Privy Council Appeal No. 25 of 1950

Memudu Lagunju - - - - - - - - - - *Appellant*

v.

Olubadan-in-Council and Another - - - - - *Respondents*

FROM

THE WEST AFRICAN COURT OF APPEAL

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH MAY, 1952

Present at the Hearing:

LORD NORMAND

LORD RADCLIFFE

LORD ASQUITH OF BISHOPSTONE

[*Delivered by* LORD NORMAND]

This is an appeal from an Order of the West African Court of Appeal dated the 4th December, 1948, allowing an appeal from an Order of the Supreme Court of Nigeria dated the 7th February, 1948, and entering judgment for the respondents, the defendants in the action. The Order of the Supreme Court had granted an injunction restraining the second defendant and respondent from performing the duties of the Timi of Ede and from receiving the salary attached to the office of Timi, a declaration that the selection of the second respondent and his subsequent installation as Timi of Ede were contrary to the native law and custom governing the selection of a Timi of Ede and were therefore null and void, a second declaration that the appellant is the person qualified and entitled by native law and custom to hold the post and enjoy the office and title of Timi of Ede, and a third declaration that the appellant was duly selected by the Ede Kingmakers as Timi of Ede in April, 1946, and that the selection was in accordance with native law and custom. The injunction and declarations granted by the Supreme Court are in precise accordance with the relief sought in the appellant's summons and statement of claim so far as now insisted in. In the statement of claim an additional declaration was sought, but it was refused by the Supreme Court and was thereafter abandoned. The Court of Appeal held that the Courts had no jurisdiction to entertain the suit.

In his pleadings the appellant alleged that he had been selected by the persons entitled by native law and custom to select the Timi of Ede and had been unanimously recommended by them for approval of the Governor through the Olubadan-in-Council, the first defendant and respondent, but that the Olubadan-in-Council contrary to native law and custom appointed the second respondent to fill the vacant office of Timi. There were also allegations that the first respondent acted in bad faith in appointing the second respondent and that the Resident of Oyo province, in which the town of Ede is situated, had also acted in bad faith in approving the appointment of the second respondent as Timi of Ede. The Supreme Court acquitted the Resident of bad faith and the appellant has acquiesced and does not now allege bad faith against the Resident. The respondents in their pleadings denied the material allegations of the appellant, and they further averred that the selection and approval of the second respondent was based on a public enquiry held at Ede in

May, 1946, when it was discovered that the majority of the Chiefs and people of Ede were strongly in favour of the appointment of the second respondent as Timi. Both respondents pleaded to the jurisdiction of the court without specifying the grounds of the plea.

On the merits, therefore, it is apparent that the dispute between the parties concerned the right of succession to the office of Timi of the town of Ede vacant by the death of the previous Timi on the 24th January, 1946, and that conflicting claims to the office were made by the appellant and the second respondent. It should be explained that the Timi of the town of Ede is the Head Chieftain of the town, and that if he is approved by the Governor or his delegate he becomes also the president of the District Council or local authority of Ede and that as such he is entitled to a stipend. The town of Ede is within the area of the Ibadan Native Authority known as the Olubadan-in-Council, presided over by the Olubadan, and the Ede District Council is subordinate to the Olubadan-in-Council.

The evidence taken in the Supreme Court disclosed that the dispute between the parties covered a wide field, including the questions whether the second respondent was eligible for the office of Timi, who were the parties within the town of Ede entitled to nominate a candidate, who were the parties within the town of Ede entitled to make a final selection, whether their selection must be unanimous, and whether their choice could be overruled by the Olubadan-in-Council. All these questions depend on the proper ascertainment and application of the relevant native law and custom. It is for this reason that the issue of jurisdiction assumes a special importance and becomes the determining issue in the appeal, for the Appointment and Deposition of Chiefs Ordinance, Cap. 12 of Nigeria, 1948 (No. 14 of 1930 as amended by No. 20 of 1945) makes special provision for preserving native law and custom in the appointment of a chief or head chief, and this ordinance admittedly applies in this case. The text of the ordinance is as follows:—

"AN ORDINANCE TO PROVIDE FOR THE APPOINTMENT AND DEPOSITION OF CHIEFS.

1. This Ordinance may be cited as the Appointment and Deposition of Chiefs Ordinance and shall apply to the Colony and Protectorate (including the Cameroons under British Mandate).

2. (1) Upon the death, resignation or deposition of any chief or of any head chief, the Governor may approve as the successor of such chief or head chief, as the case may be, any person appointed in that behalf by those entitled by native law and custom so to appoint in accordance with native law and custom: and if no appointment is made before the expiration of such interval as is usual under native law and custom, the Governor may himself appoint such person as he may deem fit and proper to carry out such duties incidental to the Chieftaincy as it may be necessary to perform.

(2) In the case of any dispute the Governor after due inquiry and consultation with the persons concerned in the selection, shall be the sole judge as to whether any appointment of a chief has been made in accordance with native law and custom.

3. The Governor may grade head chiefs as first, second, third, fourth or fifth class according to their importance.

4. The Governor, after due inquiry and consultation with the persons concerned in the selection, may depose any chief or any head chief whether appointed before or after the commencement of this Ordinance, if after inquiry he is satisfied that such deposition is required according to native law and custom or is necessary in the interests of peace, or order or good government.

5. For the purposes of Sections 2 and 4 of this Ordinance, the words 'chief' and 'head chief' mean a chief or a head chief who has been appointed to the office of native authority under the provisions of the

Native Authority Ordinance or which office is deemed to be constituted thereunder, or who is a member of a native authority constituted or deemed to be constituted under the provisions of that Ordinance or, where the office of native authority so appointed or deemed to be constituted, is a chief associated with a council, any chief or head chief who is a member of that council and any chief or head chief who is a member of an advisory council."

It is of importance to note that subsection 2 (2) originally read:—

"The Governor shall be the sole Judge as to whether any appointment of a chief or head chief, as the case may be, has been made in accordance with native law and custom"

and that it was by an amendment made by the Ordinance No. 20 of 1945 that the words "in the case of any dispute" and the words "after due enquiry and consultation with the persons concerned in the selection" were added. The Governor, it should be said, is entitled to delegate his functions under this ordinance, and he did in fact delegate them to the Resident of the province on this occasion. It was proved in evidence before the Supreme Court that the Resident was present at a meeting of the Olubadan-in-Council of the 5th December, 1946, when the Olubadan-in-Council decided to present the second respondent for approval as Timi and that he then said that everybody knew the facts from the start, that no further enquiry was necessary and that in due course he would communicate his decision. His decision was intimated in a letter of the 7th December, 1946, addressed to the Senior District Officer, Ibadan. It was in the following terms:—

"Timi of Ede: Appointment of.

With reference to the special meeting of the Ibadan Inner Council on Thursday, 5th December, I am entirely satisfied that by Native Law and Custom Mr. Adetoyese Laoye is eligible to succeed to the stool of the Timi of Ede and that he is a fit and proper person by past record to assume the office of the Head of the Ede and Ede District Subordinate Native Authority and to take his seat on the bench of the Native Court. I am also entirely satisfied that the large majority of the Chiefs of Ede eligible to take part in the selection of a Timi of Ede support the candidature of Mr. Adetoyese Laoye. That being so, I convey approval of the recommendation submitted by the Ibadan Inner Council that the Selection of Mr. Adetoyese Laoye as the new Timi of Ede should be recognised."

A copy of this letter was sent to the Olubadan-in-Council for information and necessary action.

The effect of the Ordinance and of the Resident's letter will be considered at a later stage. But first it is necessary to turn to the proceedings in the Courts including proceedings which have not yet been mentioned.

The case first came before Jibowu J. in the Supreme Court in August, 1947, when it was submitted by Crown Counsel appearing for the respondents that the jurisdiction of the court had been ousted by the Ordinance because the Governor was the sole judge whether the selection of the Timi had been in accordance with native law and custom. The learned judge gave effect to this contention, holding that it was for the Governor or his delegate to satisfy himself that the appointment of the Timi had been properly made, and that the Resident's letter of the 7th December, 1946, showed that he was satisfied that due enquiry had been made according to native law and custom by those who made the selection. An appeal was taken to the Court of Appeal, which by a judgment of the 10th November, 1947, reversed the order of the Supreme Court. The judgment was delivered by the learned President, who said that if it could be shown that no due enquiry or consultation had taken place then the condition precedent to the Governor's being vested with the powers of sole judge had not been fulfilled, and that the courts would certainly have the power to set aside the order approving the appointment of the

second respondent. The learned President also held that the Resident's letter did not show that due enquiry had been made by him. By the formal order of the Court of Appeal the case was returned to the trial judge to determine the issues before him, after hearing evidence tendered by both parties, in the light of the interpretation placed by the Court of Appeal on the ordinance. When the case came for the second time before the Supreme Court Crown Counsel submitted for the respondents that the only issue then to be tried was whether due enquiry had been made by the Resident before he gave his approval of the second respondent's appointment as Timi. But the appellant's counsel persuaded the learned judge to deal with the whole issues raised by the pleadings. After hearing evidence, some of which has been referred to above, the learned judge held that there had been no due enquiry by the Resident and therefore that the Governor could not claim to be the sole judge, since one of the conditions precedent to his assuming the rôle of a sole judge had not been fulfilled. He further held that the jurisdiction of the court had not been ousted and proceeded to consider whether the second respondent had been appointed in accordance with native law and custom. Having done so, he came to the conclusion that native law and custom had been disregarded in several ways which need not now be particularised. He granted, as has already been said, the essential part of the relief sought by the appellant. In the Court of Appeal the argument was limited by direction of the Court to the issue of jurisdiction. The first judgment was delivered by Lewey J.A. who had not been a party to the earlier judgment. He held that the provisions of section 2 (2) of the ordinance so far as relating to due enquiry were merely directions as to the manner in which the Governor ought to proceed and that the court was entirely precluded from entertaining in any way or in any action the question whether due enquiry had been made. Verity C.J., who had been a party to the previous decision, did not agree with this construction of section 2 (2) of the ordinance. He held that if it is alleged that no due enquiry had been held it was open to the proper party to come to the court and seek the appropriate relief, and he held also that the form of action adopted in this case was inappropriate and that the remedy sought was misconceived. Blackhall, P., who was not a party to the previous decision, while agreeing with the conclusions of Lewey J.A. and Verity C.J., said that even if the Governor failed to comply with the requirements of section 2 (2) of the ordinance that would not confer jurisdiction on the courts to decide whether the appointment of a chief had been made in accordance with native law and custom.

Their Lordships have heard argument upon the question of jurisdiction only and, with reference to that question, upon the construction of the ordinance. They are of opinion that subsections (1) and (2) of section 2 must be read together and as parts of one section. The first part of section 2 (1) provides for what may be considered the normal case, where no dispute has emerged at the time when the appointment of a candidate is submitted to the Governor. But it may happen that after the date of approval a dispute arises whether the appointment was in accordance with native law and custom, and it is in that event that the words " by those entitled by native law and custom so to appoint in accordance with native law and custom " have their importance and value in this subsection. Section 2 (2) provides for the case where a dispute has emerged either before approval is given or after it is given. It is then the function of the Governor as sole judge to decide whether the appointment has been made in accordance with native law and custom. If the Governor decides that native law and custom have not been observed, an approval already given would *eo ipso* fall. But though the non-approval disqualifies the appointee from exercising any of his local authority functions his appointment as Timi is not invalidated unless the Governor takes further action under section 4 to depose him. For the election of a chief is valid though no approval of it is given (*Taiwo* v. *Sarumi* [1913] 2 Nigerian L.R. 103). Section 2 (2) in terms commits to the Governor exclusively the duty of judging whether an appointment has been made

in accordance with native law and custom and the jurisdiction of the courts to decide that question is absolutely and unconditionally excluded by this subsection. The requirement that there shall be due enquiry and consultation with the persons concerned in the selection is not a condition precedent to the Governor's jurisdiction as sole judge or to the exclusion of the courts' jurisdiction, but it is a condition of the Governor's valid exercise of his function of sole judge. If he comes to a decision without having made due enquiry or without having consulted with the persons concerned in the selection there can be no doubt that in an appropriate action it would be competent for the courts to set his decision aside. But in no circumstances can the courts assume to themselves jurisdiction to decide that an appointment has or has not been made in accordance with native law or custom, and an action framed as this action is framed in order to submit that question to the courts' decision is incompetent.

It is manifest that the ordinance, and particularly the amendment made in 1945, are designed to ensure the observance of native law and custom in the appointment and deposition of chiefs, and it is of the highest importance for the welfare and contentment of the native population that the Governor should strictly adhere to the requirements attaching to the exercise of his exclusive jurisdiction. The subsection imposes two requirements, due enquiry and consultation. Due enquiry is not necessarily public enquiry, but it does imply that the parties to the dispute should be given an opportunity of being heard by the Governor as judge between them, and therefore that the date on which the enquiry is to take place should be intimated to them and that they should be invited to attend and state their case. Without that the substantial requirements of justice would not be fulfilled (*Board of Education* v. *Rice* (1911 A.C. 179) Lord Loreburn L.C., p. 182; *Local Government Board* v. *Arlidge* (1915 A.C. 120) Lord Haldane L.C., p. 132; *Errington* v. *Minister of Health* (1935 1 K.B. 249) Roche L.J., p. 280). In intimating a decision under section 2 (2) it is important also that the Governor should unambiguously declare that the appointment had (or had not) been made in accordance with native law and custom. The ordinance does not in terms impose this form in giving a decision, but the proper performance of the Governor's judicial duty requires that there should be in a matter of such importance to the native population a clear public intimation that the judicial duty expressly laid on the Governor has been exactly fulfilled. The Resident in this case in his intimation of approval declared that he was satisfied that by native law and custom the second respondent was eligible for the office of Timi of Ede. But the dispute between the parties had covered a far wider area than that, and there was a pointed absence of a declaration that on the other matters in dispute the Resident was satisfied that native law and custom had been observed.

Counsel for the first respondent submitted that the letter of the 7th December, 1946, intimated a decision given not under section 2 (2) but under section 2 (1), and before the Resident became aware of the existence of a dispute. This submission is in their Lordships' opinion unmaintainable. The Resident was fully aware that there was a dispute for he had been present at meetings when the Olubadan-in-Council had discussed the points in issue and in his evidence he did not attempt to make the case that his counsel tried to make for him. His position was that an enquiry had been held on the 19th July, 1947. On that date there took place one of the meetings of the Olubadan-in-Council at which the dispute was discussed in the Resident's presence. But the Resident held no enquiry on that date. It was not till five months later that the second respondent's name was submitted for approval. It was then that an enquiry by the Resident should have been held, and admittedly there was none.

Their Lordships might accordingly have had little difficulty in finding that the requirements of the ordinance had not been fulfilled. But whether they were fulfilled or not the courts have no jurisdiction to grant the only relief sought in this action. There may be cases in which this Board, finding itself unable to grant the specific relief claimed, would yet be

disposed to grant some other relief if equity and justice warranted it. But the appellant ought to have appreciated the weakness of his case at latest by the date of the first judgment of the Court of Appeal and he should then have reframed his action by amendment, or abandoned it and brought another action in competent form. He did neither and when the case came before the Supreme Court on return from the Court of Appeal his counsel insisted that the court should entertain and decide the question whether native law and custom had been violated. He has never deviated from that position till the last stages of the hearing of this appeal, and it would now be unfair to his opponents to allow him to change his ground or to grant him a relief which he has till this last moment never sought.

Their Lordships will therefore humbly advise Her Majesty that the appeal should be dismissed. Each party will bear his own costs of the appeal.

(15477) Wt. 8096—1 100 5/52 D.L./PI/3

In the Privy Council

MEMUDU LAGUNJU

v.

OLUBADAN-IN-COUNCIL AND ANOTHER

DELIVERED BY LORD NORMAND

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