BIRASH JOASH and the MUNICIPALITY OF DUD, Plaintiffs-Appellants

v.

THE CABINET OF THE GOVERNMENT OF THE MARSHALL ISLANDS, SHIRO RIKLON, CHIEF ELECTORAL OFFICER, and WILFRED KENDALL, MINISTER OF INTERNAL AFFAIRS, Defendants-Appellees

Civil Appeal No. 388

Appellate Division of the High Court

Marshall Islands District

January 18, 1984

Appeal from trial court denial of complaint seeking a declaration that Local Govérnment Act of 1980 was unconstitutional, and order of the Cabinet pursuant to that Act, amalgamating two municipalities. The Appellate Division of the High Court, Miyamoto, Associate Justice, held that the delegation of legislative authority to the Cabinet and Minister, giving them the power to amalgamate municipalities, was a proper delegation of authority, but reversed and remanded the case to allow further consideration on three other relevant issues of the case.

Legislature—Delegation of Authority

Power of the Cabinet and the Minister of Local Affairs under the Local Government Act of 1980, to amalgamate local governments, is a proper delegation of legislative authority.

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Counsel for Appellees: *Office of the Attorney General,* Government of the Marshall Islands

Before MUNSON, *Chief Justice,* GIANOTTI, *Associate Justice,* and MIYAMOTO, *Associate Justice*

MIYAMOTO, *Associate Justice*

On February 18, 1981, the Marshall Islands Government enacted the "Local Government Act 1980," hereinafter referred to as the "Act." Part V, Section 21 of this Act provided for the amalgamation of local governments which, under the previous law and charter, were designated municipalities.

Section 21, subsection 7 of the Act provided:

> Where there is more than one local government on an atoll or island, the Cabinet *may,* by written order to each of them, require them to amalgamate, in accordance with this section, within a period, not being less than six months, fixed by the Cabinet or such longer period as the Minister allows. (Emphasis added.)

Pursuant to said Section 21, on August 13, 1981, the Marshall Islands Cabinet issued Cabinet Order No. 1981-3(G), ordering the amalgamation of the municipalities of DUD and Majuro, the latter commonly known as Laura. Both of these municipalities are located on Majuro Atoll, Republic of the Marshall Islands.

The two municipalities failed to amalgamate under the order of the Cabinet but instead DUD filed a complaint seeking a declaration that the Act was unconstitutional and that the order of the Cabinet to amalgamate was void.

In deciding the action filed, the trial court held that "Cabinet Order No. 1981-3(G) must be complied with and that the amalgamation of Laura and D.U.D. municipalities must be effected."

Appellants raise the issues of whether Section 21(7) of the Local Government Act 1980 is an unconstitutional delegation of legislative powers to the Cabinet, and whether a referendum authorized by DUD ordinance 81-3 with regard to the amalgamation must be executed.

On the first issue, it should be emphasized that the Marshall Islands Government is a unique invention incorporating several aspects of the parliamentary form of government within a basic framework of a republican form of government. The Executive Authority is in the Cabinet whose members are collectively responsible to the Nitijela. Since the members of the Cabinet, including the President, are members of the Nitijela, the Cabinet is, as the trial court had characterized it, the "executive arm of the legislature." Thus, the concept of "separation of powers" does not exist in the usual American sense of three separate and independent branches of the government.

To insure proper interpretation of the Constitution by the courts, the Constitution provides the following guidelines:

Section 3. *Interpretation and Application of this Constitution.*

(1) In interpreting and applying the Constitution, *a court shall look to the decisions of the courts of other countries having constitutions similar, in the relevant respect, to the Constitution of the Marshall Islands,* but shall not be bound thereby; and, in following any such decision, a court shall adapt it to the needs of the Marshall Islands, taking into account this Constitution as a whole and the circumstances in the Marshall Islands from time to time.

(2) In all cases, the provisions of this Constitution shall be construed to achieve the aims of fair and democratic government, in the light of reason and experience. (Emphasis added.)

However, no authorities from these "other countries" were advanced to uphold or strike down the delegation of authority by the Nitijela to the Cabinet.

Therefore, we look to American common law on the question of delegation of legislative authority.

In 16 Am. Jur. 2d Constitutional Law § 339, the common law is stated thusly:

> It has been said that a constitutional power implies a power of delegation of authority under it sufficient to effect its purpose.

It further goes on to say that:

> The case law recognizes that there is a proper delegation of power where the legislature has laid down a complete and definite declaration of policy and established objective standards or guidelines, describing the subject matter or the field wherein the legislation shall apply.

Subsections 7 and 8 of Section 21 of Part V of the Act clearly set out the guidelines to the Cabinet and the Minister[1] as to their authority on amalgamation and what they may do if the amalgamation order is not adhered to in six months.

Accordingly, we find that the delegation of authority to the Cabinet and the Minister on amalgamation provided for in the Act has met the test of delegable legislative authority.

However, did the Nitijela have the authority to amalga mate the two municipalities into one entity? The American common law indicates that it can. In 56 Am. Jur. 2d Municipal Corporations § 50, the general law is stated thusly:

> *In the absence of any constitutional restriction,* the legislature has full power, in its discretion, to alter, extend, or restrict the boundaries of municipalities, and, as the exigencies of the public may require, *new municipalities may be created by the division or consolidation of existing ones,* or territory may be detached from one municipality and annexed to another. Unless restrained by other

[1] Minister of Internal Affairs in charge of local government.

provisions of the constitution, the time and mode of exercising this power are in the discretion of the legislature, *and the consent of the inhabitants of the territory affected need not be obtained.* (Emphasis added.)

In the Marshall Islands, the legislative authority of the government is vested in the Nitijela. It is empowered to enact legislation which is "necessary and proper" to carry out any power vested to it by the Constitution.[2] The law on local governments is one of them.

However, Article IX, Section 1 of the Constitution of the Marshall Islands provides:

(3) The whole of the land and sea areas to which any system of local government extends shall lie within the jurisdiction of a local government; and, *where there is more than one local government,* the land and sea boundaries of their respective jurisdictions shall be defined by law. (Emphasis added.)

Interestingly enough, neither party has advanced the theory that this constitutional provision which recognizes the possibility of the existence of more than one local government in a "populated atoll or island" should be interpreted to mean that the Nitijela is foreclosed from doing so.

It should be noted that the Marshall Islands Constitution does not speak of the validity of laws in terms of their constitutionality but in terms of whether a law is inconsistent with the Constitution.

Section 2 of Article I of the Constitution provides that:

Section 2. *Inconsistency with this Constitution.*

(1) Any existing law and any law made on or after the effective date of this Constitution, which is *inconsistent* with this Constitution, shall, to the extent of the inconsistency, be void. (Emphasis added.)

The question of inconsistency of the Act was not an issue in the trial court.

[2] Section 1, Article IV, Marshall Islands Constitution.

On the issue of the referendum, this court notes that the judgment of the trial court did not consider the existence of the Election and Referenda Act 1980.

This Act provides, in its pertinent sections:

Section 13. *Functions of Chief Electoral Officer.*

The Chief Electoral Officer is responsible for the supervision, conduct and organization of elections (including elections by consensus) and of *referenda,* and for the registration of electors and the maintenance of the Electoral Register, and has such other powers, duties and responsibilities as are conferred or imposed by him by this Act and the Local Government Act 1980.

* * *

Section 41. *Referenda.*

Referenda shall be held as required by the Constitution, the Local Government Act 1980, any other Act, the constitution of a local government or *an Ordinance.*

* * *

Section 83. *Calling of local government referenda.*

Referenda for the purposes of the system of local government shall be conducted as provided for by—

(a) the Local Government Act of 1980; and
(b) any other Act; or
(c) the constitution of a local government; or
(d) *an Ordinance.* (Emphasis added in the text.)

In the recent decisions of the High Court, the DUD municipality was determined to be a valid and continuing legal entity.[3] It passed Ordinance No. 81-3 which called for a referendum on the amalgamation. According to the Election and Referenda Act 1980, the Chief Electoral Officer must conduct the referendum provided by Ordinance 81-3. Therefore, it is not within the authority of the Chief Electoral Officer to determine that the proposed referendum is "moot" and therefore serves "no purpose." The Marshall

[3] See Opinions of the Appellate Division of the High Court in Civil Appeals 394, 395, and 396.

Islands Government is a government of laws and not of men. It goes without saying that the officers of that government must uphold the Constitution and laws of the republic. Clearly, this issue is a critical one, regardless of whether the Local Government Act 1980 is deemed constitutional or not.

On the question of the authority given the Interior Minister to adopt a default constitution of a local government in the event of a failure of a local government to adopt one, this problem was also not addressed in the trial court judgment. This is, however, a question which must be addressed as it may very well conflict with the constitutional provision (Section 1 of Article IX) that provides that "The people of every populated atoll or island that is not part of an atoll shall have the right to a system of local government . . . ." The right to local government implies a right of the people to establish their own government by adoption of their own constitution. The constitution of a local government, by the tenor of the Constitution, cannot be imposed from above.

In view of the foregoing, to allow the parties to have full opportunity to argue the points raised in the opinion, the court reverses the decision of the trial division and remands the same for further consideration on the three issues discussed:

1. Is the Local Government Act 1980 inconsistent with the Constitution?

2. Should the referendum be allowed pursuant to the Election and Referenda Act 1980?

3. Is the concept of default constitution for the local governments in conflict with the Marshall Islands Constitution?

The preliminary injunction ordered by the trial court shall continue in effect until further order of the court.

REVERSED AND REMANDED.

DISSENT

GIANOTTI, *Associate Justice*

I disagree with the majority opinion. I do not see the necessity for a remand to the trial division to answer the questions referred to in the majority opinion. The only reason to remand this matter would be to comply with part V, section 21, subsection 8 of the Local Government Act 1980 wherein it says that if an amalgamation is not done within six months, the Cabinet may order the same by declaring:

". . . the provisions of the Schedule, with such modifications to meet local requirements as the Minister, after consultation with the Attorney-General, by order determines, apply in respect of the atoll or island."

I uphold the right of the government to order such amalgamation. However, I find that the amalgamation cannot be complied with until the Cabinet makes its order "declaring the provisions of the schedule apply," as found in section 21, subsection 8. Therefore, until the Minister holds a consultation with the Attorney General and then makes a determination by order which of the provisions of the schedule with modifications apply, an amalgamation cannot take place.

The Marshall Islands Government is a government recognizing separation of powers. The legislative authority is, by the Marshall Islands Constitution, granted to a legislative body known as the Nitijela (Marshall Islands Constitution, Article IV, section 1).

The Nitijela is empowered to enact legislation to carry out its legislative functions.

I find the Local Government Act to be a proper constitutional power of the Nitijela and there is nothing in that

Act or the Marshall Islands Constitution preventing the Nitijela from delegating its authority to the Cabinet.

16 Am. Jur. 2d Constitutional Law § 339:

> It has been said that a constitutional power implies a power of delegation of authority under it sufficient to effect its purposes.

However, in order to do this, the legislature, in this case the Nitijela, must lay down sufficient guidelines to the Cabinet and its subordinates to implement the matters in question.

Again, 16 Am. Jur. 2d Constitutional Law § 339 faces this problem:

> The case law recognizes that there is a proper delegation of power where the legislature has laid down a complete and definite declaration of policy and established objective standards or guidelines, describing the subject matter or the field wherein the legislation shall apply,

I believe the majority opinion ignores the obvious fact that the Constitution of the Marshall Islands grants power to the Nitijela to amalgamate. I think that the majority opinion merely delays the inevitable.