

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0030 OF 1994S
 (High Court Civil Action No. 1173 of 1984)

BETWEEN

SURESH SUSHIL CHANDRA CHARAN
AND ANURADHA CHARAN

APPELLANTS

-and-

SUVA CITY COUNCILRESPONDENT

Mr Suresh Charan for the Appellants
 Ms T. Jayatilleke for Respondent

Date and Place of Hearing : 27th February, 1995, Suva
Date of Delivery of Judgment : 2nd March, 1995

JUDGMENT

The appellants in these proceedings apply for leave to appeal out of time against the Judgment of Byrne J. delivered on the 12th July 1990; against the interpretation of Byrne J made on the 13th May 1994; and against the Judgment of Thompson J.A. sitting as single Judge of Appeal on the 24th October 1994 whereby he refused leave to appeal sought under S.20 of the Court of Appeal Act.

The appeal is founded on the order for costs included in the Judgment of Byrne J. dated the 12th July 1990 which order stated as follows:-

"Defendant has to pay all reasonable out-of-pocket expenses incurred by the Plaintiffs and in default of an agreement these are to be fixed by the Registrar of the Court."

Because of a perceived difficulty in the interpretation of that order the Deputy Registrar was asked by the appellants to

refer the file to Byrne J. for interpretation. On the 13th May 1994 he made an order as follows:

- "1. *the out-of-pocket expenses means any expenses reasonably incurred by a party in presenting his case in a Court; and*
- "2. *the costs in this action are to be taxed on the scale applicable thereto before the scale was amended on 9.8.93."*

The Judgment of Thompson J.A. in refusing appellants' application for leave to appeal, concluded:-

".... that the applicants would have no reasonable prospect of succeeding with an appeal to this Court if leave were granted to them to appeal."

For the reasons that we shall shortly set out, we agree with that decision.

It is against these 3 decisions that the appellants seek leave to appeal.

We turn now to the "interpretation" so called by Byrne J. on the 13th May 1994. This was supposed to be an interpretation of an order as to costs included in his Lordship's judgment dated the 12th July 1990.

But that Judgment had already been sealed on the 24th August 1990. Consequently his Lordship had no power to alter vary explain or interpret an Order after it had been sealed, some 4 years previously. Under no circumstances could such "interpretation" be regarded as attracting the operation of the so called "slip rule."

However of further significance is that the appellants filed an appeal in this Court on the 24th August 1990. While that

appeal alleged errors in law and of fact in the Judgment the appellants did not challenge the order as to costs. Judgment was delivered allowing the appeal in part; and referring certain issues back to the High Court for consideration and determination.

The further High Court hearing was held on the 16th 17th 18th November 1993; the 28th 29th 30th March; 29th April and 18th May 1994. Judgment was delivered on the 28th November 1994. From that Judgment the appellants have lodged a further appeal to this Court.

There is a further issue which prevents our granting leave to appeal in this instance. After the Judgment of the 12th July 1990 was sealed the appellants confirm that they have accepted the amount of \$1644.50 awarded to them by that Judgment. Such acceptance coupled with an unequivocal order as to out of pocket expenses fully satisfied the Judgment thus preventing any further claim on the Respondent.

In summary therefore:-

- "1) *The Judgment of the 12th July 1990 has been sealed and provides for an order "to pay all reasonable out of pocket expenses".*
- 2) *The appeal lodged by the appellants and dated the 24th August 1990 was not an appeal against the Order for "out of pocket expenses" which order was therefore accepted.*
- 3) *His Lordship Byrne J. had no power to consider the application on the 13th May 1994 to interpret his order made some 4 years earlier."*

We are of the view that the appellants are estopped from raising as an issue the whole question of costs relative to the Judgment of the 12th July 1990. Having failed to include such an issue in the appeal they lodged on the 24th August 1990, they have as a consequence forfeited any right for leave to appeal.

Leave is accordingly refused. Costs of \$150 are awarded to the Respondent for proceedings before this Court. \$100 costs already awarded by Thompson J.A. to stand.

Moti Tikaram

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Sir Moti Tikaram
President Fiji Court of Appeal

Peter Quilliam

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Sir Peter Quilliam
Judge of Appeal

J.D. Dillon

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Mr Justice J.D. Dillon
Judge of Appeal