

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0064 OF 1996
(High Court Civil Action No. HBC 0314 of 1987)

BETWEEN:

LOGA NADAN PILLAY

APPELLANT

SUBHASH CHAND

RESPONDENT

Mr R.R. Gordon for the Appellant
Mr C. B. Young for the Respondent

Date and Place of Hearing : 4 August 1997
Delivery of reasons for Decision : 7 August 1997

DECISION

(Chambers Application for a Stay of execution order)

This is an application for an order to stay execution pending an appeal from the judgment of Lyons J. given in the High Court at Lautoka on the 1st November 1996. The notice of appeal is dated 6th December 1996. After hearing of Counsel I refused the application and indicated that I would put my reasons in writing later. I now do so.

The back ground to this matter stated very briefly, and in a condensed form, is that the respondent Chand was severely injured a motor vehicle accident which occurred on 2 September 1985. He was at the time a passenger in a vehicle driven by a man named Nadan, the vehicle being owned by the appellant Pillay.

Chand issued a writ against both Nadan and Pillay. A statement of defence was filed by solicitors, Messers Krishna & Co., on the 1st July 1987 on behalf of both defendants which included an admission of the plaintiffs allegation that Nadan was driving the motor vehicle as a servant and or agent of Pillay. Later a third party was apparently joined, the New India Assurance Company Limited, as third party insurers.

The action came on for hearing before Lyons J. on 3rd June 1996, well over ten years after the accident occurred. At the hearing Mr Cowie appeared for Chand, Mr Haroon Ali Shah apparently appeared for the two defendants, though the record refers to Ms Munam, and Mr Shankar for the third party. The judgment includes this passage:

"The trial started a little late at 10.43am to allow the parties time to "enter discussions". When it did start Counsel for the Defendants, sent a message that he was attending to a matter in a lower court. This Court (The High Court) was not of the mind to hold up its business for the convenience of counsel so the Defendants were for a short while self represented.

When counsel did appear a short time later, the court having sent an appropriate message in reply, such Counsel for the defendant assisted the court by admitting liability on behalf of the 1st and 2nd Defendants, presented brief evidence and then, with the leave of the Court, left. This was despite counsel for the plaintiff submitting that it would be advisable that he stay as there were

3.

matters between his clients and the 3rd party which required some submission. The suggestion was similarly advanced by the Court. Counsel however considered that he would be happy to withdraw and the court, in the circumstances that they were to that point, was happy to see him go."

At all events the learned trial judge gave judgment for the plaintiff Chand against the second defendant Pillay for \$244,651.00 (but surprisingly did not include the first defendant Nadan) and rejected the dependants' claim against the third party for indemnity under the insurance policy.

Pillay has appealed against the whole of the judgment. His appeal is based on numerous grounds but the overall effect is that he attacks the finding of the trial judge that held him liable for the negligence of Nadan, the amount of the judgment and the finding that the insurance policy did not indemnify him.

In two affidavits filed in support of the application for stay of execution Pillay deposed that Mr Haroon Ali Shah had "without my proper instructions", admitted liability. Further, that Krishna & Co., the solicitors who filed the statement of defence acted for the third party and had filed the statement of defence without his instructions or knowledge and that he had at no time authorised the admission that a master and servant relationship existed between himself and Nadan. On the contrary he deposed that the relationship was quite different, being on an independent contractual basis. He also said he was a business man running a successful company but gave no details whatever of the nature, size or financial position of the company

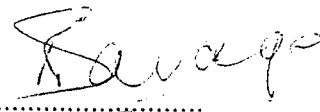
or himself. It should be noted that he applied to Lyons J. for a stay on the 12 May 1997 which was refused.

Mr Gordon for Pillay had filed a clear and full written submission in support of the application which he amplified in his oral submissions. Mr Young too, had filed a written submission in opposition and he also made oral submissions. Stated very broadly it is my view that while the Court has a very wide discretion in deciding to grant or refuse a stay it does not ordinarily grant a stay but exercises its discretion in such a way as will best meet the overall justice of the matter. In deciding on that there are various factors to be taken into account. These may vary from case to case. In this case it may be said that so far as the respondent Chand is concerned the disadvantage to him in granting a stay are obvious; he suffered considerable injuries and for years now has suffered considerable personal loss. Mr Gordon submitted that having waited 12 years a few more months while the appeal is determined will not be a great hardship. On the other hand Pillay contends that to have a pay \$244,651.00 would ruin him yet he might be successful on the appeal but by then it would be too late; he would be ruined and the successful appeal would be nugatory. In general terms it has to be borne in mind, however, that if the money is paid to Chand, and Pillay later succeeds on the appeal in relation to Chand, he may be unable to get it back, though that consideration probably would not apply as against the third party if the appeal in relation to it succeeded; and, on the other hand, if a stay is granted and the appeal fails there is the possibility that Chand may then be unable to enforce the judgment because whatever assets Pillay has now have disappeared.

5.

I made my tentative views clear to counsel and directed an adjournment for half an hour to enable Mr Gordon to discuss the mater with his client. I suggested counsel give consideration to, either, a payment into Court of a substantial sum to be held pending the determination of the appeal, or the giving of a bank guarantee or other security for such a sum. Ten minutes later Counsel returned and Mr Gordon informed me that Pillay considered that as he had appealed against the whole of the judgment he should not be obliged to make any payment into court and was not prepared to do so.

In these circumstances, and bearing in mind the complete absence of information as to Pillay's financial situation apart from his own unsupported assertion that he would be ruined if required to pay, I exercised my discretion by refusing to grant a stay and refused the application with costs to be respondent Chand.



Mr Justice Savage

JUDGE OF APPEAL