

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

CIVIL APPEAL NO: ABU0008/2000S

(High Court Civil Action No. HBC196/98S)

BETWEEN : SHEELA WATI BAJPAI

Appellant

AND : NBF ASSET MANAGEMENT BANK

Respondent

In Chambers: The Hon. Madam Justice Shameem

Hearing: 16th August 2001

Counsel: Mr R. Naidu for Appellant
Mr T. Seeto for Respondent

Decision: Friday 14th September 2001

DECISION IN CHAMBERS

This is an application made under section 20(1)(e) of the Court of Appeal (Amendment) Act 1998, for an unconditional stay of execution of an order made by Byrne J, for vacant possession of property described as CT 7966 on Lot 19 in Suva, pending appeal to the Court of Appeal.

On 2nd February 2000, Byrne J delivered judgment on the action of the NBF Asset Management Bank for vacant possession of the property in question. It was, and is occupied by Sheela Wati Bajpai, executrix of the estate of Ishwari Bajpai. His Lordship found that Order 88 of the High Court Rules had been complied with,

that there was a mortgage executed between the late Ishwari Bajpai and the Bank dated 30th October 1991, in respect of which advances were made to Mr Bajpai and to his company, Bajpai & Company Ltd., and that by 2nd February 1998, the total debt owed to the Bank was over \$14,000,000. One of the properties offered as security in respect of the debt was the residential property which was the subject of the action. The Bank issued a notice to quit but Sheela Wati Bajpai continued to live on the property. On 16th March 1998 the Bank offered to sell the property to Mrs Bajpai for \$150,000. The Bank had received other offers, the highest of which was \$120,000. Mrs Bajpai then made an offer of \$123,000.00 but the Bank refused this offer. The property was independently valued at \$195,000. Byrne J rejected the argument that the refusal to accept the offer of \$123,000 was a "clog" on the equity of redemption. He further found that the Bank was under no duty to accept the price offered, and ordered vacant possession of the property.

An application was made to him on 12th July 2001, for stay of this order. He stayed his order on condition that the Appellant pay into court within 14 days of his ruling the sum of \$500,000. He did so in the light of the fact that the Bank is owed in excess of \$14,000,000 by the estate of Ishwari Bajpai.

The Appellant now seeks unconditional stay of the order for vacant possession, pending appeal. The grounds of appeal filed on 21st February 2000 are, inter alia, that the learned judge erred in finding that the mortgage debt included the money advanced to J.P. Bajpai & Co. Ltd. as well as the advances to Ishwari Bajpai personally, that the learned judge erred in holding that the Bank could combine personal and company accounts, that the learned judge erred in ordering vacant possession when the Appellant had made the Bank the best offer received at the time and that the learned judge

erred in finding against the existence of a clog on the equity of redemption.

The application for stay was made by summons, and the affidavit of Deborah Appana, Law Clerk. She states that she is informed by Mr Hamendra Nagin that the appeal has good prospects of success, that the Appellant has been residing at the property since November 1974, that the Appellant has no other place to go, and that her appeal will be rendered nugatory if an unconditional stay is not granted. She further states that:

"The condition imposed by his Lordship Justice Byrne that the Appellant pay into court the sum of \$500,000 within 14 days of the Judgment is unreasonable and prejudicial to her claim pending an appeal."

The Respondent opposes the application. The affidavit of Laisenia Takala sworn on 5th August 2001, refutes the proposition that the appeal has any merit, and states that the condition of the payment of \$500,000 was generous in view of the huge debt owed by the Appellant.

In reply, the affidavit of Deborah Appana sworn on 30th August 2001, states that the condition was so unreasonable that the Appellant could not comply with it, thus rendering the appeal nugatory. The affidavit refers to the present political and economic crisis in Fiji, and says that it is impossible to bring and deposit into court a sum of \$500,000. Finally, it states that the Appellant is willing to pay \$200 to \$300 per month rental on the property until her appeal is determined.

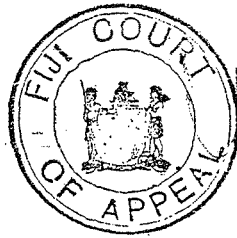
The principles governing an application for stay pending appeal are well-settled. They are that a successful litigant

should not be lightly deprived of the fruits of his success, that an appeal should not be rendered nugatory, and that a stay may be granted if there are special circumstances in the case. The grant or refusal of stay is a discretionary matter.

In this case, Byrne J granted stay at first instance. He appears therefore to have accepted the Appellant's argument that prima facie, the appeal is not devoid of merit. Although I have reservations about the likelihood of the success of this appeal, in the light of the fact that the issues raised appear to have been well-traversed by legal authorities, I am similarly prepared to accept that the Appellant has an appeal which is worthy of some argument.

However, the Bank should not be lightly deprived of the consequences of its success, and in particular should not be prejudiced because of the inevitable delay before this appeal is heard. The Appellant, as executrix of her husband's estate now owes the Bank a sum in excess of \$14,000,000. The original undisputed advance in respect of which the house in which the Appellant stays, was \$1,000,000. Whether or not the Appellant succeeds in showing that subsequent advances were not made on the same account, the fact of this initial debt to the bank is undisputed. The sum ordered by Byrne J as a condition of the stay, was only for half of this amount. Clearly, the Bank's interests must be protected while the Appellant pursues her appeal. If the current economic crisis has made it impossible for the Appellant to find the money, how will that same crisis affect the Respondent's interests in the property which is the subject of this appeal? Whilst this appeal is pending, the Respondent cannot take steps to sell the property and to try to recover its huge losses on the account.

In all the circumstances, I do not consider that the condition imposed by Byrne J was unreasonable. I decline to order an unconditional stay. The Appellant must pay the sum of \$500,000 into court within 14 days of this judgment or deliver vacant possession.



Nazhat Shameem
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Nazhat Shameem
JUDGE

At Suva
Friday 14th September 2001

Solicitors

Messrs. Sherani & Co. for Appellant
Legal Officer, NBF for Respondent