongariro Company subsequently found difficulty in carrying out its obligations and in 1914 and 1919 it made agreements with the Egmont Box Company Limited under which it obtained assistance from the Egmont Company. At the same time statutory provisions were passed, which provided that in the event of default by the Tongariro Company in its obligations to the respondent Board, the rights and obligations of the Tongariro Company under its agreements with the Egmont Company were to be transferred from the Tongariro Company to the Board. In 1930, owing to the defaults of the Tongariro Company, the Board cancelled the agreement between them, and questions then arose between the Board and the Egmont Company, the latter claiming that the Tongariro Company was indebted to it in an amount exceeding £46,000, and that the liability had been transferred to the Board under the statutory provisions of 1914 and 1919.

In the hopes that a solution might be provided by negotiation, section 18 of the Native Land Amendment and Native Land Claims Adjustment Act, 1930, provided *inter alia* that the respondent Board should be authorised to enter into a new contract with the Egmont Company incorporating such terms of the 1919 agreement as should be mutually agreed upon with such additional terms as should in the opinion of the respondent Board, subject to the approval of the Native Minister, be fair, reasonable and equitable. If any dispute were to arise as to the terms to be included in the new agreement, the decision of the Native Minister was to be final, provided that if the Egmont Company were dissatisfied with the Native Minister's decision it could decline to execute the proposed contract and the parties were thereupon to be left to their respective rights and obligations under the agreement of 1919. It was further provided that if no new contract was entered into under the Act, the respondent Board should remain the statutory agent of the native owners with as full authority to act as if it were the legal owner of the premises.

No new agreement was arrived at or executed, and thereupon section 10 of the Finance Act, 1934-1935, was passed which was shortly thereafter superseded by section 14 of the Act of 1935 and the statutory charge on the lands followed, against which the appellant seeks to be indemnified by the respondent Board. In his Statement of Claim the appellant embodies his allegation of breach of duty by the respondent Board as the statutory agent of the native owners in his prayer

" (1) For a declaration by this Honourable Court that the defendant Board's failure—

(*a*) to obtain from this Honourable Court directions as to the legal liability (if any) of the defendant Board and/or the

native owners aforesaid to the Egmont Box Company Limited; or in the alternative:—

(*b*) to terminate the contract of the Egmont Box Company Limited and sue for damages

was negligence and/or breach of duty.

(2) For a further declaration by his Honourable Court that the defendant Board's failure to represent to the Crown that it would be wrong to make any settlement with the Egmont Box Company Limited which involved the payment of moneys to be charged on the aforesaid lands until the liability of the native owners for any of such moneys had first been determined by this Honourable Court, was negligence and/or breach of duty."

Their Lordships fully agree with the opinion of the Court of Appeal on this contention of the appellant; it is not open to the Court to go behind what has been enacted by the Legislature, and to enquire how the enactment came to be made, whether it arose out of incorrect information or, indeed, on actual deception by someone on whom reliance was placed by it. The Court must accept the enactment as the law unless and until the Legislature itself alters such enactment, on being persuaded of its error. The principle laid down in *Labrador Company* v. *The Queen*, [1893] A.C. 104, referred to by the Court of Appeal, is directly applicable. Lord Hannen, in delivering the judgment of the Board, states (at p. 123):

> " This is an absolute statement by the legislature that there was a *seigneurie* of Mingan. Even if it could be proved that the legislature was deceived, it would not be competent for a court of law to disregard its enactments. If a mistake has been made, the legislature alone can correct it. The Act of Parliament has declared that there was a *seigneurie* of Mingan, and that thenceforward its tenure shall be changed into that of *franc aleu roturier*. The courts of law cannot sit in judgment on the legislature, but must obey and give effect to its determination."

Before the Court can accede to the appellant's claim for an indemnity against the charge imposed by section 14 of the Act of 1935, the Court will require not only to find that the respondent Board owed to the native owners the duty alleged and that it committed the breaches of that duty which are alleged, but also that the enactment of section 14 was the reasonable and natural consequence of such breaches, and, even assuming the duty and breaches to have been established, the third and last essential step for the appellant's success would involve an enquiry by the Court of the nature prohibited by the principle of the *Labrador* decision. The appellant therefore fails in his first contention.

While the appellant's first contention assumed the legislative validity of the statutory charge enacted by section 14 of the Act of 1935, and sought a remedy by indemnification against the liability thus imposed, his alternative contention, which remains to be dealt with, challenges the power of the Legislature of New Zealand to impose such a charge on the native lands.

The appellant maintained (1) that the Treaty of Waitangi was a solemn compact defining the rights given to the Maori people in respect of their lands; (2) that the right thus acquired by the Maori people is cognisable in the Courts; (3) that such right was declared by the Imperial Act of 1852 (15 and 16 V. cap. 72) which granted a representative constitution to New Zealand; (4) that the Colonial Laws Validity Act, 1865 (28 and 29 V. cap. 63) preserves such right; that the Imperial Act of 1857 (20 and 21 V. cap. 53) which amended the above Act of 1852, did not authorise the Parliament of New Zealand to legislate in derogation of a treaty right; and (6) that the Legislature of New Zealand has recognised and adopted the Treaty as part of the municipal law; and that section 14 of the Act of 1935 derogates from the right conferred by the second article of the Treaty in so much as it imposes a charge on the native lands.

Article the Second of the Treaty of Waitangi, which was dated the 6th February, 1840, was as follows:

> " Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their lands and estates, forests, fisheries, and other properties which

> they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right to pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf."

Under Article the First there had been a complete cession of all the rights and powers of sovereignty of the Chiefs. It is well settled that any rights purporting to be conferred by such a treaty of cession cannot be enforced in the Courts, except in so far as they have been incorporated in the municipal law. The principle laid down in a series of decisions was summarised by Lord Dunedin in delivering the judgment of this Board in the Gwalior case, *Vajesingji Joravarsingji* v. *Secretary of State for India*, (1924), 51 Ind. App. 357, at p. 360, in these words:

> " When a territory is acquired by a sovereign state for the first time that is an act of state. It matters not how the acquisition has been brought about. It may be by conquest, it may be by cession following on treaty, it may be by occupation of territory hitherto unoccupied by a recognised ruler. In all cases the result is the same. Any inhabitant of the territory can make good in the municipal courts established by the new sovereign only such rights as that sovereign has, through his officers, recognised. Such rights as he had under the rule of predecessors avail him nothing. Nay more, even if in a treaty of cession it is stipulated that certain inhabitants should enjoy certain rights, that does not give a title to those inhabitants to enforce these stipulations in the municipal courts. The right to enforce remains only with the high contracting parties. This is made quite clear by Lord Atkinson when, citing the Pongoland case of *Cook* v. *Sprigg*, he says, (*Secretary of State for India* v. *Kamachee Bai Rajbai*, (1915) 42 Ind. App. 229, at p. 268) ' It was held that the annexation of territory made an act of state and that any obligation assured under the treaty with the ceding state either to the sovereign or to the individuals is not one which the municipal courts are authorised to enforce.' "

So far as the appellant invokes the assistance of the Court, it is clear that he cannot rest his claim on the Treaty of Waitangi, and that he must refer the Court to some statutory recognition of the right claimed by him. He therefore refers to the Imperial Act of 1852, under which representative government was conferred on New Zealand by the creation of a legislative body called the General Assembly, the powers of which, so far as material to the present question, are provided for in sections 53, 72 and 73 as follows:—

> " 53. It shall be competent to the said General Assembly (except and subject as hereinafter mentioned) to make laws for the peace, order and good government of New Zealand, provided that no such laws be repugnant to the law of England.
>
> 72. Subject to the provisions herein contained it shall be lawful for the said General Assembly to make laws for regulating the sale, letting, disposal and occupation of the waste lands of the Crown in New Zealand, and all lands wherein the title of natives shall be distinguished as hereinafter mentioned, and all such other lands as are described in an Act of the Session holden in the tenth and eleventh years of Her Majesty, chapter 112, to promote colonization in New Zealand and to authorise a loan to the New Zealand Company, as demesne lands of the Crown, shall be deemed and taken to be waste lands of the Crown within the meaning of this Act, provided always that, subject to the said provisions and until the said General Assembly shall otherwise enact, it shall be lawful for Her Majesty to regulate such sale, letting, disposal and occupation by instructions to be issued under the signet and royal sign manual.
>
> 73. It shall not be lawful for any person other than Her Majesty, Her Heirs and Successors, to purchase or in anywise acquire or accept from the aboriginal natives land of or belonging to or used or occupied by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal natives in any such land as aforesaid; and no conveyance or transfer, or agreement for the conveyance or transfer, of any such land, either in perpetuity or for any term or period either absolutely or conditionally, and either in property or by way of lease or occupancy, and no such release or extinguishment as aforesaid shall be of any validity or effect unless the same be made to, or entered into with, and accepted by Her Majesty, Her Heirs or Successors, ... "

The appellant's contention was that the right conferred by the Waitangi Treaty was made a substantive part of the municipal law by section 73 of this Act, but he had to concede that the Imperial Parliament, by virtue of its sovereign power of legislation, might have altered any right recognised or conferred by section 73, by enacting a few months later a provision in the precise terms of section 14 of the New Zealand Act of 1935. In view of this admission—which in the opinion of their Lordships was rightly made—the only ground left on which the appellant can challenge the validity of section 14 is that the Imperial Parliament has not conferred upon the New Zealand Legislature the power to alter section 73 of the Act of 1852. But this ground also fails, since, while section 73 of the Act of 1852 was expressly excepted from the power of alteration and repeal of the provisions of that Act conferred by the amending Act of 1857 (20 and 21 V. cap. 53), the Imperial Parliament passed an Act in 1862 (25 and 26 V. cap. 48) which enabled the Assembly to repeal section 73 of the Act of 1852 and provided that no enactment of the Assembly should be invalid because of repugnancy to section 73. If it were needed, the provisions of the Colonial Laws Validity Act 1865 (28 and 29 V. cap. 63) operate to the same effect.

If then, as appears clear, the Imperial Parliament has communicated to the New Zealand Legislature power to legislate in regard to the native lands, it necessarily follows that the New Zealand Legislature has the same power as the Imperial Parliament had to alter and amend its legislation at any time. In fact, as pointed out by the learned Chief Justice, section 73 of the Act of 1852 was repealed by the New Zealand Legislature by the Native Land Act, 1873. As regards the appellant's argument that the New Zealand Legislature has recognised and adopted the Treaty of Waitangi as part of the municipal law of New Zealand, it is true that there have been references to the Treaty in the statutes, but these appear to have invariably had reference to further legislation in relation to the native lands, and, in any event, even the statutory incorporation of the second article of the treaty in the municipal law would not deprive the Legislature of its power to alter or amend such a statute by later enactments.

In the opinion of their Lordships, the appellant has failed to satisfy them that the enactment of the statutory charge in section 14 of the Act of 1935 was beyond the competency of the New Zealand Legislature, and the appeal fails on this point also.

Their Lordships will therefore humbly advise His Majesty that the appeal should be dismissed with costs and that the order and judgment of the Court of Appeal of New Zealand should be affirmed.

(11268) Wt. 8194—7 90 4/41 D.L. G. 338

In the Privy Council.

HOANI TE HEUHEU TUKINO

v.

THE AOTEA DISTRICT MAORI LAND BOARD

DELIVERED BY THE LORD CHANCELLOR

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