

IN THE FIJI COURT OF APPEAL AT SUVA  
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO: ABU0062 OF 2000  
(High Court Civil Action No. HBC0016/00)

BETWEEN:            AMRIT PRASAD  
Appellant

AND:                TRADE SUPPLIES LIMITED  
Respondent

In Chambers:        The Hon. Madam Justice Nazhat Shameem

Hearing:             5<sup>th</sup> October 2000

Counsel:            Ms. A. Sharan for the Appellant  
                             Mr. W. Morgan for the Respondent

Date of Judgment:   Wednesday 11<sup>th</sup> October 2000

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DECISION ON APPLICATION FOR STAY  
PENDING APPEAL

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This is an application to stay the execution of the judgment of Fatiaki J dated 8<sup>th</sup> September 2000, dismissing an application to set aside judgment in default of Defence.

The grounds of appeal are as follows:

- "(a) That the learned Judge erred in law in holding that the claim is in liquidated damages;
- (b) That the learned Judge failed to give proper consideration to Appellant's contention that the claim was unliquidated and that Appellant had good defence to set aside the said damages."

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The grounds on which this application is made are that there are good chances that the appeal will be successful, and that a refusal of the application would render the appeal nugatory.

The affidavit of Amrit Prasad, sworn on 28<sup>th</sup> September 2000 states that the default judgment taken out by the Respondent was irregular because the claim was not liquidated, and that the Respondent in the execution of the judgment caused the issuing of a writ of *fifa* in the High Court. In a supplementary affidavit sworn on 3<sup>rd</sup> October 2000, Amrit Prasad states that the Sheriff Officer had seized goods and chattels from his business premises which had caused his electrical business to come to a halt. He states that his appeal will be made nugatory if a stay on execution of the judgment is not granted, and that he will suffer unquantifiable damages.

Counsel for the Respondent opposes the application for stay. He submits firstly that there is no merit in the appeal, and secondly that the judgment sum can simply be paid back to the Appellant if his appeal is successful. He further submits that all the matters raised on appeal were fully canvassed before Fatiaki J and that he dealt with the issues thoroughly in his judgment.

Default Judgment was entered in the sum of \$30,865.00 plus interest at 4% per annum from 7<sup>th</sup> February 2000. The writ of summons claimed the sum of \$30,800.00 plus interest and costs. The claim was for work done by the Plaintiff for the Defendant, for the fabrication and supply of distribution boards and a switchboard, in partial performance of a contract the full value of which was \$61,000.00 VIP.

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In seeking to set aside judgment in default, the Defendant (now the Applicant) argued that he had a meritorious defence (that the Plaintiff had delayed performance of the contract and had been in breach of it forcing the Defendant to order the items from another company at a higher price) and that the amount claimed was excessive.

In his judgment Fatiaki J found that the claim was one based on "quantum merit" for work actually done in partial fulfillment of the order. He found that performance was progressive, that invoicing was progressive and that therefore a claim for part-performance could be specifically valued. He found that the defendant had failed to raise an arguable defence and dismissed the application.

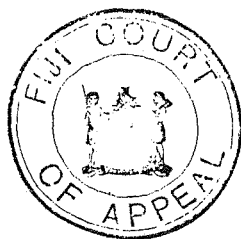
It appears therefore that the Applicant's submission was dealt with by Fatiaki J, who found that the Plaintiff could make a claim for part performance in liquidated form. The Default Judgment itself is for a liquidated sum. Counsel referred me to a decision of the Court of Appeal in Suresh Charan -v- National Insurance Co. Ltd. Civil Appeal No. ABU0067/98S. In that case default judgment was for both liquidated damages and unliquidated damages to be assessed. The Court of Appeal held that despite this irregularity, the Defendant was not entitled to have the judgment set aside on the issue of liability. The appeal was allowed as there was no evidence that a claim for the whole of the amount in the final judgment had been liquidated by the acts of the Defendant Company.

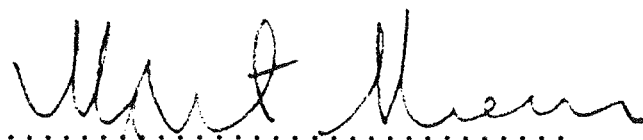
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Fatiaki J did find such evidence in this case and concluded that the whole of the amount claimed had been liquidated by the Applicant Company. In the absence of the court record with the evidence he had before him, I am not satisfied that the appeal has reasonable prospects of success.

Furthermore the Applicant has failed to show me why the judgment sum of \$30,865.00 plus interest could not be refunded to him if his appeal is successful. He has not said he is unable to pay this sum. Indeed the payment of this sum to the Respondent would have prevented the execution process which he has been subjected to. I am therefore not satisfied that a refusal of a stay order would render the appeal nugatory.

For these reasons stay of execution of judgment is refused. The Applicant must pay the Respondent's costs which I set at \$85.00.



  
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Nazhat Shameem  
JUDGE

Solicitors:

Messrs. Messrs. Kohli & Singh for the Appellant  
Messrs. Mitchell Keil & Associates for the Respondent