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IN THE FIJI COURT OF APPEAL

CIVIL APPEAL NO. 38 OF 1986

Between:

R.B. PATEL LTD.

Appellant

- and -

J.P. BAJPAI & CO. LTD. & OTHERS

Respondents

Mr. V. Kalyan for Appellant

Dr. M.S. Sahu Khan for Respondents

Date of Hearing: 22nd September, 1987

Delivery of Judgment: 25th September, 1987

JUDGMENT

Roper, J.A.

This is an appeal against the refusal of Cullinan, J. to allow costs to the Appellant, which was the successful party in judicial review proceedings of some complexity.

The first matter to decide is whether the court has jurisdiction to hear the appeal, Dr. Sahu Khan having argued that the notice of appeal is a nullity.

S. 12 (2)(e) of the Court of Appeal Act (Cap. 12) reads:-

"No appeal shall lie -

- (e) without the leave of the Court or Judge making the order, from an order of the Supreme Court or any Judge thereof made with the consent of the parties or as to costs only."

In this case no prior leave was obtained and it is on that basis that Dr. Sahu Khan argued that the notice of appeal filed was a nullity. Other provisions of the Court of Appeal Act having a bearing on the issue are Sections 16 and 17 which read:-

- "16. Subject to the provisions of section 17, the Court of appeal shall not entertain any appeal made under the provisions of this Part unless the appellant has fulfilled all the conditions of appeal as prescribed by rules of court.
17. Notwithstanding anything hereinbefore contained, the Court of Appeal may entertain an appeal made under the provisions of this Part on any terms which it thinks just. "

The relevant rules of Court referred to in S.17 read:-

- "Rule 26(2) Any application to the Court of Appeal for leave to appeal (whether made before or after the expiration of the time for appealing) shall be made on notice to the party or parties affected.
- (3) Wherever under these Rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below. "

The rules of court were not fulfilled and the question is whether S. 17 of the Act saves the position. It is to be noted that S. 16 is made subject to S.17, and the latter applies "notwithstanding anything hereinbefore contained" which must cover not only failure to comply with the provisions of S. 16 but also the requirements of leave contained in 12 (2)(e). The question is whether an appeal as to costs filed without leave is an appeal "made under the provisions of this Part" which is the expression used in S. 17. There can be no doubt that S. 17 would not give authority to launch an appeal in any case where S. 12(2) provided that no appeal would lie in any circumstances. For example, S. 12(2) provides that no appeal lies from an order extending time for appealing; or from an order giving unconditional leave to defend; or from a decision where an enactment provides that such a decision shall be final.

The Part of the Court of Appeal Act with which we are concerned does permit an appeal as to costs on certain terms, and in our opinion the provisions of S. 17 are wide enough to give this court jurisdiction to dispense with the required leave, or fulfillment of the rules of court, or indeed to grant leave itself pursuant to the power in S.13, which reads, so far as is relevant "For all the purposes of and incidental to the hearing and determination of any appeal under this Part the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court....."

It is clear that S. 17 is paramount and its purpose is to enable this court to do "justice", where strict compliance with the rules would deny it. We believe the section could also be applied where leave is necessary but is wrongfully refused. We therefore grant leave to appeal.

The judicial review proceedings concerned the Appellant's application to the Director of Town & Country Planning for the rezoning of land owned by it to enable the construction of a supermarket complex. The Director approved the rezoning of the land from residential to commercial and the Respondents then sought an order of certiorari to quash his decision.

The grounds on which they sought relief were:-

- (a) That the Director had no powers or rights to grant the permission for rezoning and development as had been done.
- (b) The Director acted arbitrary and/or unreasonably and/or unfairly and/or improperly and/or capriciously.
- (c) There was denial to the Applicants of the principles of natural justice in that:-
 - (i) The actions of the Director were tainted with bias.
 - (ii) The Director predetermined the whole issue prior to giving an opportunity for anyone to lodge objections.
 - (iii) The Director disqualified himself to determine the application.
 - (iv) The Director did not give a fair hearing to the application.

- (v) The Director took into account irrelevant matters and omitted to take relevant matters into account.
- (d) That the Director and/or the Suva Rural Local Authority disregarded the provisions of the Town and Country Planning Act.
- (e) That the Director abused and/or misused his powers under the Town Planning Act.
- (f) That the Director acted in an arbitrary, capricious and/or unreasonable manner and/or exercised his discretion improperly.
- (g) That the Director did not exercise his discretion judicially and/or judiciously having regard to all the relevant circumstances.
- (h) That the Director did not exercise his powers in good faith for the purposes for which the powers were granted.

The Respondents failed on all counts (and indeed Cullinan, J. held that they did not even have the locus standi to bring the proceedings) and even if they had been able to make out some sort of a case Cullinan, J. indicated that he would not have exercised his discretion in their favour. We are inclined to agree with Mr. Kalyan that this is a case where leave to issue the proceedings should never have been granted.

The Appellant made an application for costs following the issue of the judgment and according to the record it would appear that Respondents' Counsel's objection was aimed mainly at the scale rather than the making of an order.

In the result Cullinan, J. refused an order saying:-

" As Dr. Sahu Khan observes, this was to a large extent a public matter. Secondly, as the court observed in judgment, the subsidiary legislation is confusing, which to some extent justifies bringing of application. Thirdly, the Court found that there was procedural irregularity, which gave rise to the application, in the first case, but not such as to warrant certiorari.

In all the circumstances, even though court found that applicants lacked for locus standi, I consider they were, as members of public, to some extent justified in bringing application.

In all the circumstances I consider that the equitable result is that I should make no order as to costs. "

Although an award of costs is in the discretion of the Trial Judge, the discretion must be exercised judicially and not arbitrarily; that is, it must be exercised in accordance with established principles and in relation to the facts of the case. However, the fact that a Judge takes into account extraneous matters in making an award does not of itself entitle an appellate court to interfere unless the extraneous matters were the operative reason for the Judge exercising his discretion as he did, in the sense that the extraneous matters were the overriding reasons for the exercise. (See Smiths Ltd. and another v. Middleton No. 2 /1986/ 2 All E.R. 539).

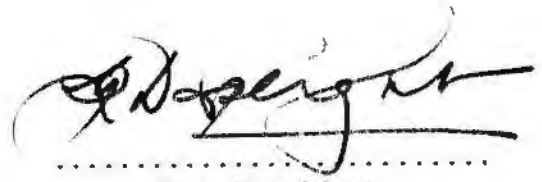
In the present case Cullinan, J. referred to four matters, namely, that it was "a public matter", the subsidiary legislation was confusing, there had been a procedural irregularity, and the Respondents had some interest as members of the public.

In our opinion the only one of those factors which had any possible bearing on the question of costs was the "procedural irregularity", and Dr. Sahu Khan did not attempt to persuade us otherwise. The simple fact was that the "procedural irregularity" was irrelevant to Cullinan, J's decision, he having found that the Respondents lacked locus standi and in any event it was within the Respondents' knowledge before the case was heard that the irregularity would not help them.

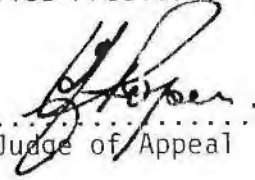
This was a novel and difficult case and we see no reason why costs should not have followed the event, but on the normal scale.

We therefore order the Respondents to pay the Appellant's costs in the Court below as fixed by the Registrar, and in such proportions as he directs if the parties cannot agree.

The Appellant is similarly allowed the costs of this appeal.



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Vice-President



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Judge of Appeal



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Judge of Appeal