

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

**CIVIL APPEAL NO. ABU 0073 of 2018**  
(High Court Action No. HBC 160 of 2015)

BETWEEN:

**SUBHAG WATI**  
**AVINESH PRASAD**

Appellants

AND:

**AMI CHAND**  
**RITESHNI SHALINI LATA**  
**iTAUKEI LAND TRUST BOARD**

Respondents

Coram : Chandra, RJA

Counsel : Mr Charan for the Appellants  
Mr E Maopa for the 1<sup>st</sup> and 2<sup>nd</sup> Respondent  
Ms L Komaitai for the 3<sup>rd</sup> Respondent

Date of Hearing : 25 July, 2019

Date of Ruling : 5 November, 2019

## **RULING**

[1] By summons filed on 21<sup>st</sup> August 2018 the Appellant sought the following orders:

*“1. That the execution ad all further proceedings to enforce the Judgment delivered by the Honourable Justice Ameer on the 3<sup>rd</sup> day of July 2018 in this matter be stayed unconditionally pending the determination of appeal to the Court of Appeal being Civil Appeal No.ABU 0073 of 2018.*

*2. The 2<sup>nd</sup> Appellant be allowed to cultivate and harvest sugar cane on farm no.18516 on the Native LeaseNo.25971 until the determination of Appeal to the Court of Appeal.*

*AND For Further Orders:*

*3. That leave be granted to the Appellants to add the and/or to join Bank of South Pacific a registered commercial bank having its registered at 371 Victoria Parade, Suva as an interested party to the proceedings;*

*4. That all documents and papers in this appeal to be served on the Bank of South Pacific or its Solicitors;*

*5. The time for service to be abridged;*

*6. That the cost of this application abide the result of the appeal.”*

[2] The said summons was supported by an affidavit sworn on the 20<sup>th</sup> August 2018 by Avinesh Prasad the Second Appellant.

[3] The present matter relates only to the 1<sup>st</sup> prayer of the summons being an application to stay the execution of the judgment of the High Court delivered on 3<sup>rd</sup> July 2018. The 2<sup>nd</sup> prayer has already been dealt with by the President of the Court of Appeal by order made on 12<sup>th</sup> July 2019.

[4] The 1<sup>st</sup> Respondent has filed an affidavit in reply to the affidavit of Ami Chand filed on 21<sup>st</sup> August 2018.

[5] The Respondents had instituted action against the Appellants in respect of their entitlements in the property occupied and claimed by the 2<sup>nd</sup> Respondent, and involved the consideration of

the validity of two last wills executed by the 1<sup>st</sup> Appellant's husband, Chandu Lal, and father of the 1<sup>st</sup> Respondent, the sale of the said property to the 2<sup>nd</sup> Appellant by the 1<sup>st</sup> Appellant and related matters.

[6] After trial, the learned High Court Judge by judgment delivered on 3<sup>rd</sup> July 2018 gave judgment in favour of the Respondents and made the following orders:

*"1. There will be a declaration that the last Will and Testament of Chandu Lal dated 3 January 2018 to be null and void.*

*2. The sale of the estate property to Avinesh Prasad and Ragni Devi (the second defendants) and the transfer registered in their name be revoked and cancelled. The Registrar of Title shall do all things to cancel and revoke the transfer registered in the second defendants' names.*

*3. The second and third defendants shall not deal, sell, transfer or assign whatsoever the Native Lease No.25971 land known as Navatu No.5 on ND 4120 having an area of 10 A.1 Rood and 24 Perches.*

*4. The second defendant shall pay the sum of \$40,000.00 to the plaintiffs with post judgment interest at the rate of 6% per annum from the date of the writ of summons (18 September 2015) till the date of this judgment (3 July 2018).*

*5. There will be a declaration that the first and second plaintiff are entitled to 3 acres each of land in the Estate of Chandu Lal.*

*6. The defendants shall jointly and severally pay the summarily assessed costs of \$5,000.00 to the plaintiffs."*

[7] The Appellants made an application for stay of execution of the said judgment to the same High Court and after hearing the parties, the application was refused on 31 August 2018 and costs in a sum of \$300.00 was ordered to be paid by the Appellants to the Respondents.

[8] The Appellants thereafter renewed their application for stay of execution of the judgment of the High Court by making the present application.

[9] In the notice of appeal filed by the Appellants, the following grounds of appeal have been formulated:

Grounds of appeal of the First Appellant.

*"1. That the learned trial Judge hold the first appellant is not the registered proprietor of native lease no. 25971 being Navatu N0.5 in the Tikina of Nadi Province of Ba (the said land) when he finds the sales and purchase agreement was not consented to by the 3<sup>rd</sup> respondent and he also found in evidence actual fraud that defeats the indefeasibility of title [refer to para 63 & 71 of the judgment].*

2. *That the learned trial Judge holds the purchase of the said land not being consented after he analysed the evidence by the defence witnesses [as per para 57 to 67 of the judgment].*
3. *That the trial Judge holds the content of the second Will of Chandhu Lal was made without his approval. This is so after trial judge analysed the evidence of the plaintiff and 1<sup>st</sup> defendant's witnesses [as per paragraph 42 to 52 of the judgment].*
4. *That the learned trial Judge holds one of the attesting witnesses of the second Will of Chandhu Lal had interest in the estate of Chandu Lal. In this regard the ground of appeal is vague and ambiguous. The judgment clearly mentioned Shiu Narayan, DW3, has interest in the said estate because the evidence show that he was involved in the drafting and witnessing of the Wills, first and second, of Chandhu Lal. He negotiated with sale of the said property, the price of the property, arranging the solicitor, taking the 1<sup>st</sup> defendant to the solicitor for signing of the sales and purchase agreement and now living with the 1<sup>st</sup> defendant in his compound, who was the executor and trustees of the estate of Chandu Lal.*

#### Grounds of appeal of the Second Appellant:

1. *That the learned trial Judge holds and rejected the second appellant defence that he purchased the land in good faith as a bona fide purchaser. The trial judge came to the conclusion herein after he considered the statement of defence for the 2<sup>nd</sup> appellant and the evidence that at the time of the purchase of the said land he was in full knowledge that the 1<sup>st</sup> respondent was in occupation of the land. The recital on the sales and purchase agreement (PEX 12) clearly states:*

*Whereas the vendor has advised the purchaser and the purchasers are fully aware the vendor's brother in law is also residing on the land the purchaser in buying the land subject to his occupation [refer to para 66 to 68 of the judgment].*

2. *That the learned trial Judge holds the 1<sup>st</sup> appellant bought the said land at lower price rather than the market value. Again this ground of appeal is vague and ambiguous. In fact the trial judge considered the evidence by the first appellant that he bought the said land comprising with 10 acres 1 rod and 24 perches for \$70,000.00 and he intends to sell for \$550,000.00 The absence of valid and professional valuation to value the said property prompt the trial judge to hold the above.*
3. *As to the evidence order the trial Judge holds the respondents have interest in the property by analyzing the Wills and Deeds together with family arrangement that had been continuing throughout the 30 years of occupation by the respondent. [refer to para 69 of the judgment]. The ground of appeal is vague and ambiguous.*
4. *The trial Judge holds the value of the demolished house was \$40,000. He considered the evidence of the 1<sup>st</sup> Respondent as it is undisputed and unchallenged. That ground of appeal has no merit.*
5. *As to the last 2 grounds of appeal the trial judge holds and finds there is actual fraud committed by the appellant and the sales and purchase agreement is without the consent of the 3<sup>rd</sup> respondent and is null and void; the indefeasibility of the title has been*

*defeated by actual fraud [refer to p26 para 71 to 76 of the judgment]. He ordered permanent injunction against the appellants.”*

[10] The principles upon which a stay is granted in the Supreme Court were set out in **Stephen Patrick Ward v. Yogesh Chandra** CBV0010 (20 April 2010) by Gates P :

*“[4] The issue for determination is whether the Petitioner’s case prior to the hearing is sufficiently exceptional to allow for some interlocutory relief. For at the Supreme Court, that is at final Court of Appeal stage, the hurdles to be overcome for a petitioner seeking special leave are formidable. Sufficiently exceptional may be a stronger test than that favoured in New South Wales where the hurdle was said to be overcome if “the applicant could demonstrate a reason or an appropriate case to warrant the exercise of discretion in its favour”:* **Alexander v. Cambridge Credit Corporation Ltd** (1985) 2 NSWLR 685 at p.694; applied in **Penrith Whitwater Stadium Ltd & Anor v. Lesvos Pty Ltd & Anor** [2007] NSWCA 103.”

[11] In arriving at a decision as to whether the Appellant’s circumstances are sufficiently exceptional for the grant of stay relief pending appeal, it is necessary to consider the relevant principles set out by the Court of Appeal in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** Civil Appeal ABU 0011.04S, 18<sup>th</sup> March 2005. They were:

*“(a) Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). See **Philip Morris (NZ) Ltd v. Liggett & Myers Tobacco Co. (NZ) Ltd** [1972] 2 NZLR 41(CA) l.*

*(b) Whether the successful party will be injuriously affected by the stay.*

*(c) The bona fides of the applicants as to the prosecution of the appeal.*

*(d) The effect on third parties.*

*(e) The novelty and importance of questions involved.*

*(f) The public interest in the proceeding.*

*(g) The overall balance of convenience and the status quo.”*

**If no stay is granted, whether the Appellants’ right of appeal will be rendered nugatory**

[12] It was submitted by Counsel for the Appellants that the grounds of appeal are valid ground that have to be determined by the Court of Appeal. That, if a stay is not granted and the first and Second Respondents sub-divided the subject property in terms of the judgment that is being impugned and obtain separate leases for 3 acres each, the Second Appellant will lose their investment and the whole land area as to the lease. Further, that if the Appellants succeed in the

appeal that the Appellant will not be able to recover the 3 acres as the first and second Respondents might dispose off the property and/or encumber the same.

[13] The appeal involves the consideration of the validity of two wills, and the subsequent actions of the Appellants in respect of the subject property, which involves registration of title, consent of the 3<sup>rd</sup> Respondent (ILTB), among other grounds. A considerable change has taken place in the property as it would appear that the original structures on the land were either demolished or renovated and improved by the 2<sup>nd</sup> Appellant and if before the appeal is heard there is a change in the property by subdividing same it may affect the 2<sup>nd</sup> Appellant in the event that his appeal succeeds.

[14] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have submitted that the grounds of appeal filed by the Appellants are without merit and not arguable. The success or failure of the grounds of appeal cannot be gone into in detail at this stage and it is left to the Court of Appeal to consider same.

[15] In view of the fact that changes can be made to the property if the 1<sup>st</sup> and 2<sup>nd</sup> Respondents take steps to execute the judgment and divide the property, the interests of the Appellants may be affected, and the appeal has the tendency to be nugatory.

#### **Whether the successful party will be injuriously affected by the stay**

[16] The 1<sup>st</sup> and 2<sup>nd</sup> Respondents have in their affidavit in opposition regarding the application of the Appellants for stay stated that they had visited the office of the 3<sup>rd</sup> Respondent regarding the allocation of the 3 acres granted in the judgment of the High Court and had been advised to await the outcome of the appeal.

[17] In view of that position, even though they have stated that they have no permanent abode at present, they may have to await the outcome of the appeal to get their entitlements in the land if the outcome of the appeal is in their favour.

[18] The 2<sup>nd</sup> named Appellant according to his own affidavit and the affidavit of the 1<sup>st</sup> and 2<sup>nd</sup> Respondents is a person of substantial assets and therefore the Respondents would be able to enforce the judgment and reap the benefits by way of obtaining the sums of money awarded in the judgment of the High Court depending on the outcome of the appeal.

[19] It would seem therefore that the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, the successful party will not be injuriously affected by the granting of a stay order.

#### **The bona fides of the applicant as to the prosecution of the appeal**

[20] In his affidavit, the 2<sup>nd</sup> named Appellant has stated that, the notice of appeal was filed within time and has taken action in order to prosecute the appeal diligently, and that Judge's Notes are awaited to compile the copy record.

[21] It has been submitted on behalf of the Appellants that the grounds of appeal are meritorious and bona fide with a high likelihood to succeed.

[22] As the Appellants have taken the necessary steps in time in prosecuting their appeal their bona fides are not in doubt.

### **The effect on third parties**

[23] It is only the Appellants and the Respondents who are involved in this matter. The Appellant has submitted that there is a charge on the subject property by Bank of south Pacific. But the Bank is not a party to this action.

### **Novelty and importance of question involved**

[24] The registered ownership of the Second Appellant has been ordered to be revoked and cancelled by the judgment of the High Court. There was a claim that the property was registered in the name of the first Appellant. The second will of Chandu Lal was declared null and void in the said judgment.

[25] These are matter of importance to be decided in the appeal.

### **The public interest in the proceedings**

[26] There is no issue regarding public interest in this matter.

### **The overall balance of convenience and the status quo**

[27] The second Appellant is in possession of the property and in the process of cultivating on the land as well. On the other hand the 1<sup>st</sup> and 2<sup>nd</sup> Respondents have submitted that they had been evicted from the said property and they have no proper permanent abode, they have suffered as a result of being deprived of the property.

[28] As the Respondents have been informed by the 3<sup>rd</sup> Respondent that they should await the outcome of the appeal to have the property divided to get their three acres it would be in the best interests of the parties to maintain status quo that was there before the judgment of the High Court was delivered. In these circumstances the balance of convenience would weigh with the Appellants.

[29] If the 2<sup>nd</sup> Appellant has been cultivating sugar cane on Farm No. 18516 on the Native Lease No. 25971 and has reaped or would be reaping any benefits therefrom and continues to do so, the proceeds of such benefits till such time as the appeal is finally determined should be deposited with the Chief Registrar of the High Court.

[30] In consideration of all the material placed before this Court, it is ordered that the execution of the judgment of the High Court be stayed until the final determination of the appeal.

### **Orders of Court:**

*(1) The execution of the judgment of the High Court is stayed pending the final determination of the appeal by the Court of Appeal.*

*(2) The Appellants are ordered to expedite the hearing of the appeal by taking the necessary steps;*

*(3) The 2<sup>nd</sup> Appellant is ordered to deposit any proceeds from the cultivating and harvesting of sugar cane on Farm No. 18516 on the Native Lease No. 25971 with the Chief Registrar of the High Court till such time as the appeal is finally determined.*

*(4) Costs in the appeal.*

**Justice Suresh Chandra**

**RESIDENT JUSTICE OF APPEAL**