

IN THE COURT OF APPEAL, FIJI
[CIVIL APPELLATE JURISDICTION]

Civil Appeal No. ABU 0088 of 2016
(High Court Civil Action No. HBC 277.2010)

BETWEEN : **SATYA NAND** T/A Alesh Enterprises Ltd.

Appellant

AND : 1. **RAJENDRA PRASAD**

2. **JEREMAIA VUNISA**

Respondents

Before : Hon. Justice Almeida Guneratne, JA

Counsel : Ms. S. Kunatuba for the Appellant
Mr. S. Singh for the Respondents

Date of Hearing : 08 February, 2017

Date of Ruling : 22 February, 2017

RULING

Nature of the present Application

[1] The present application is one seeking leave to appeal out of time pursuant to Rule 17(3) of the Court of Appeal Rules against the Judgment of the High Court of Suva dated 24th July, 2015.

Brief Background to the Present Application

- [2] Against the judgment of the High Court dated 24th July, 2015 the Appellant had sought leave to appeal but out of time by 317 days. Nevertheless leave had been granted in a single judge hearing on the basis that there was an arguable case, that being the overriding criterion as established by precedents. That application had been granted subject however to certain conditions (Vide: Civil Appeal No. ABU 70 of 2015).
- [3] The Appellant having fallen foul of those conditions the appeal was deemed to have been abandoned. Consequently, it is pursuant to Rule 17(3) that this application has been made against the same judgment of the High Court referred to above and on the same grounds of appeal that had been urged in ABU 70 of 2015.

The Grounds of Appeal

- [4] The Grounds of appeal upon which the Appellant intends to rely in the event that an enlargement of time is granted are set out as follows:-

- “1. That the learned trial Judge erred in fact and law when he decided that the rental of \$2000.00 per month was only for Shop No. 2*
- 2. That the Trial Judge erred in fact and law when he accepted the 1st Defendant’s version of the increase in rental of shop No.2 without any written application by the 1st Defendant to the Office of the Fair Rents Officer.*
- 3. That the trial Judge erred in fact and law when he did not consider that one cannot increase the rental of the premises being rented for more than 2.25% after 31st December 1985.*
- 4. That the trial judge erred in law when he did not take into account that provisions in the written Agreement were in breach of existing law on the matter.*
- 5. That the trial judge erred in law when he did not consider claim of damages in respect of forceful and illegal closure of Shop No.2 for 7 days.”*

Re: The solitary Ground of Appeal on which the Application for leave to Appeal out of time had been granted in ABU 70/2015

- [5] That is, “That the trial judge erred in fact and in law when he did not consider that one cannot increase the rental of the premises being rented for more than 2.25% after 31st December 1985.” (Vide: at page 4 of the Single Judge Ruling in ABU 70 of 2015, 15th April, 2016 per Calanchini, P). This is Ground 3.
- [6] Leave being granted on the said ground in ABU 70/2015 I feel justified in assuming that, in that application viz: ABU 70/2015, Calanchini P would have had regard to Section 12 (3) of the Counter Inflation (Rents) (Control) Order of 10 of 1986.
- [7] Even if I were to look afresh at the said solitary ground on which leave had been granted in ABU 70/2015, I am inclined to grant leave for I have no doubt in my mind that it raises an important and arguable case involving the interpretation of the said Order 10 of 1986 and its application or otherwise to the instant case.

Remaining issues to be Addressed

- [8] Learned Counsel for the Respondent contended that the Order No.10 of 1986 the Appellant placed reliance on has been repealed by the Commerce Commission Decree No. 49 of 2010 (CCD).

The Impact of the CCD

- [9] Section 160(1) (f) of the CCD has repealed the Counter Inflation Act 1978 (Cap 12). However, the reliance placed by learned Counsel for the Appellant is on the Counter Inflation (Rents) (Control) Order (Cap 73) of 1986, specifically, Section 12(3) thereof, which states that: “After 31st December, 1985 a person shall not charge in respect of the letting or continued letting under tenancy at a rate which is 2.25% more than the rate applicable to those premises on 31st December, 1985.”

- [10] The CCD makes no mention of the Counter Inflation (Rents) Control Order which is later in point of time to the repealed Counter Inflation Act.
- [11] In those circumstances, one immediate and consequential issue that arises for consideration is whether the Counter Inflation (Rents) (Control) Order (Cap 73 survives Section 160 (1) (f) of the CCD?
- [12] Yet another matter demands consideration and that is, whether the increase of rent without an application to the Office of the Fair Rents Officer was in contravention of Section 29(4) of the Fair Rents Act (Cap 269). The Fair Rents Act still remains in the Statute Book and the CCD does not touch it.
- [13] Taking those questions in the factual context of this case, where the initial tenancy agreement had been for one shop (Shop No. 1), (the rental had been fixed at \$1,200.00), the agreed new rental being for \$2,000.00 but on the basis that another (Shop No.2) would be made available to the Appellant which had not come to pass, the Appellant's contention that whether the said increase from \$1,200.00 to \$2,000.00 was lawful, in my view, results in arguable issues.
- [14] Having called for the original High Court Record, I noted that the Appellant had at paragraph 9 of the Statement of Claim put in issue, *inter alia* the impact of the Counter Inflation (Rents) Control Order and the Fair Rents Act. The judgment of the High Court makes no reference to either.
- [15] In the earlier round of litigation between the parties, although Calanchini, P in (ABU 0070/2015) had, allowed leave to appeal only on Ground 3, I find that Ground 2 also raises an important question to be determined.
- [16] Learned Counsel for the Respondent referred to two judgments (as carrying persuasive authority) of the High Court viz: Marimuttu & Sons Limited v Native Land Trust Board (HBC 43 of 2008 per Madam Wati, J) and Stinson Pearce Limited vs Reddy Construction Company Limited (Civil Action NO. 437 of 2004 per Mutunayagam, J).

[17] However, I was unable to derive assistance from the said judgments of the High Court that could be regarded as going against the Appellant's case in the present application.

Conclusion

[18] Consequently, notwithstanding the delay of 146 days, I accept the reasons adduced by Counsel for the said delay (being her sudden ill health which has been substantiated by medical certificates and supporting affidavits). In any event, the overriding (and decisive) criterion is as to whether there is an arguable case, (vide: the Supreme Court decision in **NLTB (now ITLTB) v Ahmed Khan and Another** (CBV 2 of 2013, 15th March, 2013 and several other decisions referred to in my Ruling in **Abdul Munaf v Tahir Hussain Munshi & Khairul Nisha Birbo** (Civil Appeal No. ABU 0014.2016, 26 September, 2016). That relegates to the background the "prejudice" factor. For the aforesaid reasons, I make order granting leave to appeal against the judgment of the High Court dated 24th July, 2015 on grounds 2 and 3 referred to in the Appellant's Notice and Grounds of Appeal.

In re: the Matter of Costs

[19] In that regard, I took into consideration the chequered history behind this case and the protracted litigation. The present application is the second bite the Appellant is having at the cherry (so to speak). The Respondents have had no part in the causes for the delay. Accordingly I am of the view that, the Respondents must be compensated in some way for which reason, in the exercise of my discretion, I take exception to the rule that, costs should follow the event.

Final Orders in this Ruling

- 1) Leave to appeal is granted against the Judgment of the High Court dated 24th July, 2015 on grounds 2 and 3 urged in the Notice/Grounds of Appeal.
- 2) The Appellant shall pay within 21 days of this Ruling a sum of \$1,500 .00 to the Respondents.

- 3) Should the Appellant fail to comply with Order 2 above, the Registrar is directed to list the matter, before the Honourable President of this Court for an appropriate order.

- 4) In the event of the Appellant complying with Order 2, the Registrar is directed to list this matter on a call over date for the President of this Court to list the Appeal for hearing by the Full Court on a suitable date.



Idel A. Guneratne

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Hon. Justice Almeida Guneratne
JUSTICE OF APPEAL