DIST & FVD. 114 C.L.R. 226

[HIGH COURT OF AUSTRALIA.]

WATERS . . . . . APPLICANT;
PLAINTIFF,

AND

THE COMMONWEALTH AND OTHERS . RESPONDENTS.
DEFENDANTS,

H. C. OF A. 1951.

MELBOURNE, *March* 5, 13-15, 19.

Fullagar J.

Territories of the Commonwealth—Judiciary—High Court—Jurisdiction—The Constitution (63 & 64 *Vict. c.* 12), *Chap. III., s.* 122.

Chapter III. of the Constitution does not extend to the Territories which are governed under the power conferred on the Commonwealth Parliament by s. 122 of the Constitution. Accordingly, s. 75 of the Constitution does not confer on the High Court original jurisdiction in or in respect of those Territories.

R. v. *Bernasconi*, (1915) 19 C.L.R. 629, discussed and applied.

Mainka v. *Custodian of Expropriated Property*, (1924) 34 C.L.R. 297; *Porter* v. *The King*; *Ex parte Chin Man Yee*, (1926) 37 C.L.R. 432; *Federal Capital Commission* v. *Laristan Building & Investment Co. Pty. Ltd.*, (1929) 42 C.L.R. 582, at p. 585; and *Australian National Airways Ltd.* v. *The Commonwealth*, (1945) 71 C.L.R. 1, at p. 84, referred to.

MOTIONS.

The writ in an action in the High Court by Fred Waters against the Commonwealth, the Director of Native Affairs for the Northern Territory and other officers of the Commonwealth claimed (*a*) A declaration that the plaintiff was on 12th February 1951 wrongfully and illegally taken into custody by the Commonwealth of Australia and its officers servants and agents and by the other defendants and then and thereafter wrongfully and illegally detained, imprisoned and transported to Haast Bluff Settlement by the defendants; (*b*) Habeas corpus; (*c*) An injunction restraining the defendants from continuing to detain and imprison the plaintiff; and other relief.

Pursuant to leave granted by *Fullagar* J., the plaintiff served on the defendant Director of Native Affairs notice of motion for an interlocutory injunction restraining that defendant his servants officers and agents from detaining or further detaining the plaintiff or from further authorizing directing or procuring the detention of the plaintiff at Haast Bluff Settlement or elsewhere, and for other relief. A similar notice was served on other defendants.

The defendants gave notice of motion for an order that the action be struck out on the ground that the High Court had no jurisdiction to hear the action.

The motions were heard together before *Fullagar* J. Other material matters appear in the judgment hereunder.

T. G. Rapke, for the plaintiff.

J. G. Norris K.C. and *D. P. Derham*, for the defendants.

Cur. adv. vult.

March 19.

FULLAGAR J. delivered the following judgment :—

I have to deal with (1) a motion by the plaintiff for an interlocutory injunction, and (2) a motion by the defendant to strike out for want of jurisdiction, in an action in which the plaintiff, Fred Waters, otherwise known as Fred Nadpur, purports to sue the Commonwealth and the Director of Native Affairs. The latter defendant is appointed and holds office under Ordinances made by the Governor-General under the *Northern Territory (Administration) Act* 1910-1949. The plaintiff is an aboriginal within the meaning of Ordinances relating to aboriginal natives, and the cause of action is the alleged detention of the plaintiff against his will in an aboriginal reserve constituted under the Ordinances and situate at a place called Haast Bluff, about one hundred miles from Alice Springs. Before the action was commenced certain other proceedings were launched which I think it necessary briefly to mention. I will refer throughout to Fred Waters as " the plaintiff."

The alleged detention of the plaintiff commenced on 12th February 1951. Shortly after that date an application was made to me *ex parte* for an order nisi for habeas corpus under Order XLVIII., rule 3, of the Rules of this Court. The application was based on an affidavit by one Murray Norris, who deposed that he was the President of the North Australia Workers' Union, an organization registered under the *Commonwealth Conciliation and Arbitration Act* 1904-1950. I refused the application, without considering its

H. C. OF A. 1951.

WATERS v. THE COMMONWEALTH.

merits, on the sole ground that I had no jurisdiction. The matter was, in my opinion, neither a matter in which original jurisdiction is conferred upon this Court by s. 75 of the Constitution nor a matter in which the Parliament has conferred jurisdiction upon this Court under s. 76 of the Constitution. I did not consider the further jurisdictional question to which I shall have to refer in a moment. No question of *locus standi* seemed to me to arise. Subject to certain qualifications, any person may move any court of competent jurisdiction for habeas corpus in respect of any person alleged to be unlawfully detained.

Before I had formally announced my refusal of an order nisi for habeas corpus, the writ in the present action was issued, and, on my announcement of that refusal, an application was made to me for an interim injunction to restrain the Director from continuing to detain the plaintiff at Haast Bluff. I refused to grant an interim injunction, but I gave leave to serve with the writ a notice of motion for an interlocutory injunction. Such a notice of motion was duly served, and this motion is one of the two motions which are now before me.

The ground on which I had held that I had no jurisdiction in habeas corpus was prima facie met by the issue of the writ. It claimed an injunction against an officer of the Commonwealth, and so created a matter within the terms of s. 75 (v.) of the Constitution. It also created a matter in which the Commonwealth was a party, and so a matter within the terms of s. 75 (iii.) of the Constitution. It seems to me (for reasons into which I need not enter) that it is unlikely that the Commonwealth could ultimately be held liable in the action, even if it were otherwise maintainable, but it would be difficult, I think, to say that there was not a genuine or bona-fide claim against the Commonwealth: cf. *R.* v. *Carter*; *Ex parte Kisch* (1) and *Hopper* v. *Egg & Egg Pulp Marketing Board* (2).

On the return of the motion a further objection was taken to the jurisdiction. This objection was based on *R.* v. *Bernasconi* (3). It was submitted that s. 75 of the Constitution did not confer original jurisdiction on this Court in or with respect to "Territories" which are not part of the federal organization created by the Constitution though they are subject to the law-making powers conferred upon the Parliament of the Commonwealth by s. 122. It is to be observed that the argument does not directly raise the question whether the Parliament could under s. 122 lawfully confer upon this Court original jurisdiction in a Territory or the subsidiary

(1) (1934) 52 C.L.R. 221.
(2) (1939) 61 C.L.R. 665.
(3) (1915) 19 C.L.R. 629.

question whether, if it could, the power is subject to any limitation by reference to subject matter.

In *R.* v. *Bernasconi* (1) it was decided that s. 80 of the Constitution, which requires trial by jury of indictable offences against the laws of the Commonwealth, had no application to the local laws of a Territory enacted under s. 122. This view might perhaps have been placed on the simple and narrow basis that a law made under s. 122 was a law of the Territory concerned and not a law of the Commonwealth within the meaning of s. 80. It seems, however, to have been placed on a much wider basis. *Griffith* C.J. said (2): "In my judgment, Chapter III. of the Constitution is limited in its application to the exercise of the judicial power of the Commonwealth in respect of those functions of government as to which it stands in the place of the States, and has no application to Territories." I think that *Isaacs* J. (3) was really expressing the same view, and *Gavan Duffy* J. and *Rich* J. (4) seem to me to concur in the passage which I have quoted from the judgment of the learned Chief Justice.

As *Dixon* J. pointed out in the *Airways Case* (5), there is some difficulty in reconciling *R.* v. *Bernasconi* (1) (if placed on the broad basis) with *Mainka* v. *Custodian of Expropriated Property* (6), if not with *Porter* v. *The King*; *Ex parte Chin Man Yee* (7). But in *Federal Capital Commission* v. *Laristan Building & Investment Co. Pty. Ltd.* (8) the same learned Justice, after referring to the three cases, said:—"It thus appears that three of the six members of the Court who took part in the decision of *Porter* v. *The King*; *Ex parte Chin Man Yee* (7) treated s. 122 as insufficient to empower the legislature to invest the High Court with original jurisdiction in respect of a Territory. The whole Court regarded the decision in *Bernasconi's Case* (1) as showing that Chapter III. dealing with the Judicature, did not extend to the Territories which are governed under the power conferred upon the Parliament by s. 122." As I have pointed out, the question whether s. 122 empowers the Parliament to invest this Court with original jurisdiction in respect of a Territory, and, if so, whether the power is limited by s. 76, does not strictly arise in this case. But the question whether Chapter III. extends to the Territories in the sense that it is law in and for the Territories seems to me to be the very question that does arise. The matter does not seem to me to be carried any further by s. 56

(1) (1915) 19 C.L.R. 629.
(2) (1915) 19 C.L.R., at p. 635.
(3) (1915) 19 C.L.R., at p. 637.
(4) (1915) 19 C.L.R., at p. 640.
(5) (1945) 71 C.L.R. 1, at p. 84.
(6) (1924) 34 C.L.R. 297.
(7) (1926) 37 C.L.R. 432.
(8) (1929) 42 C.L.R. 582, at p. 585.

H. C. OF A. 1951.

WATERS v. THE COMMONWEALTH.

Fullagar J.

of the *Judiciary Act* 1903-1950. That section was enacted under s. 78 of the Constitution, which is itself part of Chapter III.

I think it is a difficult question. It may be that *R.* v. *Bernasconi* (1) should be placed on the narrow basis which I have suggested above. It may be that the whole question really turns on the interpretation of s. 5 of the *Constitution Act* itself. For the purpose of s. 122 of the Constitution no distinction can be drawn between Territories surrendered by a State and Territories otherwise acquired by the Commonwealth, but it may be that, for the purposes of s. 5 of the *Constitution Act*, a distinction is to be drawn between Territories which are "parts of the Commonwealth" and Territories which are not "parts of the Commonwealth." Such a view seems to be contemplated by s. 8 of the *Bankruptcy Act* of the Commonwealth. But it seems to me that these are questions which can only be answered by a Full Court, and that I must treat *R.* v. *Bernasconi* (1) as deciding that Chapter III. of the Constitution "has no application to Territories"—"does not extend to the Territories." This view seems to me (though I say this with some hesitation) to amount in substance to this, that the only laws in force in any Territory are (1) laws originally in force therein and continued in force therein by virtue of some rule of the common law, and (2) laws specially enacted for the Territory under s. 122. But, however this may be, on the view which I take of *R.* v. *Bernasconi* (1), I am bound to hold that I have no jurisdiction in this action. It follows that the defendant's motion succeeds, and the action must be struck out for want of jurisdiction.

This automatically disposes also of the motion for an injunction. But, since the question of jurisdiction is obviously one which may go on appeal, I think I ought to go on to consider that motion on its merits and express the views which I have formed.

The plaintiff was on 12th February 1951 in effect taken into custody at Darwin and removed to Haast Bluff Aboriginal Reserve in pursuance of an Order signed on that date by the defendant Director of Native Affairs. Such an order would, of course, be ineffective without statutory authority, and the statutory authority is said to be found in ss. 6 and 16 of the *Aboriginals Ordinance* 1918-1947. The argument for the plaintiff (apart from one or two points which I consider to be of no substance) was twofold. It was said in the first place that those sections did not authorize the removal, and it was said in the second place that the powers given by those sections had not been exercised bona fide for any purpose for which they were conferred.

(1) (1915) 19 C.L.R. 629.

The Ordinance gives very wide powers indeed to the Director, who was formerly styled Chief Protector of Aboriginals. Section 7 provides that he shall be the legal guardian of every aboriginal, and it may be noted in passing that in the well-known case of *Tuckiar* v. *The King* (1) it was the Chief Protector who instructed solicitors and counsel on behalf of Tuckiar. Section 6 provides that the Director shall be entitled at any time to undertake the care custody or control of any aboriginal if, in his opinion, it is necessary or desirable in the interests of the aboriginal for him to do so. For that purpose he may enter any premises where the aboriginal is or is supposed to be, and may take him into his custody. The powers of the Director under this section may be exercised whether the aboriginal is under a contract of employment or not. Section 16 provides that the Director may cause any aboriginal to be kept within the boundaries of any reserve or aboriginal institution, or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein. This provision does not apply to "any aboriginal who is lawfully employed by any person".

I should think that it is obvious (apart from the second argument for the plaintiff) that these powers authorized the removal of the plaintiff to Haast Bluff and his detention there if they applied to the plaintiff. I do not think it necessary to consider the relation between ss. 6 and 16. I think the Director must rely on s. 16, and the argument for the plaintiff was that that section did not apply because the plaintiff was at the material time lawfully employed by a person.

The words "lawfully employed" clearly, I think, refer to other provisions of the Ordinance. Section 22 provides that a person shall not employ or continue to employ any aboriginal unless he has a licence to employ aboriginals in the prescribed form for the time being in force. The words "continue to employ" seem clearly to have reference to the moment of time at which s. 22 comes into force. Section 26 provides that any person residing within a Town District and desiring to employ any aboriginal in any Town District shall, in addition to obtaining a licence to employ aboriginals, enter into an agreement with the aboriginal in the prescribed form. (Employment in any area other than a Town District was not suggested in this case.) A form of licence, and a form of agreement, are prescribed by regulations made by the Minister under s. 67 of the Ordinance. An aboriginal is not, in

(1) (1934) 52 C.L.R. 335.

H. C. OF A. 1951.

WATERS v. THE COMMONWEALTH.

Fullagar J.

my opinion, "lawfully employed" within the meaning of s. 16 unless both s. 22 and s. 26 of the Ordinance have been complied with.

On 8th February one George Gibbs, an organizer of the North Australia Workers' Union, made application on the prescribed form for a licence to employ two male aboriginals. He wished the licence to be issued in the name of the union. He was informed by a clerk in the employ of the Native Affairs Branch of the Northern Territory Administration, who is also a Protector of Aboriginals under the Ordinance, that only a personal licence could be issued. On 9th February a licence was issued authorizing George Gibbs to employ two male aboriginals. Murray Norris, President of the North Australia Workers' Union, deposed in an affidavit sworn on 14th February that on Wednesday 7th February the union commenced to employ Waters as a caretaker of the Darwin stadium, a property said to be owned by the union. Descending to further particulars in an affidavit sworn on 5th March, he deposed that on Wednesday 7th February George Gibbs on behalf of the union and in his presence engaged the plaintiff as a caretaker of the stadium. Assuming for the moment that these statements are true, I am clearly of opinion that the plaintiff was not at the relevant time "lawfully employed by a person" within the meaning of s. 16 of the Ordinance. George Gibbs had a licence to employ, but he never employed the plaintiff. If the union employed the plaintiff, it had no licence. Whether it was legally capable of holding a licence as a juristic person need not be considered. In any case there was no agreement in the prescribed form. The objection that the action of the Director was not authorized in terms by s. 16 of the Ordinance cannot, therefore, in my opinion, possibly be sustained.

The other argument, that there had been an abuse of power or an absence of bona fides in the exercise of power, by the Director, I have considered very anxiously. The powers which the Director wields are vast, and those over whom he wields them are likely often to be weak and helpless. His responsibility is heavy. When he acts, every presumption has to be made in his favour. He must often act on his own opinion in circumstances of difficulty, and no court can substitute its opinion for his. But, on the other hand, the courts must be alert to see that, if that which is not expected does happen and he does mistake or abuse his power, the mistake or abuse does not go either undetected or unredressed. The material before me in this case, however, fails completely, in my opinion, to make even a prima-facie case of abuse of power.

It was argued that, both under s. 6 and under s. 16, the only consideration which should affect the discretion of the Director was the welfare of the particular aboriginal concerned. This may be so under s. 6, but, so far as s. 16 is concerned, it is, in my opinion, by no means the only legitimate consideration. Unlike s. 6, s. 16 contains no reference to the formation of any particular opinion on the part of the Director. The discretion given is in terms absolute. I have no intention, on such an application as this, of laying down any rules for the guidance of the Director. But I think I should say that, in my opinion, he may legitimately take into consideration a number of other factors in addition to the welfare of the particular aboriginal concerned, and that these include the welfare of other aboriginals and the general interests of the community in which the particular aboriginal dwells.

The affidavit of Norris states that on 12th February a "protest strike" took place in the Bagot Reserve at Darwin, in which it was alleged that the plaintiff took a leading part. It also states that the Director informed the Acting Secretary of the North Australia Workers' Union over the telephone that Waters had been sent to Haast Bluff "for creating a nuisance and organizing yesterday's protest." It is denied by the Director in par. 4 of his second affidavit that he had any conversation on the subject with the Acting Secretary, and, for reasons which will appear, I am not prepared to believe that any such conversation ever took place. I think that the immediate occasion of the plaintiff's "removal" most probably did lie in the part taken by him in the events of 12th February, but I think also that for some time before that date there had been disturbances among the natives at and about Darwin, in the course of which they had been incited not to work and subjected to threats if they continued to work. In these matters I think that the plaintiff had from time to time taken a leading part, and that he had been incited thereto by officers of the union, into whose motives I see no need to inquire. In these circumstances the Director says that he formed the opinion that it was "necessary and desirable in the interests of the plaintiff that he should be taken into custody and kept in such custody for a reasonable time in a place as far removed as practicable from the natives and others associated with him in the happenings" that had taken place. I think it impossible for any court to say that there was any abuse of power here or even that the Director's decision was unwise or unjust. I should perhaps say that I have not approached the matter from quite the same point of view as

H. C. OF A. 1951.

WATERS v. THE COMMONWEALTH.

Fullagar J.

that from which I should have approached an ordinary case of an application for an interlocutory injunction. It is a matter of personal liberty, and, if I had thought that any real prima-facie case had been made out, I should probably have thought the balance of convenience and justice best served by setting the plaintiff free for the time being. But I do not think that any prima-facie case at all is made out. The powers given by the Ordinance are extremely wide, but I consider it impossible on the material before me that the inference could be drawn that they were either misunderstood or abused.

But, apart from the conclusion which I have reached and expressed above, I have formed the opinion that this action is not brought in good faith by those who are really responsible for its commencement. In par. 4 of his affidavit of 5th March Norris says :—" On Wednesday the 7th day of February 1951 an organizer of the union, Mr. George Gibbs, on behalf of the union *and in my presence* engaged the plaintiff as a caretaker of the Darwin stadium." Affidavits filed on behalf of the defendants show that the licence to employ aboriginals was not issued to Gibbs until the 9th. They also state with convincing detail that Norris in fact left Darwin by plane for Melbourne at 5.20 a.m. on 7th February. His purpose appears to have been to attend the hearing of a case in the Arbitration Court in the following week. He was in Melbourne on 14th February, when he swore an affidavit in the habeas corpus application. In an answering affidavit sworn at Melbourne on 9th March Norris corrects the date given in his former affidavit from 7th February to 9th February. No explanation whatever either by affidavit or by argument has been offered as to how it came about that, being presumably in Southern Australia on 9th February, he was present on that date at a conversation in Darwin between Gibbs and Waters. It should be added that the movements of Waters between 7th and 12th February do not suggest that he had any duties whatever to perform in connection with the Darwin stadium. Only one conclusion seems possible, and that is that an attempt has been made to set up a fictitious contract of employment with a view to bringing the case within the exception to s. 16 of the Ordinance. Waters, of course, cannot be considered responsible if Norris chooses to commit perjury, and that is one of the reasons why I have felt it necessary to consider this case with special care. But the matters which I have mentioned do tend to make the whole case ring false, and give the impression that there is a degree of hypocrisy about it. I have not considered

whether I have any such power as that given to a Judge of the Supreme Court of Victoria by s. 476 of the *Crimes Act* 1928. The Commonwealth Crown Solicitor is in possession of the facts, and whether any and what action should be taken against Norris is a question which is not in my hands.

I order that the action be struck out for want of jurisdiction. No order, of course, is made on the motion for interlocutory injunction.

It remains only to deal with the question of costs. I have power to make an order as to costs although I have held that I have no jurisdiction in the action: *Judiciary Act* 1903-1950, s. 26. I am quite prepared to find that the action was commenced by the solicitor on the record without the authority of the plaintiff, and I think that I have power to order him to pay personally the costs of the defendants as between solicitor and client. But the circumstances of this case are very exceptional. Thinking, as I do, that the action was commenced without the plaintiff's authority, I cannot make an order for costs against the plaintiff. (Such an order would, of course, be worthless anyhow.) And, so far as the solicitor is concerned, I cannot overlook the fact that, by refusing an interim injunction, I deprived him of a possible opportunity of obtaining ratification of his action in issuing the writ. The validity of an antecedent authority to take proceedings, or of a ratification of proceedings taken without antecedent authority, might well be challenged in such a case as this, apart altogether from s. 7 of the Ordinance, which makes the Director the "legal guardian" of all aboriginals. On the one hand, I would not like to discourage any person, who thinks that a real injustice has been done to an aboriginal, from invoking the assistance of the courts even against the Director. On the other hand, I take, as I have indicated, a very unfavourable view of the present proceedings. On the whole, I think that the decisive factor must be the fact that the solicitor on the record has had no opportunity of obtaining a ratification of his institution of proceedings and supporting the validity of the ratification if challenged. I will make no order as to costs.

One thing should be said in conclusion. One fairly obvious answer to a claim for an interlocutory injunction in this case was that there was another court—the Supreme Court of the Northern Territory—which had jurisdiction to grant habeas corpus. I should not, however, have refused the motion on this ground, if I had thought that I had jurisdiction. The reason is that, at the time of the institution of the action, there was no Judge of the Supreme

H. C. OF A. 1951.

WATERS v. THE COMMONWEALTH.

Court of the Northern Territory who was able to perform the functions of that court. This state of affairs has since been remedied, but I should have thought that the position ought to be considered as it existed at the date of the commencement of the action.

Action struck out for want of jurisdiction. No order on motion for interlocutory injunction. No order as to costs.

Solicitor for the plaintiff, *Jack M. Lazarus.*

Solicitor for the defendants, *K. C. Waugh*, Crown Solicitor for the Commonwealth.

E. F. H.