James
v.
The Board of Review (Paddy Lands)
and another

COURT OF APPEAL
WIMALARATNE, P. AND TAMBIAH, J.
C.A. (S.C.) 172/74.
MAY 18, 1979.

Interpretation (Amendment) Act No. 18 of 1972, section 22—Preliminary objection taken thereunder—No certiorari clause in Paddy Lands Act—Effect of such clause read with bar created by section 22—Paddy Lands Act, section 59 (3)—Whether writ of certiorari lies.

The petitioner filed the present application to quash by way of certiorari a decision of the Board of Review constituted under the Paddy Lands Act No. 1 of 1958 as amended by Act No. 61 of 1961, on the ground that the reasons given by the Board were manifestly erroneous. The finding of the Board of Review was that the petitioner was not the ande cultivator of a certain paddy land and in coming to this finding the Board reversed the findings made by the Assistant Commissioner of Agrarian Services in favour of the petitioner. A preliminary objection was taken on behalf of the 6th respondent that the petitioner's application was barred by section 22 of the Interpretation (Amendment) Act No. 18 of 1972 read with section 59 (3) of the Paddy Lands Act.

Section 59 (3) of the Paddy Lands Act provided that a decision of the Board in appeal "shall.....be final and conclusive and shall not be called in question in any Court". Section 22 of the Interpretation (Amendment) Act provided that where such words appeared in any enactment no Court shall have jurisdiction to pronounce upon the validity or legality of such order. The proviso to the section contained a saving clause to the effect that the Supreme Court could exercise its powers to issue writs where such order was *ex facie* not within

the power conferred on such authority or Tribunal, or where the rules of natural justice had not been complied with or where there had been no conformity with any mandatory provision of law which was a condition precedent to the making of such order.

Held

The provisions of section 22 of the Interpretation (Amendment) Act read with section 59 (3) of the Paddy Lands Act bar the petitioner's application for a writ of certiorari and the preliminary objection must accordingly be upheld. The section bars any kind of challenge to an order which comes within section 22 on grounds other than those specified in the proviso.

Cases referred to

(1) *R. v. Electricity Commissioners, ex parte London Electricity Joint Committee, (1924) 1 K.B. 171 ; 130 L.T. 164 ; 93 L.J.K.B. 390*
(2) *Smith v. East Elloe Rural District Council, (1956) A.C. 736 ; (1956) 1 All E.R. 855 ; (1956) 2 W.L.R. 888*
(3) *Anisminic Ltd. v. Foreign Compensation Commission, [1969] 2 A.C. 147 ; (1969) 1 All E.R. 208 ; (1969) 2 W.L.R. 163*

APPLICATION for a Writ of Certiorari.

Nimal Senanayake, for the petitioner.
H. L. de Silva, for the 6th respondent.
Priyantha Perera, Deputy Solicitor General, as *amicus curiae*.

Cur. adv. vult.

June 15, 1979

WIMALARATNE, P.

The scope of section 22 of the Interpretation (Amendment) Act, No. 18 of 1972, arises for consideration in this application.

The petitioner complained to the Assistant Commissioner of Agrarian Services, Kegalle, that he was the tenant cultivator of a paddy land called Pahalagedera Kumbura, and that he was evicted on 21.4.68 by Babanis, the 6th respondent. The Assistant Commissioner held an inquiry under section 4 (1A) (*a*) of the Paddy Lands Act, No. 1 of 1958, as amended by Act No. 61 of 1961, for the purpose of deciding the question whether or not the petitioner had been evicted. He decided that the petitioner was the ande cultivator, and determined under section 4 (1A) (*b*) of the Act that the petitioner was evicted during the Yala crop of 1968.

The 6th respondent appealed to the Board of Review set up under the Act. The Board of Review, after inquiry, held that the petitioner was not the ande cultivator, and set aside the order of the Assistant Commissioner. In its order dated 6.10.73 the Board gave the following reasons for its decision :—

(*a*) that there had been a delay till 10.6.72 to complain about the eviction ; and

(*b*) that the petitioner had not presented himself to get his name included as a tenant cultivator at the revision of the paddy lands register.

The present application is to quash this decision of the Board of Review on the ground that the reasons given by the Board are manifestly erroneous.

Objection has been taken by learned Counsel for the 6th respondent that section 22 of the Interpretation (Amendment) Act, read with section 59 (3) of the Paddy Lands Act, is a bar to the present application.

Section 22 of the Interpretation (Amendment) Act reads thus :—

> "22. Where there appears in any enactment, whether passed or made before or after the commencement of this Ordinance, the expression "shall not be called in question in any court", or any other expression of similar import whether or not accompanied by the words "whether by way of writ or otherwise" in relation to any order, decision, determination, direction or finding which any person, authority or tribunal is empowered to make or issue under such enactment, no court, shall, in any proceedings and upon any ground whatsoever, have jurisdiction to pronounce upon the validity or legality of such order, decision, determination, direction or finding, made or issued in the exercise or the apparent exercise of the power conferred on such person, authority or tribunal.
>
> Provided, however, that the preceding provisions of this section shall not apply to the Supreme Court in the exercise of its powers under section 42 of the Courts Ordinance, in respect of the following matters, and the following matters only, that is to say—
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> (*a*) where such order, decision, determination, direction, or finding is ex facie not within the power conferred on such person, authority or tribunal making or issuing such order, decision, determination, direction or finding; and
>
> (*b*) where such person, authority or tribunal upon whom the power to make or issue such order, decision, determination, direction or finding is conferred is bound to conform to the rules of natural justice, or where the compliance with any mandatory provisions of any law is a condition precedent to the making or issuing of any such order, decision, determination, direction or finding, and the Supreme Court is satisfied that there has been no

conformity with such rules of natural justice or no compliance with such mandatory provisions of such law:

Provided further that the preceding provisions of this section shall not apply to the Supreme Court in the exercise of its powers under section 45 of the Courts Ordinance to issue mandates in the nature of writs of habeas corpus."

Section 59 (3) of the Paddy Lands Act is as follows:—

"59 (3) The Board of Review may, on any appeal made under this Act to such Board, confirm or vary the determination or decision from which such appeal is made, and the decision of such Board on such appeal shall, except otherwise provided in this Act, be final and conclusive and shall not be called in question in any Court".

It has been contended by Counsel for the respondent that the combined effect of these two provisions is to limit the jurisdiction of this Court in issuing the writ of certiorari to quash the decision of the Paddy Lands Board of Review. The writ will issue if, and only if,—

(*a*) the order of the Board is ex facie not within the power conferred on the Board, or

(*b*) the Board has not complied with the rules of natural justice or with a mandatory provision of law which is a condition precedent to the making of an order.

Section 22 was included in the statute book in order to remove the jurisdiction to quash or declare invalid orders of statutory authorities on other grounds such as mala fides, error of law, failures to take into consideration relevant matters or taking into consideration irrelevant matters, use of power for improper purposes, and ultra vires, although ex facie the order is one within the powers of the authority. Counsel's submission is that unless this meaning is given to section 22 the law would be very much the same as before the amendment; so that the obvious intention of the legislature was to remove the grounds of certiorari, other than those within the proviso.

The principal contention of Counsel for the petitioner has been that the main part of section 22 deals with decisions which a tribunal is *empowered to make* under the statute. There are certain things that statutory authorities are empowered to do, and certain other things they are not empowered to do. For example, a tribunal having to act in a judicial way is not em-

powered to say that it will disregard all the evidence led by both parties and act on its own knowledge of the facts of the case. Counsel conceded that the amendment has restricted interference by the Courts and has considerably narrowed the scope of certiorari, but posed the question, " what of the large number of cases where the order is one which the tribunal is *not empowered* to make ? " No statutory body is empowered to make an order which is blatantly in contravention of statute law. While earlier notions of ' error of law on the face of the record ', failure to take into consideration relevant matters etc. are no longer of avail, disregard of what the legislature itself has enacted should be taken into account, is a completely different matter. In such instances the order is one which the tribunal is not empowered to make either because of an error of law or an error of procedure which the tribunal is required to follow.

It has to be remembered that the limitation imposed by section 22 applies only to bodies and tribunals established by statutes which expressly provided that the orders made by them " shall not be called in question in any court ". The legislature which passed this amendment had considered it desirable that finality should be given to decisions of certain persons authorities and tribunals, and that they should be subject to judicial review only within certain specified limits. That is why the main part of the section uses the expression " upon any ground whatsoever " except in proceedings and upon grounds set out in the proviso. The rigorous limitations to the ambit of review is also emphasized by the use of the words " in respect of the following matters and following matters *only* ".

The practice of inserting " no certiorari " clauses in statutes, although it has been discontinued in England, is still followed in some Commonwealth Countries. In Canada " no certiorari " clauses have received rough treatment by the Courts ; but in Australia the High Court has given an effective field of operation to strong privative clauses—See, *S. A. de Smith—Judicial Review of Administrative Action* (3rd Edition), pages 323, 324.

In discussing the scope of Certiorari and Prohibition, Atkin, J. said, " wherever any body of persons having legal authority to determine the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in those writs ". *The King v. Electricity Commissioners, ex parte London Electricity Joint Committee* (1). The answer to Mr. Senanayake's submissions and the interpretation he places on the words " empowered to make " is, I think

found in this statement of the law. "Empowered to make" could be equated to "having legal authority to determine". The words "empowered to make", in section 22 have, in my view, been used to designate the nature of the person, authority or tribunal whose orders are the subject of legislation. These words focus attention on the character of the deciding body. The body must be vested with legal authority to decide. If it is so vested with authority, an order, even if erroneous in fact or in law is yet capable of legal consequences, because, in the words of Lord Radcliffe, "it bears no brand of invalidity upon its forehead". *Smith v. East Elloe Rural District Council* (2), at 769.

The answer to the question "has the tribunal the power to make the order it has made?" has to be gathered by looking at the terms of the empowering law, and not by seeking to find out whether it has properly exercised that power. Is it ex facie outside the enabling power? If so, it is a nullity. Or is it within the four corners of the enabling law? If so, it is an order which acquires a certain immunity from judicial review. Take, for example, the powers vested in Rent Boards under the Rent Act, No. 7 of 1972; although there is no ouster clause in the Rent Act, unlike in the Paddy Lands Act, Rent Boards have the power to fix standard rents, authorized rents, receivable rents etc., and to decide upon permitted increases. But it has no power to order the ejectment of tenants. If the Rent Board in deciding upon the rent which a tenant has to pay, arrives at a wrong figure, this is an order which the Board has the power to make. If the Board makes order of ejectment that order has the brand of invalidity on its forehead; the former has not.

The decision of the House of Lords in *Anisminic Ltd. v Foreign Compensation Commission* (3) must be considered in this connection. Section 4 (4) of the Foreign Compensation Act, 1950, contained an ouster clause in these words: "The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law". The majority of the House held that the term "determination" shall not be construed as including everything which purported to be a determination, but was not in fact a determination, because the Commission had misconstrued the provisions of the order defining their jurisdiction; and accordingly the court was not precluded from inquiring whether or not the order of the

Commissioner was a nullity. Lord Reid gave the following reason : "There are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly," at p. 171. His Lordship seems to imply thereby that if the Commission had refused to take into account something which it was required to take into account, then the determination is a nullity, and notwithstanding the ouster clause certiorari would lie to quash such determination.

Had the Paddy Lands Act been the only Statute under consideration, this statement of the law would have been applicable, and notwithstanding the provisions contained in section 59 (3) it would be open to this court to review the validity of the Board's decision. But the Interpretation (Amendment) Act enacted in 1972 compels us to look at the problem from another angle. That Act expressly provides that where a 'no certiorari' clause is contained in a statute, a determination could be questioned if and only if, the conditions specified in the proviso to section 22 have not been satisfied. In that situation, the reasoning of Lord Morris of Borth-Y-Gest is more in consonance with our legislation. Said Lord Morris: "If a tribunal, while acting within its jurisdiction makes an error of law which it reveals on the face of its recorded determination, then the court, in the exercise of its supervisory function, may

correct the error unless there is some provision preventing a review by a court of law. If a particular issue is left to a tribunal to decide, then even where it is shown (in cases where it is possible to show) that in deciding the issue left to it the tribunal has come to a wrong conclusion, that does not involve that the tribunal has gone outside its jurisdiction. It follows that if any errors of law are made in deciding matters which are left to a tribunal for its decision such errors will be errors within jurisdiction. If issues of law as well as of fact are referred to a tribunal for its determination, then its determination cannot be asserted to be wrong if Parliament has enacted that the determination is not to be called in question in any court of law", at p. 182.

Much the same view has been expressed by de Smith, that "a no certiorari clause would probably be held to take away the power to quash for patent error of law not going to jurisdiction, inasmuch as a determination flawed by such a defect is not a nullity but merely voidable", at p. 323 (3rd Ed.).

The following words of Viscount Simonds in the East Elloe case appear to be most relevant to the problem under consideration:— "I think that anyone bred in the tradition of the law is likely to regard with little sympathy legislative provisions for ousting the jurisdiction of the Court.....But it is our plain duty to give the words of an Act their proper meaning..... What is abundantly clear is that words are used which are wide enough to cover any kind of challenge which an aggrieved person may think fit to make" at p. 750; and I may substitute in the context of our legislation, any kind of challenge, on grounds other than those specified in the proviso.

If we were to place the wide meaning as contended for by Counsel for the petitioner, to the words "empowered to make" we would be legislating to restore the plenary powers which this court exercised prior to the amendment. That plainly is not our function. I would accordingly uphold the preliminary objection and refuse this application with costs payable by the petitioner to the 6th respondent.

In view of the substantial and important question of law involved I would grant the petitioner leave to appeal to the Supreme Court.

TAMBIAH, J.—I agree.

Application dismissed.