

IN THE FIJI COURT OF APPEAL

At Suva

Civil Jurisdiction

CIVIL APPEAL NO. ABU0043 OF 1993

Between :

FIJI POSTS AND TELECOMMUNICATIONS LIMITED

Appellant

- and -

PRATAP SINGH

s/o Chanan Singh

Respondent

Mr. S.P. Sharma for the Appellant

Mr. G.P. Shankar for the Respondent

RULING

This is an application by the appellant *"for a stay of proceedings in High Court Judicial Review No. 16 of 1993"*. No specific rule has been mentioned nor was reference made in the application to any section in the Fiji Court of Appeal Act which might empower the court to grant the application.

Be that as it may learned counsel who appeared on instructions for the appellant directed the court's attention to Section 20 of the Fiji Court of Appeal Act (Cap. 12) which *inter alia* empowers a single judge of the Court of Appeal :

"(f) to stay execution or ~~make~~ any interim order to prevent prejudice to the claims of any party pending an appeal ; and

(g) generally, to hear any application, ~~make~~ any order, or give any direction incidental to an appeal or intended appeal, not involving the decision of the appeal."

More particularly counsel referred to the general part of the section which reads :

"... but if the judge refuses an application to exercise any such power or if any party is aggrieved by the exercise of such power, the applicant or party aggrieved shall be entitled to have the matter determined by the court as duly constituted for the hearing and determining of appeals under this Act."

However before dealing in any detail with the above provisions and in order to better understand the nature and substance of the present application it is necessary to briefly refer to the relevant history behind the application which may be summarised as follows :

- (1) On 30.6.93 the respondent issued in the High Court a writ in *Civil Action No. 369/93* against the petitioner claiming damages for his wrongful and unlawful dismissal from the petitioner's employ ;
- (2) On 2.7.93 the respondent issued an Originating Notice of Motion in *Judicial Review 16 of 1993* seeking leave to apply for judicial review of the decision by the respondent to dismiss him. Leave was opposed ;

- (3) On 6.10.93 Scott J. delivered a 6 page decision refusing leave.
- (4) On 18.10.93 the respondent filed in the Fiji Court of Appeal a Notice of Appeal in Civil Appeal No. 43 of 1993 against the decision of Scott J. and sought the following "catch-all" relief :

"the decision of the High Court be set aside and that leave to apply for judicial review be granted together with the interim reliefs prayed by the appellant (which inter alia included a declaration and an injunction) and there be an order for hearing of substantive motion de novo and/or that the decision of the High Court be set aside and that this Honourable Court grant him leave to apply for Judicial Review and the interim reliefs prayed by him, and also hear the substantive application for relief and remedy and that the Respondent do pay all costs."

- (5) On 20.10.93 the respondent filed a motion seeking the following orders :

"(1) Leave be granted to apply for Judicial Review and/or interim relief as prayed in the papers filed before the High Court ;

(2) An order for stay in respect of the decision or order made by the Board of the Respondent ;

(3) That there be speedy hearing of the appeal, and costs be cost in the cause."

- (6) On 29.10.93 the parties appeared before the resident judge of appeal and the following 'consent order' was recorded :

"By consent leave to issue Judicial Review granted. Matter remitted to High Court for hearing of substantive judicial review application before a different judge. Costs in cause."

- (7) On 29.10.93 the 'consent order' was entered and sealed by the solicitor for the respondent ; and on 9.12.93 Notice of discontinuance of Civil Appeal No. 43 of 1993 was filed.

- (8) A week later on 16.12.93 the appellant filed a Notice of

Appeal against the above consent order of the single Judge of Appeal granting leave to apply for judicial review without first hearing and deciding the (respondent's) appeal against the decision of Scott J. refusing leave ;

- (9) On 24.1.94 the present application was filed together with an affidavit of the company secretary of the appellant company in which he deposed :

"2. The decision being appealed against is a consent order given by a judge in chambers of this Honourable Court. I have been instructed by the Board of the appellant to brief and generally assist counsel in this case. At no time did the Appellant consent or authorise anyone to consent on its behalf in the matter then before this Court."

So much then for the "history" of the action. I turn next to consider the arguments of learned counsel for the respondent in opposing the application.

Firstly counsel argues that the order made by the judge of appeal "is not appealable under Section 12 of the Court of Appeal Act" and therefore was incompetent and ought not to be supported by an order staying proceedings pending its determination. In other words 'the appellant's appeal against the 'consent order' could not be brought and therefore ought not to be "protected".

I accept at once that Section 12 of the Court of Appeal (Cap. 12) does not furnish a 'right of appeal' against a 'consent order' made by a single Judge of Appeal [as opposed to one made by a High Court judge viz Section 12(2)(e)].

In the particular circumstances of this case however it is a misnomer to talk about a 'right of appeal' as learned counsel for the appellant made clear this is not an 'appeal' as such under Section 12 of the Fiji Court of

Appeal Act, rather, it is more accurately described as an application to the full Court of Appeal from an order of a single judge of appeal pursuant to the general part of Section 20(g) of the Fiji Court of Appeal Act (*op. cit* at p.2).

Faced with that response counsel for the respondent then argued that even if this were an application under Section 20(g) nevertheless it would be incompetent because the appellant cannot be said to be "*a party aggrieved*" by the order of the resident judge of appeal for the simple fact that the order was one to which it had consented through its counsel who had been instructed by its solicitors on record Ms. Raza & Associates.

Learned counsel for the appellant however submits that the appellant's "*grievance*" is not to the fact of the order *per se* but rather to the jurisdiction of the single judge of appeal to make the order which could not be considered either "*incidental*" to the respondent's appeal or "*not involving the decision of the appeal*" in Civil Appeal No. 43 of 1993.

There is not the slightest doubt in my mind that the '*consent order*' cannot be categorised as either and indeed I would go so far as to say that the '*consent order*' finally and effectively disposed of Civil Appeal No. 43 of 1993 and although learned counsel for the respondent vainly referred to the other "*reliefs*" sought in the substantive application for judicial review which were not specifically dealt with in the '*consent order*' nothing of any substance turns upon them. In effect they have been referred back to the High Court for determination at the substantive hearing of the judicial review.

I am satisfied that the present application to have the 'consent order' referred to the full Court of Appeal is competent and well taken and I reject learned counsel for the respondent's submissions to the contrary.

I am also satisfied that there is some merit in the application having regard to a recent ruling of the resident judge of appeal in Civil Appeal 16 of 1993 Vatuwaga Transport Co. Ltd. and Anor. v. T.C.B. and Anor. in which the appellant having been refused leave to apply for judicial review by the High Court sought *inter alia* leave to apply for judicial review before a single judge of the Court of Appeal.

In rejecting the application the learned judge of appeal after considering Section 20(g) of the Court of Appeal Act (Cap.12) said at p.5 :

"I have no hesitation in ruling that the application is not incidental to an appeal or intended appeal. I therefore, hold that I have no jurisdiction to hear the application, let alone grant leave to apply for judicial review."

Needless to say if that decision is correct and is affirmed by the full Court of Appeal in this application then it need hardly be said that jurisdiction cannot be conferred by consent where there is none in law.

I am also satisfied that the appellant's application to have this matter placed before the full Court of Appeal would be gravely prejudiced if the substantive proceedings in Judicial Review 16 of 1993 were permitted to continue unabated.

Indeed if the proceedings were permitted to continue on

what at best is a doubtful grant of leave to apply for judicial review (*albeit by consent*) than events may well overtake the present application and render it nugatory.

I am also satisfied that a stay of proceedings at this juncture pending the determination by the full Court of Appeal of the legality or otherwise of the '*consent order*' and the leave to apply for judicial review granted thereunder would significantly reduce the further proliferation of applications in this case.

A refusal to stay the High Court proceedings in *Judicial Review 16 of 1993* would also inevitably place the High Court in the unenviable position of having to hear and determine an application for judicial review on the basis of a '*consent order*' granting the very leave which had been earlier refused in a reasoned decision of the High Court which had not yet been overturned.

The application is accordingly granted for a stay of all High Court proceedings in *Judicial Review No. 16 of 1993* pending the determination by the full Court of Appeal of the appellant's present application against the '*consent order*' of a single judge of the Court of Appeal granted on the 29th of October 1993.


(D.V. Fatiaki)

JUDGE OF APPEAL

At Suva,
25th February, 1994.