IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL PETITION NO. CBV 0019 of 2019
[Court of Appeal No. ABU 0099/17]

BETWEEN : **FRED WEHRENBERG**

Petitioner

AND :
1. **SEKAIA SULUKA**
2. **TAUVOLI**
3. **EPARAMA**
4. **COMMISSIONER OF POLICE**
5. **ATTORNEY GENERAL & MINISTER OF JUTSICE**

Respondents

Coram : **The Hon. Madam Justice Chandra Ekanayake**
Judge of the Supreme Court

The Hon. Mr. Justice Priyasath Dep
Judge of the Supreme Court

The Hon. Mr. Justice Priyantha Jayawardena
Judge of the Supreme Court

Counsel : **Petitioner in person**
Mr J. Mainavolau for the Respondents

Date of Hearing : **17th of August, 2022**

Date of Judgment : **26th of August, 2022**

JUDGMENT

Ekanayake, J

[1] I have read the judgment in draft of Justice Jayawardena. I agree with his reasoning and conclusions.

Dep, J

[2] I have read in draft the judgment of Jayawardena J and I agree with his reasons and conclusions.

Jayawardena, J

The Petition

Facts in Brief

[3] The Petitioner had filed a Writ of Summons and a Statement of Claim in the High Court of Lautoka claiming for damages. Thereafter, he had filed an amended Statement of Claim. In the said Statement of Claim, the Petitioner stated that he was physically and mentally tortured and subjected to cruel, inhumane, and harsh treatment by the 1st, 2nd and 3rd Respondents, who were Police Officers as the first cause of action. Further, he stated that the said Police Officers had instituted criminal proceedings in the Magistrate's Court with malice and without reasonable grounds. Hence, he was claiming damages against the Police Officers on the second cause of action.

[4] The said Respondents had filed a Statement of Defence and denied the allegations levelled against them in the said Statement of Claim. Further, they had subjected the Petitioner to strictest proof of the said allegations. Moreover, the said Respondents had pleaded statutory bar as a defence.

[5] Thereafter, the Petitioner had filed a reply to the said Statement of Defence, and re-iterated the allegations levelled against the said Respondents**.** Further, it was denied that the causes of action pleaded in the Statement of Claim are statutorily barred.

[6] After the pre-trial conference, the Petitioner had filed the following motions in court and sought leave of court in respect of the requests made in the said motions. i.e.,

(i) Motion – to accept the affidavit of subpoena, court clerk filed on 13.1.2015
(ii) Motion - filed on 10.5.2016 seeking leave to use affidavits (evidence in chief)
(iii) Motion to join his wife Walburga as the 2nd Plaintiff, filed on 25.11.2014

[7] The aforementioned applications had been opposed by the Respondents.

[8] The Respondents had requested the court to order the Petitioner to give oral evidence at the trial and to strike out the affidavits filed by the Petitioner for the reasons that in the said affidavits only facts should have pleaded and not law. Further, the affidavits should contain only facts that are within the knowledge of the deponent, as provided in Order 41 rule 5. Moreover, the affidavits filed in court should not contain hearsay evidence.

[9] After an inquiry, the learned judge had declined to allow the said motions filed by the Petitioner and made the following Orders;

"(a) I decline the defendant's application to strike out the affidavits filed by the plaintiff

(b) I direct that all witnesses be available to given evidence at the trial.

(c) The plaintiff's notice of motion filed on 10th May, 2016, is declined.

(d) The plaintiff's application to join his wife as a plaintiff is declined.

(e) The plaintiff's application to subpoena the former court clerk is declined.

(f) The defendants shall pay the plaintiff costs in the sum of $500.

(g) I order costs in the cause in respect of the four applications I have determined.

(h) This case will be called before the Master of the High Court of Labasa on 3rd March, 2017, at 9 a.m. to fix for hearing."

[10] Being aggrieved by the said ruling, the Petitioner had sought leave to appeal from the High Court. However, the said application had been refused by the court. The Orders of the said court are as follows;

"(a) The application of the plaintiff for leave to appeal Ruling of 17th February, 2017, declining the plaintiff's interlocutory applications, is declined.
(b) The plaintiff shall pay the defendants costs summarily assessed in a sum of $750.
(c) The parties will be notified of the date this case will be called before the Master in the High Court of Labasa, to fix a date for hearing."

[11] Being aggrieved by the said Order, the Petitioner had appealed to the Court of Appeal. After hearing the appeal, the Court of Appeal had dismissed the said appeal too. The Court of Appeal had made the following Orders;

"1. The appeal of the Appellant is dismissed and the trial may proceed.

2. The Interlocutory Orders of the High Court dated 27th February, 2017 and 3rd August 2017 are affirmed.

3. In all the circumstances, there will be no order for cost."

[12] Thereafter, the Petitioner had filed the instant application seeking special leave to proceed and to allow the appeal.

[13] The grounds of appeal urged before the Supreme Court are as follows;

Petition before the Supreme Court

Ground 1

That the Court of Appeal erred in law in holding that the learned High Court judge was correct when he found that the Petitioner's claims were personal and not vested jointly with his wife.

Ground 2

That the Court of Appeal erred in law in holding that the learned judge was correct in declining the Appellant's motion to call subpoena, the former court clerk to contradict the court record.

Ground 3

The Court of Appeal erred in law by dismissing the third ground of appeal and holding that they see no reason to interfere with the order of the learned judge.

Ground 4

The Court of Appeal erred in law by holding that the learned judge of the High Court had determined the matters on technicalities.

Ground 5

The Court of Appeal erred in law in dismissing the fifth ground of appeal by holding that the Petitioner had not addressed the learned judge's order of $750.00 made against him in his written submissions.

I will now consider the above-mentioned grounds of appeal raised by the Petitioner.

Ground 1

[14] The Petitioner submitted that the Court of Appeal had failed to consider the amended Writ of Summons, where it was stated that the Petitioner's claim is vested jointly with his wife.

[15] Further, the Court of Appeal had failed to consider that the Petitioner's wife was a joint property owner who was affected by the tortious actions of the Respondents and therefore, she is also entitled to claim the reliefs claimed by the Petitioner.

[16] A careful consideration of the Statement of Claim and the amended Statement of Claim shows that the first cause of action pleaded in the said Statement of Claim relates to damages for personal injuries caused to the Petitioner. The second cause of action is based on the malicious prosecution of the Petitioner. Order 15 rule 6(6), stipulates the applicable procedure applicable to addition of parties.

Order 15, rule 6(6) states;

"The addition or substitution of a new party shall be treated as necessary for the purpose of paragraph (5) (a) if, and only if, the Court is satisfied that-

(a) the new party is a necessary party to the action in that property is vested in him at law or in equity and the plaintiffs claim in respect of an equitable interest in that property is liable to be defeated unless the new party is joined; or

(b) the relevant cause of action is vested in the new party and the plaintiff jointly but not severally or

(c) the new party is the Attorney-General and the proceedings should have been brought by realtor proceedings in his name: or

(d) the new party is a company in which the plaintiff is a shareholder and on whose behalf the plaintiff is suing to enforce a right vested in the company; or

(e) the new party is sued jointly with the defendant and is not liable severally with him and failure to join the new party might render the claim unenforceable."

(emphasis added)

[17] A careful consideration of the amended Statement of Claim shows that the two causes of action stated in the said Statement of Claim are only applicable to the Petitioner. Thus, it is not possible to join the wife of the Petitioner in the instant case.

[18] In any event, the second cause of action pleaded in the said Statement of Claim is damages for malicious prosecution, which is only applicable to the Petitioner. Therefore, it is not possible to add the wife as a Plaintiff in the case.

[19] Furthermore, Order 15 rule 6 (5) states;

"No person shall be added or substituted as party after the expiry of any relevant period of limitation unless either –

(a) The relevant period was current at the date when proceedings were commenced and it is necessary for the determination of the action that the new party should be added, or substituted or

(b) *The relevant period arises under the provisions of subparagraph (l) of the proviso to paragraph 4(l) (d) of the Limitation Act and the court directs that these provisions should not apply to the action by or against the new party".*

(emphasis added)

[20] Having considered the materials in the instant case, I am of the opinion that the wife of the Petitioner *is not necessary for the determination of the action under reference.*

Ground 2

[21] The learned judge had disallowed an application made by the Petitioner to call subpoena, a former court clerk to show that one of the former judges had allowed the Petitioner to file a joint affidavit.

[22] In paragraph 3 of the affidavit dated 7th of July 2015, filed by the said former court clerk, stated that she can recall the former judge of the trial court informing the Petitioner to file a joint affidavit.

[23] It is not possible to lead evidence to contradict case records maintained by the courts. However, if there is an omission in the recording of proceedings in court, parties can file a motion before the judge who presided on that day, and with the consent of the said judge and the other parties, any error or omission in the proceedings can be rectified. However, such steps had not taken place in the instant case. Thus, I am of the opinion that it is not possible to challenge the court record by leading oral evidence at a later stage of a case. Further, I am of the opinion that the learned judge was correct in refusing to allow the Motion filed by the Petitioner to lead evidence of the said court clerk. Thus, I am of the opinion that the Court of Appel did not err in affirming the said order made by the trial judge.

Ground 3

[24] The Petitioner submitted that the learned judge had refused to allow the use of the combined affidavit and the supplementary affidavit filed by the Petitioner.

[25] Order 41 rule 2 allows affidavits by two or more deponents. Further, rule 10 permits the use of affidavits in court proceedings. Order 41 rule 1, stipulates the form of an affidavit. However, at the time the court allows an application to file a joint affidavit, the court is unaware of the contents of the affidavit that would be filled in court. Hence, once an affidavit is filed in court, the court is empowered to peruse the affidavit and decide whether the affidavit should be allowed to be produced in the proceedings of the case.

[26] It is pertinent to note that the request made by the said Respondents to strike out the affidavit tendered to court by the Petitioner had been refused by the trial judge. However, having considered the said affidavit, the court had directed the Petitioner to call the witnesses.

[27] In any event, it is not possible to decide a case based on the affidavits filed by the parties. Witnesses should give evidence in court, and they should be subject to cross-examination. The only exception to the above is to file evidence in chief by way of an affidavit with the permission of court.

[28] Further, deciding the procedure applicable to a case and the steps is entirely a matter for the trial judge and the appellate court should not interfere with the discretion used by a trial judge.

[29] In view of the above, I am of the opinion that the Court of Appeal has not erred in affirming the order of the trial judge.

Ground 4

[30] The Petitioner submitted that section 43(1) of the Human Rights Decree 2009, which states: *"Court must act according to equity, good conscience and the substantial merits of the case, without regard to technicalities"* was not complied with by the trial judge.

[31] The procedure that governs the trial before the High Court is stipulated in the High Court Act and the Rules published under the said Act. Thus, the courts are required to follow the said Act and the rules published thereunder.

[32] Further, section 43(1) of the Human Rights Decree 2009 does not override the provisions of the High Court Act and the rules. However, a careful consideration of the High Court case record shows that the trial judge had not been technical in making any of the orders in the case.

[33] Thus, I am of the opinion that the Court of Appeal did not err in affirming the order made by the learned High Court judge in rejecting the motions filed by the Petitioner.

Ground 5

[34] The appellant made submissions and stated that the said costs ordered by court was excessive. However, there are is no materials before the court to support that position. Hence, I am of the opinion that the Court of Appeal did not err in affirming the Order made by the High Court judge regarding the costs.

Consideration of Granting of Special Leave to Appeal

[35] The jurisdiction of the Supreme Court with respect to special leave to appeal is set out in section 7 of the Supreme Court Act, 1998 which states;

> *7(1) In exercising its jurisdiction under section [98 of the Constitution of the Republic of Fiji] with respect to … leave to appeal in any civil or criminal matter, the Supreme Court may, having regard to the circumstances of the case –*
>
> *(a) refuse to grant leave to appeal;*
>
> *(b) grant leave and dismiss the appeal or instead of dismissing the appeal make such orders as the circumstances of the case require; or*
>
> *(c) grant leave and allow the appeal and make such other orders as the circumstances of the case require.*
>
> *7(2) In relation to a criminal matter, the Supreme Court must not grant special leave to appeal unless-*
>
> *(a) A question of general legal importance is involved;*

(b) A substantial question of principle affecting the administration of criminal justice is involved; or

(c) Substantial and grave injustice may otherwise occur."

7(3) In relation to a civil matter (including a matter involving a constitutional question) the Supreme Court must not grant special leave to appeal unless the case rises-

a. A far reaching question of law;

b. A matter of great general or public importance;

c. A matter that is otherwise of substantial general interest to the administration of civil justice."

[36] The criteria laid down in section 7(3) of the Supreme Court Act, 1998 to obtain special leave to appeal shows that special leave to appeal to the Supreme Court cannot be obtained as a matter of course, but only after fulfilling the criteria set out by the Act.

[37] In view of the fact that the legislator has set out a criteria that needs to be satisfied to obtain special leave to appeal, it is necessary to consider whether the Petitioner has met the threshold set out in section 7(3) of the Supreme Court Act. Thus, it is necessary to consider whether the instant Petition contains any of the grounds set out in section 7(3) of the Supreme Court Act.

[38] I have considered the grounds of appeal, the questions of law stated in the petition and the submissions made by the Petitioner in court (oral and written submissions), and I am of the view that the issues in the instant application are only matters between the parties. Further, none of the grounds pleaded in the petition fall within the criteria set out in section 7(3) of the Supreme Court Act.

[39] Thus, I hold that the Petitioner has not satisfied the threshold contemplated in section 7(3) of the Supreme Court Act, 1998 to obtain special leave to appeal. Therefore, the application for special leave to appeal is refused.

[40] Further, the instant petition arises from an Interlocutory Order. The petitioner has not shown that there are exceptional circumstances where the intervention of this court is warranted.

[41] In ***K R Latchans Brothers Limited v Transport Control Board and Tui Davuillevu Buses Limited*** (Civil Appeal 12 of 1994) the Court of Appeal held;

> *"The granting of leave to appeal against interlocutory order in not appropriate except in very clear cases of incorrect application of the law. It is certainly not appropriate when the issue is whether discretion was exercised correctly unless it was exercised either for improper motives or as result of a particular misconception of the law.*
>
> *We do not agree that the intended question for the Court of Appeal involves a point of law of law of great significance. The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lord in Ashmore v Corp of Lloyd's [1992] 2 All ER 486.*
>
> *Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellant court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings."*

[42] Further, ***in re The Will of F.B. Gilbert (deceased) (1946) 46 S.R. Nsw 318 Jordan CJ at page 323*** *stated:*

> *"There is a material difference between an exercise of discretion on a point of practice of procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases would be delayed interminably and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercise of discretion in interlocutory applications from a judge in Chambers to a Court of Appeal."*

[43] In the circumstances, I am of the opinion that the instant application arising from an interlocutory order made by the trial judge does not warrant the intervention of this court.

[44] Accordingly, the application for special leave is refused.

Order

1. Application for special leave is refused.

2. The application is dismissed.

Hon. Madam Justice Chandra Ekanayake
JUDGE OF THE SUPREME COURT

SUPREME COURT FIJI

Hon. Mr. Justice Priyasath Dep
JUDGE OF THE SUPREME COURT

Hon. Mr. Justice Priyantha Jayawardena
JUDGE OF THE SUPREME COURT