

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0070 OF 1995S
(High Court Civil Action No. 547 of 1982)

BETWEEN:

RAM SWAMY
(Father's name Shiu Narayan)
Of Qeleloa, Nadi, Labourer

First Appellant
(Original 5th Defendant)

AND ADINARAYAN alias TOTA
(Father's name Shiu Narayan)
of Qeleloa, Nadi, Labourer

Second Appellant
(Original 6th Defendant)

AND

PADMA WATI daughter of Viraiya
of Qeleloa, Nadi, Cane Farmer

Respondent
(Original Plaintiff)

Mr C.B. Young for the Appellants/Applicants
Mr H.A. Shah for the Respondent

Date and Place of Hearing: 13 March 1997
Delivery of Decision: 9 April 1997

DECISION

**(Chamber application seeking (i) leave to appeal
and (ii) a stay order)**

On 28 February 1997 the Fiji Court of Appeal consisting of Sir Maurice Casey, Ward and Hillyer JJ.A. dismissed an appeal by the 1st and 2nd Appellants against the decision of the Lautoka High Court whereby Sadal J. ordered that they deliver vacant possession of the land they were occupying, to the Respondent Padma Wati (the Original Plaintiff). The Appellants now wish to appeal to the Supreme Court against the decision of the Fiji Court of appeal. They have come to a single judge seeking the following 2 Orders -

- (1) Leave to appeal to the Supreme Court.
- (2) The Judgment of Mr. Justice Sadal in Civil Action No. 547 of 1982 delivered on the 3rd day of November, 1995 ordering the Appellants to deliver vacant possession of the land they are occupying at Qeleloa, Nadi and the Judgment of the Court of Appeal delivered on the 28th day of February, 1997 dismissing the Appellants' Appeal with cost to the Respondent be stayed pending the final determination of the Appellants' Appeal to the Supreme Court.

The first question that requires determination is whether a single judge has power to grant leave to appeal to the Supreme Court. In Fiji Public Service Association v The Registrar of the Trade Unions & Anor - Civil Appeal No. 32 of 1990, I considered this very issue and came to the

conclusion that a single judge had no such power having regard to the provisions of Section 117(2) of the 1990 Constitution. I held that the expression "in the opinion of the Court" must be construed to mean the full Court of Appeal. I came to this view notwithstanding the specific provisions of Section 12 of the Supreme Court Decree 1991 (Decree No. 47 of 1991) which read as follows:

- "12. A single judge of the court shall have power and jurisdiction:*
 - (a) to determine any application to the Court for leave to appeal in any case under any provision of law;*
 - (b) generally in respect of any appeal pending before the Supreme Court, to make such order and to give such other directions as he shall consider the interests of justice or circumstances of the case require:*

Provided that any order, direction or decision made or given in pursuance of this section may be varied, discharged or reversed by the Court when consisting of three judges which may include the judge who made or gave the order, directions or decisions."

I also held that the constitutional provision must prevail over any conflicting or inconsistent subsidiary legislation.

Mr Young, Counsel for the Appellants, has strongly submitted that I have taken too restrictive a view of the constitutional provision. He has cited N.Z., Australian and English cases in support of his argument and has urged that I deal with the leave to appeal application on the merits.

I am not persuaded that the framers of the Constitution intended a single judge to have power to deal with an application for leave to appeal. I adhere to the ruling I gave in the Public Service Association's Case wherein I dealt with the matter in some detail. Even if I am in error on the question of jurisdiction it is not mandatory for a single judge to determine an application

for leave if he is of the opinion that it is desirable that the application should be dealt with by the full Court, i.e. by a Court consisting of at least 3 judges. The facts, circumstances and issues involved in this case make it eminently desirable that the leave application should be dealt with by the full Court.

As a matter of historical interest the following provisions of the Supreme Court Appeal Rules (No. 2) 1988 made under Judicature Decree 1988 (although now repealed) are not without significance -

11.-(1) Every application for leave to appeal under section 19(2)(a) of the Judicature Decree shall be made to the Court of Appeal by notice of motion supported by an affidavit setting out the reasons why leave should be granted on the ground that the question involved in the appeal is one that, by reason of its great general or public importance or otherwise ought to be submitted to the Supreme Court.

(2) If leave is granted pursuant to sub-rule (1) above, the Court of Appeal under the hand of the presiding judge shall issue to the applicant a certificate to that effect."

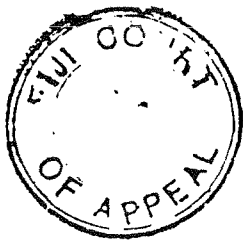
I draw particular attention to the words "under the hand of the presiding judge" appearing in 11(2) above.

Having regard to the conclusion that I have reached I am of the view that the stay application should also be dealt with by the full Court. It is to be noted that the stay application is seeking a stay "pending the final determination of the Appellants' Appeal to the Supreme Court." The stay application is inextricably linked with the leave application and is indeed dependent on its outcome.

What then is the fate of the stay application in the interim period? As I am not able to deal with the primary application the interest of justice demands that I make an interim order to preserve the status quo in respect of the possession order.

Consequently I make the following orders -

1. The application for leave to appeal is adjourned for hearing before the full Court at 9.30 am on 21 May 1997.
2. The stay application is also adjourned to the same date and time for determination by the full Court.
3. Execution of the possession order is stayed until 9.30 am on 21 May 1997.
4. Applicants' Counsel to deliver to the Court of Appeal Registry 3 extra copies of his written submissions together with 3 extra copies of his list of authorities, within 14 days.
5. Costs of this application to be determined by the full Court.



Moti Tikaram
Sir Moti Tikaram
President, Fiji Court of Appeal