

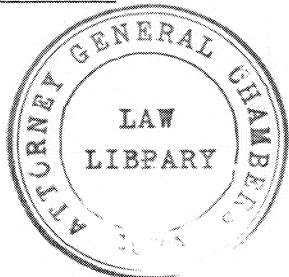
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IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0002 OF 2006

[HIGH COURT CIVIL APPEAL NO. HBC 427 OF 2005]

BETWEEN:



RAJESH PRASAD f/n Ram Lochan

Applicant

NARHARI ELECTRICAL COMPANY AND
BANK OF BARODA

Respondent

Anand Singh for applicant
Nilesh Lajendra for first respondent
Ms R. Sharma for second respondent

Hearing: 24 January 2006

Ruling: 7 February 2006

RULING

This is an application by the applicant/appellant for a stay of execution pending appeal. It is necessary, for an understanding of the application, to give a little of the background of the progress of the action in the court below.

The case relates to a purported sale and purchase agreement of a piece of land in the Bhindi Industrial Subdivision, Vatuwaqa described in CT 26971 in which the applicant was the vendor and the first respondent the purchaser. The contract of sale, dated 30 March 2004, was the result of pressure by the second respondent on the applicant to regularise his borrowing when he defaulted on repayments to the bank.

I have heard considerable details about the manner in which that sale was effected but I do not need to repeat them. The action was commenced in the High Court by the applicant filing a statement of claim on 23 August 2005 seeking various declarations as

to the nature of the transaction, an order that the sale and purchase agreement be set aside and additionally or alternatively an order for damages against the second respondent for inducing a sale below the market value. That action has not yet been heard. A defence and counter claim were filed by the first respondent on 5 September 2005 and a defence by the second respondent on 8 September 2005.

At the same time the claim was filed, the applicant filed a notice of motion seeking an interlocutory injunction against the defendants restraining them from registering the transfer. It was set for hearing on 31 August 2005 but, in the meantime, the first respondent filed a notice of motion on 30 August 2005 for an order for immediate vacant possession.

It appears both motions were heard by the learned judge on the same date, 19 October 2005. He dismissed the application for an interlocutory injunction with costs and ordered that the plaintiff (the present applicant) should give vacant possession of the property in CT 26971 but stayed the order until 30 November 2005 to allow the plaintiff to relocate his business. That order was sealed on 24 October 2005.

Notice of appeal was filed against both orders initially on 29 November 2005 but was deemed abandoned under rule 17(2) on 6 December 2005. A fresh notice of appeal was filed on 9 January 2006 together with a notice of motion for a stay of both orders of 24 October 2005 until further order of this Court. It is this motion the Court is now to consider.

~~Counsel for the respondents raise a preliminary objection that the notice of appeal was~~ filed out of time. By rule 17(2) fresh notice of appeal needed to be filed within 21 days of the date upon which the original appeal had been deemed to be abandoned. The filing of the fresh notice on 9 January 2006 was, respondents' counsel contend, out of time. Mr Singh points out that, by Gazette Notice, the Chief Justice declared a legal vacation from 12 December 2005 to 13 January 2006 and provided that time should not run during that period; LN 1793/2005.

Mr Singh is clearly on firm ground and the preliminary objection is dismissed.

An application for a stay was heard by the learned High Court judge on 14 December 2005. Although counsel's submissions suggested to him that the appeal must have been deemed to have been abandoned at that time, he sensibly heard the application and, in a ruling on 23 December 2005, refused the stay.

This is not, of course an appeal from his refusal but a fresh application for a stay and this court must consider the issue afresh.

The details of the original transactions to which I have referred are relevant only to an assessment of the likelihood of success in the substantive appeal. Mr Singh fluently urges that, by impugning the validity of the sale of the land to the first respondent, he can demonstrate that his client should be able to retain the land for his business pending the appeal. The applicant has improved his financial status and is now in a position to establish a viable business on the site. To deny a stay and allow the transfer of title to go ahead would rob him of the fruits of what he suggests is the likely success of his appeal.

He further suggests that the balance of convenience is best served by preserving the status quo.

I do not accept those arguments. I am satisfied that, if he is successful, damages will be an adequate remedy. His original claim, which is yet to be tried, is for just such a remedy from the second respondent as an additional or alternative prayer. Further, on the documents filed with this Court for the application, it appears that the applicant was paid and accepted the full purchase price and used much of it to pay off his debts including those to the second respondent.

I do not know nor is it necessary to know how much his present improved financial status stems from that assistance with his financial obligations. However, it is plain from the documents before me that the status quo has only been achieved by the applicant's failure to give vacant possession at the time the money was paid and accepted. I do not consider