

IN THE HIGH COURT OF FIJI AT SUVA
CIVIL JURISDICTION

Civil Action No. HBM 33 of 2018

BETWEEN : **MAHENDRA CHAUDHARY**

PLAINTIFF

AND : **STATE**

1ST DEFENDANT

AND : **THE ATTORNEY GENERAL**

2ND DEFENDANT

BEFORE : **His Lordship Hon. Justice Kamal Kumar**

COUNSEL : Mr A. K. Singh, Mr M. A. Khan and Mr D. Kumar for
the Plaintiff
Mr S. Sharma, Ms B. Narayan, Ms P. Prasad and Ms
O. Solimailagi for the Defendants

DATE OF RULING : 25 May 2018

RULING
(Application to Strike Out)

1.0 INTRODUCTION

1.1 On 7 March 2018, Plaintiff filed Originating Summon (Expedited Form) which was returnable on 28 March 2018, seeking following Declaration and/or Orders:-

“Declarations

Retrospectivity

1. *The **2013 Constitution (the Constitution)** and the **Electoral Decree 2014** were not in force when the Plaintiff was found to have committed the relevant offences under the Exchange Control Act;*
2. *That Sections 56 (2)(g) and s23 of the **2013 Constitution** and the **Electoral Decree 2014** respectively do not have retrospective application and/or effect in its disqualifying provisions as it relates to the Plaintiff;*
3. *That at the time of the commissioning of the alleged commissioning of offences, the relevant prevailing laws were the **1997 Constitution Amendment Act** and the **1998 Electoral Act**;*

Denial of Plaintiff’s rights under the 2013 Constitution

4. *That section 56 (2)(g) of the Constitution contravenes the Plaintiff’s right to:-*
 - i. *Be a candidate for election to Parliament as guaranteed under sections 56(1) and (2) of the Constitution;*
 - ii. *Participate in the political affairs of Fiji as guaranteed to him under the Constitution, the **Human Rights Decree 2009** and obligatory international treaties and conventions as ratified or applicable to Fiji;*

- iii. *To belong to and be nominated by a registered political party for the purposes of being a candidate for Parliament; and*
 - iv. *Equal citizenry and is inconsistent with the values that underpin democratic society based on equality, human dignity and freedom and in accordance with international conventions such as International Covenant on Civil and Political Rights (ICCPR) and the European Convention on Human Rights, 1950 (**ECHR**).*
5. *That the disqualification of the Plaintiff under s56(2)(g) of the Constitution from contesting parliamentary elections on matters for which a subsequent blanket amnesty was given to all other Fiji residents and no criminal and/or any other proceedings issued under those who had breached the **Exchange Control Act**, is irrational, politically motivated and a breach of sections 16(1) (3) and 26(3)(b) and 26(4) of the Constitution as it applies to the Plaintiff.*
6. *That section 56(2)(g) of the Constitution is ultra vires given that it contravenes the authority of Parliament as contained in section 46(1) and (2) of the Constitution for the following reasons:-*
- a. *is unreasonable;*
 - b. *oppressive;*
 - c. *arbitrary and imposed by an unelected administration without proper consultation with or with the mandate for the creation of the Constitutional provisions complained of;*
 - d. *adopted without the sanction of a duly constituted Parliament and/or elected representatives of the peoples of Fiji; and/or*
 - e. *has not been ratified subsequently by the elected Parliament of Fiji.*

7. *That the Plaintiff in the circumstances has been or will be adversely affected in contravention of his rights by the limitation in Section 56(2)(g) of the Constitution by way of an unreasonable, arbitrary and unlawful limitation placed on the Plaintiff's right to be nominated in the list of candidates for the forthcoming election in 2018.*

Order/s

1. *As per Declaration 1 - 6 (inclusive) as pleaded herein above;*
2. *That the prohibition in section 56(2)(g) of the 2013 Constitution relating to be a candidate for election to Parliament does not apply to and/or affect the Plaintiff's right to be nominated as a candidate for the 2018 parliamentary elections.*
3. *The Plaintiff is eligible to stand as a candidate for the 2018 parliamentary elections;*
4. *Any other orders be made that the Court may deem fit and expedient in the circumstances; and*
5. *Costs."*

("Originating Summons")

- 1.2 On 23 March 2018, Defendants filed Acknowledgement of Service and Summons to Strike Out seeking:-

"FOR AN ORDER that the Plaintiff's Originating Summons dated 15 February 2018 and Affidavit in Support of Mahendra Pal Chaudhry sworn on 7 March 2018; both filed on 7 March 2018, be struck out on the grounds that this Honourable Court does not have the jurisdiction to hear Plaintiff's application pursuant to:-

- (1) Sections 173(4) and 173(5) of the Constitution of the Republic of Fiji;
- (2) The Administration of Justice Decree 2009, as saved under section 173(5) of the Constitution of the Republic of Fiji; and

(3) Order 21 Rule 5 of the High Court Rules 1988.

AND FOR AN ORDER that the Plaintiff's Originating Summons dated 15 February 2018 and Affidavit in Support of Mahendra Pal Chaudhry sworn on 7 March 2018 both filed on 7 March 2018, be struck out on the grounds:-

- 1) It discloses no reasonable cause of action;
- 2) It is scandalous, frivolous and vexatious;
- 3) It is an abuse of court process.

AND FOR FURTHER ORDERS as the Court may deem fit to make in the circumstances.”

(“Strike Out Application”)

1.3 Originating Summons and Strike Out Application were called on 28 March 2018, when:-

- (i) Mr Sharma, Senior Counsel for the Defendants informed Court that Defendants will not file any Affidavit in Support of Strike Out Application on the ground that legal issues are raised in Strike Out Application;
- (ii) Mr Sharma also submitted that this action should be stayed under Order 21 Rule 5 of High Court Rules 1988, on the ground that Plaintiff has not paid \$2,000.00 cost awarded in HBM Action No. 56 of 2017, between Plaintiff and Karan Chand Bidesi as 1st and 2nd Plaintiffs and the Defendants when Plaintiffs in that action withdrew that Action. Order 21 Rule 5 of High Court Rules provide as follows:-

“5.-(1) Where a party has discontinued an action or counterclaim or withdrawn any particular claim made by him therein and he is liable to pay any other party's costs of the action or counterclaim or the costs occasioned to any other party by the claim withdrawn, then if, before payment of those costs, he subsequently brings an action for

the same, or substantially the same, cause of action, the Court may order the proceedings in that action to be stayed until those costs are paid.

(2) An application for an order under this rule may be made by summons or motion or by notice under Order 25, Rule 7.”

- (iv) This court held that even though there is still little change in prayers sought, the issue in both actions is substantially the same and as such Order 21 Rule 5 applies in this instance;
 - (v) Mr M. A. Khan appearing for the Plaintiff informed the Court that Mr A.K. Singh who represents Plaintiff is away overseas for medical treatment and is expected back by 14 April 2018;
 - (v) Mr Khan also informed Court that cost will be paid within one (1) day;
 - (vii) This Court stayed this proceeding pending payment of cost, Court ordered in HBM Action No. 56 of 2017 and Ordered that upon payment of cost, Plaintiff is at liberty to make Application to have the stay removed;
 - (vii) Court also ordered Plaintiff to pay Five Hundred dollars (\$500.00), costs for the day.
- 1.4 On 5 April 2018, Plaintiff without Leave of Court filed Amended Originating Summons which was returnable on 26 April 2018.
- 1.5 On 26 April 2018:-
- (i) It was confirmed by Counsel for the parties that cost in HBM Action No. 56 of 2017, and costs awarded on 28 March 2018, has been paid.
 - (ii) Mr Sharma submitted that:-
 - (a) Plaintiff has failed to file formal Application to have stay removed as ordered by this Court;

- (b) Amended Originating Summons is flawed;
 - (c) Court has to hear Strike Out Application first.
 - (iii) Mr Singh submitted that this matter be reinstated as they are present in Court.
 - (iv) At Court's instance Mr Singh made oral application to have the Stay removed which was consented to by Mr Sharma as Counsel for Defendants.
 - (v) Mr Singh as Counsel for Plaintiff sought leave to withdraw Amended Originating Summons.
 - (vi) Court then re-instated this action, granting leave to Plaintiff to withdraw Amended Originating Summons, directed parties to file and serve Submissions in respect to Strike out Application; and adjourned the Application to 9 May 2018 at 11.30, for hearing.
- 1.6 Parties filed and served Submission as directed and made Oral Submissions on 9 May 2018.
- 1.7 It is noted to all Decrees and Promulgations are now called Act pursuant to section 107 of Revised Addition of Law (Consequential Amendments) Act 2016, which Act amended Section 2 and 3 of Interpretation Act 1967.
- 1.8 However, for sake of convenience all Decrees and Promulgations issued from 5 December 2006 to October 2014 (first sitting of Parliament) shall be referred as Decrees and/or Promulgations.

2.0 Defendant's Submission

- 2.1 Defendant by its Senior Counsel Mr Sharma submitted that:-

- i. The 2013 Constitution of the Republic of Fiji (hereinafter referred to as “**the Constitution**”), is the Supreme Law of this Country and the Courts are established by the Constitution.
- ii. The Constitution gives jurisdiction to Courts and provides for matters in respect of which Courts do not have jurisdiction;
- iii. Section 173(4) of the Constitution which starts with words “Notwithstanding anything contained in this Constitution” is overriding provision which states that this Court has no jurisdiction in respect to what is stated therein.

Mr Sharma referred to **Waqavonovono v Chairperson of Fijian of Electoral Commission** HBM No. 92 of 2014 (28 July 2014) delivered by this Court; **Singh and Anor. v Electoral Commission & Ors** Civil Action No. HBC 245 of 2014 (4 September 2014) delivered by this Court; and **One Hundred Sands Ltd v Attorney General of Fiji & Anor.** and **Attorney-General of Fiji & Anor. v. One Hundred Sands Ltd.** Civil Appeal No. ABU 27 of 2015 and ABU 31 of 2015 (High Court Action No. HBJ 9 of 2015).

- iv. Section 173 (4) (d), does not apply in this instance which is contrary to what is submitted by the Plaintiff in his written submission.
- v. The Constitution at section 173(5) retains certain Provisions of Administration of Justice Decree 2009 (“**AJD**”) and challenge for de-registration of the Second Plaintiff in **Padarath & Anor. v His Excellency the President of Fiji & Others** Civil Action No. HBC 33 of 2013 (14 March 2013) was dismissed by Her Ladyship Justice Wati for want of jurisdiction under Section 51(4) of AJD.
- vi. Orders sought in the Originating Summons is an abuse of Court process and this Court has no jurisdiction to grant such Orders and the fact of the matter is no Writ has been issued by His Excellency the President for an election and as such no nomination has been called for.

- vii. Constitution expressly empowers authorities for conduct of general election as provided for in sections 53(4)(5), 56(4) of the Constitution and sections 22, 23, 24, 25, 26 and 29 of Electoral Decree 2014.
- viii. Every single procedure is provided for in the Electoral Decree 2014 which includes nomination of candidates which need is to be delivered to Supervisor of Elections (“**SOE**”) (Section 26 of Electoral Decree) and if any person needs to appeal SOE’s decision they should file appeal to Electoral Commission (Section 34 of Electoral Decree) whose decision **is final** and “**not subject to any further appeal to or review by any Court, tribunal or any other adjudicating body**” (Section 31 (6) of Electoral Decree).
- ix. In **Steven Singh’s** case, Plaintiff challenged SOE’s decision when this Court held that it has no jurisdiction to deal with SOE’s decision in respect to nomination of candidates for the election.
- x. Jurisdiction is granted to court in Electoral Decree 2014, to deal with post-elections issue as Court of Disputed Return and referred to paragraphs 4.0 and 4.11 of the Ruling in **Waqavonovono’s** case.
- xi. This Court has no jurisdictions to grant orders sought and if this Court holds otherwise then it will open floodgates whereby almost every provision will be challenged.
- xii. Plaintiff’s argument that Section 173(4)(d) gives Court jurisdiction has no merit on the ground that, no decision has been made by SOE and even if SOE did make a decision, Court’s jurisdiction is ousted by s173(4)(d) of the Constitution.
- xiii. Nowhere under the Electoral Decree, Court is given jurisdiction to determine challenges to pre-election matters.
- xiv. Section 3(10) of the Constitution is interpretation section and does not provide any rights itself and section 100 of the constitution deals with general jurisdiction and interpretation.

- xv. Plaintiff's claim that section 173 (4) does not apply retrospectively has no merits because there is no dispute as to when offence was committed.
- xvi. Section 56(2)(g) of the Constitution only comes into effect when a person who is nominated is convicted which in this case was on 4 April 2014, and not when offence is committed.
- xvii. Plaintiff committed breach of Exchange Control Act 1950 and the law was same when offence was committed and when Plaintiff was convicted which conviction was post promulgation of the Constitution (7 September 2013) and making of Electoral Decree 2014 (28 March 2014).

3.0 Plaintiff's Submissions

3.1 Senior Counsel for the Plaintiff, Mr Singh submitted that:-

- i. Plaintiff is not challenging the Electoral Decree 2014;
- ii. Constitution is flawed in the sense that Section 100(4) of the Constitution is very important provision which gives empowerment to Court whilst Section 173 is a limiting section which takes away what is given in Section 100 of the Constitution.
- iii. Question for Court is which one is going to prevail?
- iv. What is provided in Section 100 of the Constitution is the fundamental right of all citizens of the country and has overriding power to deal with matters coming before it which power cannot be taken away by the Constitution.
- v. Third last paragraph to the Preamble of the Constitution provides that:-

"RECOGNISE the Constitution as the supreme law of our country that provides the framework for the conduct of Government and all Fijians."

- vi. Everything in the Constitution must relate to the preamble and everything Court considers must meet the objects in section 1, 2(2) and 3 (1)(2) of the Constitution.
- vii. Question that needs to be asked is, does a citizen have right to come to Court and challenge his right.
- viii. A democratic society and value that attaches to such society ensures that citizens have right to come to court to have the disputes resolved.
- ix. Section 100 of the Constitution is not subject to section 173 of the Constitution and as such powers given under section 100 of the Constitution has no qualification.
- x. Bearing in mind sections 1, 2, and 3 of the Constitution, section 100 of the Constitution is to prevail.
- xi. Section 173 of the Constitution has very wide terms and need to be well defined.
- xii. Plaintiff relies on 173(4)(d) of the Constitution and submits Plaintiff comes within the exception.
- xiii. Section 100 of the Constitution is an exception well within sections 173(4)(d) of the Constitution.
- xiv. Decisions that falls within section 173(4)(d) is the decision to incorporate section 56(2),(g) in the Constitution which provides “any person has not, at any time during the 8 years immediately before being nominated, been convicted of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more”.
- xv. That decision is crystalised and should be an exception in the promulgation section 173 of the Constitution.
- xvi. The court has jurisdiction to deal with this matter.

4.0 Defendants Reply to Plaintiff's Submission

4.1 Defendants by Ms Narayan in reply submitted that:-

- i. Section 173 and Section 100 of the Constitution are competing sections.
- ii. If section 100 has the word “Notwithstanding anything contained in the Constitution” then section 100 would be in conflict with section 173 and this court will then have to declare which provision prevails.
- iii. At paragraph 4.10 of **Waqavonovono** case this Court stated that section 173 takes away Court jurisdiction in relation to election matters.
- iv. Section 173 (4)(d) of the Constitution gives Plaintiff a right to challenge a decision and as such there is no decision before this court to be challenged.
- v. Section 100 of the Constitution is a mandate to either enforce or interpret the Constitution by virtue of section 2 of the Constitution. Hence, Court can only interpret what sections 100, 56(2)(g) or section 173 say and cannot accept any challenge against those provisions.

5.0 Law and Analysis

5.1 Plaintiff relied on last three (3) paragraphs in the Preamble, section 1, 2 and 3(1) of the Constitution.

5.2 The last three paragraphs of the Preamble provides as follows:-

“RECOGNISE the Constitution as the supreme law of our country that provides the framework for the conduct of Government and all Fijians;

COMMIT ourselves to the recognition and protection of human rights, and respect for human dignity;

DECLARE our commitment to justice, national sovereignty and security, social and economic wellbeing, and safeguarding our environment.”

5.3 Sections 1, 2 and 3(1) of the Constitution provide as follows:-

- “1. *The Republic of Fiji is a sovereign democratic State founded on the values of:-*
- a) common and equal citizenry and national unity;*
 - b) respect for human rights, freedom and the rule of law;*
 - c) an independent, impartial, competent and accessible system of justice;*
 - d) equality for all and care for the less fortunate based on the values inherent in this section and in the Bill of Rights contained in Chapter 2;*
 - e) human dignity, respect for the individual, personal integrity and responsibility, civic involvement and mutual support;*
 - f) good governance, including the limitation and separation of powers;*
 - g) transparency and accountability; and*
 - h) a prudent, efficient and sustainable relationship with nature.*
- 2.-(1) *This Constitution is the supreme law of the State.*
- (2) Subject to the provisions of this Constitution, any law inconsistent with this Constitution is invalid to the extent of the inconsistency.*
 - (3) This Constitution shall be upheld and respect by all Fijians and the State, including all persons holding public office, and the obligations imposed by this Constitution must be fulfilled.*
 - (4) This Constitution shall be enforced through the courts, to ensure that-*
 - a) laws and conduct are consistent with this Constitution;*
 - b) rights and freedoms are protected; and*
 - c) duties under this Constitution are performed.*
 - (5) This Constitution cannot be abrogated or suspended by any person, and may only be amended in accordance with the procedures prescribed in Chapter 11.*
 - (6) Any attempt to establish a Government other than in compliance with this Constitution shall be unlawful, and-*

a) *anything done to further that attempt is invalid and of no force or effect; and*

b) *no immunities can lawfully be granted under any law to any person in respect of actions taken or omitted in furtherance of such an attempt.*

3.-(1) *Any person interpreting or applying this Constitution must promote the spirit, purpose and objects of this Constitution as a whole, and the values that underlie a democratic society based on human dignity, equality and freedom.”*

5.4 Section 100(3), (4) of the Constitution provides as follows:-

“100.-(1)

(2)

(3) *The High Court has unlimited original jurisdiction to hear and determine any civil or criminal proceedings under any law and such other original jurisdiction as is conferred on it under this Constitution or any written law.*

(4) *The High Court also has original jurisdiction in any matter arising under this Constitution or involving its interpretation.”*

5.5 It cannot be disputed that this Court has jurisdiction to deal with matters arising under the Constitution and involving its interpretation (s100(4)).

5.6 The gist of Plaintiff’s challenge is that Section 56(2)(g) of the Constitution contravenes Plaintiff’s right to contest election and it is ultra vires.

5.7 Section 56(2)(g) of the Constitution provides as follows:-

“56(2) *A person may be a candidate for election to Parliament only if the person-*

(a)

(b)

(c)

(d)

- (e)
- (f)
- (g) **has not, at any time during the 8 years immediately before being nominated, been convicted of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more; and”**

5.8 Defendants in their Submission have submitted that this Court has no jurisdiction to deal with the issues relating to validity of Section 56(2)(g) and Plaintiff’s eligibility to contest the election pursuant to section 173(4) of the Constitution and the Electoral Decree.

5.9 Section 173(4) has been considered by this Court in **Waqavonovono** case, **Stephen Singh** case; and Court of Appeal in **One Hundred Sands Ltd.** case.

5.10 Section 173(4)(a), (b), (c), (d) of the Constitution provides as follows:-

“173.-(4) **Notwithstanding anything contained in this Constitution, no court or tribunal (including any court or tribunal established or continued in existence by the Constitution) shall have the jurisdiction to accept, hear, determine, or in any other way entertain, or to grant any order, relief or remedy in any proceeding of any nature whatsoever which seeks or purports to challenge or question-**

a) **the validity or legality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;**

b) **the constitutionality of any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution;**

- c) **any Promulgation, Decree or Declaration, and any subordinate laws** made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, **for being inconsistent with any provision of this Constitution, including any provision of Chapter 2 of this Constitution;** or
- d) **any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration,** and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, **except as may be provided in or authorised by any such Promulgation, Decree or Declaration** (including any provision of any such laws), made or as may be **made between 5 December 2006 until the first sitting of the first Parliament under this Constitution.**”

(emphasis added)

- 5.11 Senior Counsel for the Plaintiff submitted that Plaintiff is not challenging the validity of Electoral Decree.
- 5.12 Plaintiff submits that section 100(3)(4) of the Constitution gives this Court an overriding power to deal the declaration sought in respect to s56(2)(g) of the Constitution and as such provision of s100(3)(4) should prevail over the s173(4) of the Constitution.
- 5.13 Plaintiff by his Senior Counsel further submitted that section 100 of the Constitution is not subject to s173(4) of the Constitution.
- 5.14 It must be noted that section 173(4) commenced with the words “Notwithstanding any contained in this Constitution”.

5.15 In **Stephen Singh's** case which was referred to and relied by Defendant this Court at paragraph 3.28 stated as follows:-

*“Notwithstanding is defined in the Oxford Advanced Learners Dictionary of Current English 7th edition to mean **“without being affected by”**.*

5.16 Preamble, sections 1, 2, 3 and 100 are contained in the Constitution and such is caught by s173(4)(a), (b) and (c) of the Constitution.

5.17 This Court accepts Defendants Submission that the Constitution is the Supreme Law of the Country as provided for in Section 2 of the Constitution.

5.18 This Court with greatest of respect to Senior Counsel for the Plaintiff rejects its submission that s100 is overriding provision and is not caught by section 173(4)(a), (b), (c) of the Constitution.

5.19 Defendants by their Senior Counsel submitted that the Constitution was promulgated pursuant to section 2 of the Constitution of the Republic of Fiji (Promulgation) Decree 2013 (Decree No. 24 of 2013) (**“Constitution Decree”**) which provided as follows:-

“2.-(1) There shall be for the Republic of Fiji a Constitution which shall be as set out in the Schedule to this Decree.

(2) The Constitution as set out in the Schedule to this Decree shall come into force on the 7th day of September 2013.

(3) Wherever it may hereafter be necessary for the Constitution to be printed, it shall be lawful to omit all parts of this Decree apart from the Schedule and the Constitution of the Republic of Fiji as so printed shall have the force of law notwithstanding the omission.

(4) For the avoidance of doubt, the Schedule to this Decree shall be construed and have effect as part of this Decree.”

5.20 This Court also accepts Defendants Submission that the Constitution formed part of the Constitution Decree as provided in section 12 of Interpretation Act 1967.

5.21 Section 12 of the Interpretation Act 1967, provides as follows:-

“Every schedule to or table in any written law shall, together with any notes thereto (unless a contrary intention appears), be construed and have effect as part of such written law.”

5.22 This Court holds that:-

- (i) Constitution was promulgated on 7 September 2013, which is well within the period 5 December 2016 and 6 October 2014 (first sitting of Parliament) and since 56(2)(g) is one of the provisions of the Constitution its validity or legality cannot be challenged in any Court or tribunal as provided for under section 173(4)(a) of the Constitution;
- (ii) The constitutionality of s56(2)(g) cannot be challenged in any court (s173(4)(b));
- (iii) Even if provision of s100 is inconsistent with s173(4) of the Constitution it cannot be challenged in any Court as provided for in Section 173(4)(c) of the Constitution.

5.23 Plaintiff by his Counsel submitted that the decision made under a Decree or Promulgation falls under the exception in section 173(4)(d) of the Constitution.

5.24 For sake of convenience s173(4)(d) states as follows:-

*“any decision made or authorised, or any action taken, or any decision which may be made or authorised, or any action which may be taken, under any Promulgation, Decree or Declaration, and any subordinate laws made under any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006 until the first sitting of the first Parliament under this Constitution, **except as may be provided in or authorised by any such Promulgation, Decree or Declaration (including any provision of any such laws), made or as may be made between 5 December 2006***

until the first sitting of the first Parliament under this Constitution.”

- 5.25 When the Court enquired with Mr Singh, Senior Counsel for the Plaintiff as what is the decision he is referring to as being subject to the exception in s173(4)(d) he stated that it is the decision to incorporate section 56(2)(g) into the Constitution.
- 5.26 With all due respect to Senior Counsel for the Plaintiff this Court and so does Ms Narayan, Counsel for the Defendant was totally surprised as to how such submission could be made.
- 5.27 Exception in s173(4)(d) simply means that if a particular Promulgation or Decree made between 5 December 2006 and 6 October 2014, gives any person a right to challenge any decision made or authorised to be made or any action or authorised to be taken pursuant to that Promulgation or Decree then that person can move the Court to challenge that particular decision or action.

For example:-

- (i) XYZ Decree was made on 6 December 2006;
 - (ii) Under s173(4)(d) any decision made under XYZ Decree cannot be challenged unless there is a provision in XYZ Decree itself which provides that a decision made or action taken under XYZ Decree can be challenged in any Court of law.
- 5.28 In respect to Plaintiff's submission in respect to section 1, 2 and 3 of the Constitution this Court holds that where Court has been called upon to interpret or deal with any provision of the Constitution or written law then Court must have regard to matters stated at section 1, 2 and 3 of the Constitution.
- 5.29 When the Constitution provides that the Courts do not have jurisdiction to deal with certain matters then section 1, 2 and 3 of the Constitution become irrelevant, as in this case.

5.30 In addition to the Declaration sought Plaintiff is also seeking following Orders:-

- “1. *As per Declaration 1 - 6 (inclusive) as pleaded herein above;*
2. *That the prohibition in section 56(2)(g) of the 2013 Constitution relating to be a candidate for election to Parliament does not apply to and/or affect the Plaintiff’s right to be nominated as a candidate for the 2018 parliamentary elections.*
3. *The Plaintiff is eligible to stand as a candidate for the 2018 parliamentary elections;*
4. *Any other orders be made that the Court may deem fit and expedient in the circumstances; and*
5. *Costs.”*

5.31 Having held that this Court does not have jurisdiction to entertain challenge to section 56(2)(g) of the Constitution for it being invalid, unconstitutional or ultra vires this Court cannot make the Orders sought in paragraph 1 to 3 of the Originating Summons.

5.32 In respect to Order 2 this Court accepts Defendants Senior Counsels’ submission that for Court to grant such order will be to usurp the powers of SOE and Electoral Commission.

5.33 The nomination for candidates needs to be submitted to the SOE as is provided for in Section 25(8) (Independent Candidate) and section 26 (Party Candidate) of the Electoral Decree 2014.

5.34 If the SOE refuses to accept the nomination, then that person or party has right of appeal to Electoral Commission pursuant to section 31 of Electoral Decree 2014, which decision stands to **“be final and shall not be subject to any further appeal to, or review by any court, tribunal or any other adjudicating body.”** (s31(6) of Electoral Decree).

5.35 This Court in **Waqavonovono** case stated as follows:-

“4.10 It must be noted that even though this court has unlimited original jurisdiction to hear and determine any civil or criminal proceeding under any law or matters arising under the Constitution or involving its interpretation as provided for in Section 100(3) and (4) of 2013 Constitution the jurisdiction to determine matters relating to election is special jurisdiction.

4.11 Jurisdiction/Power to determine the pre-election matters such as registration of voters, registration of political parties and nomination of candidate and so on are granted to Supervisor of Elections and Electoral Commission whereas jurisdiction to determine dispute post-election is granted to Court of Disputed Return which is the High Court of Fiji (Part 5 - Electoral Decree 2014).

4.12 In **Prasad v. Singh** [2002] FJHC 8: HBC 0269 of 2011 (8 February 2002). His Lordship Justice Gates (as he then was) the current Chief Justice in dealing with post-election dispute stated as follows:

“It is clear the Court of Disputed Return exercise a special jurisdiction allowed by the Constitution and under the Electoral Act which legislation is in the nature of a code Osborne v, Shepherd [1981] 2 NSWLR 277 at p208G: Josefa Rusaqoli v. Attorney - General & Anor. (unreported) Suva High Court civil Action No. 0149 of 1994S; 6 June 1994 at p6.”

4.13 No jurisdiction has been granted to this Court in respect to pre-election matters.

4.14 The rationale for the special jurisdiction is that matters relating to pre-election issue and post-election issue must be determined expeditiously. (see **Prasad v. Singh** supra)”

5.36 At paragraph 3.32 of **Stephen Singh** case this Court stated as follows:-

“I must make it clear and put to rest that this Court does not have inherent jurisdiction to deal with matters relating to pre-election process and post-election matters. The jurisdiction to deal with matters relating to election are given to the Courts by the Electoral Decree 2014 and as

such Court must exercise its powers within the confines of the Electoral Decree 2014 and the Regulations made under the Electoral Decree.”

5.37 Hence this Court holds that it does not have jurisdiction to entertain the Orders sought by Plaintiff in respect to his nomination as candidate for the election or his eligibility to contest the election.

5.38 To put in very simple terms:-

- (i) Plaintiff or his party has to submit his nomination to SOE;
- (ii) It is upto SOE whether to accept his nomination or not;
- (iii) If SOE refuses to accept his nomination then he has right of appeal to Electoral Commission.

5.39 This Court takes note of the fact that no Writ has been issued by His Excellency the President of Fiji for any election.

5.40 Defendants by their Counsel submitted that Declaration 1 and 2 does not demonstrate any reasonable cause of action and is an abuse of court process.

5.41 Declaration 1 and 2 in the Originating Summons are as follows:-

- “1. The 2013 Constitution (the Constitution) and the Electoral Decree 2014 were not in force when the Plaintiff was found to have committed the relevant offences under the Exchange Control Act;*
- 2. That Sections 56 (2)(g) and s23 of the 2013 Constitution and the Electoral Decree 2014 respectively do not have retrospective application and/or effect in its disqualifying provisions as it relates to the Plaintiff.”*

5.42 It is abundantly clear that s56(2)(g) deals with “conviction” and not commissioning of the offence.

- 5.43 It is not disputed that the Plaintiff was convicted on 4 April 2014, which after the Constitution was promulgated (7 September 2013) and Electoral Decree was enacted (28 March 2014).
- 5.44 Plaintiff by his Senior Counsel Mr Singh stated that Plaintiff is not challenging Electoral Decree 2014, which would mean that Plaintiff is not challenging s23(4)(g) of Electoral Decree 2014.
- 5.45 There is no question that provision of section 23(4)(g) of Electoral Decree 2014 has similar prohibition as section 56(2)(g) of the Constitution.

6.0 Conclusion

6.1 This Court holds that:-

- (i) Declarations 1 and 2 in the Originating Summons has no reasonable cause of action and is an abuse of court process and such declaration sought is struck out;
- (ii) This Court does not have jurisdiction **“to entertain, or to grant any order, relief or remedy, in any proceedings of any nature whatsoever”** in respect to validity or constitutionality of Section 56(2)(g) of the Constitution which prohibits any person to a candidate for election to Parliament if that person “at any time during the **8 years immediately before being nominated**, been **convicted** of any offence under any law for which the maximum penalty is a term of imprisonment of 12 months or more;” and
- (iii) This Court cannot Order for Plaintiff to be nominated as Candidate for the election or that he is eligible to contest the election on the ground that that power is vested in SOE and Electoral Commission and Electoral Commission’s decision in this regard is not subject to review by this Court or any tribunal or adjudicated body.

7.0 Costs

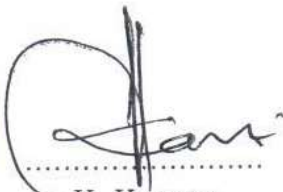

7.1 This Court takes into consideration that the parties filed Submissions and made oral submissions.

7.2 This Court also takes into consideration that Plaintiff's Counsel was put on notice about the jurisdiction issue which has been subject to this Court's ruling in **Waqavonovono** case, **Stephen Singh** case, **Padarath's** case and **One Hundred Sands Limited** case.

8.0 Orders

8.1 This Court makes following Orders:-

- (i) Originating Summons filed on 7 March 2018, is dismissed and struck out;
- (ii) Plaintiff do pay Defendants costs assessed in the sum two thousand five hundred dollars (\$2,500.00) within fourteen (14) days from date of this Ruling.



K. Kumar
JUDGE

At Suva

25 May 2018

Singh & Singh Lawyers for the Plaintiff

Office of the Solicitor-General for the Defendants