SURESH CHARAN

v

S.M. SHAH & OTHERS

[COURT OF APPEAL, 1995 (Kapi, Thompson, Hillyer JJ.A) 8 March]

Civil Jurisdiction

Practice (Civil) - Judicial Review- power to grant leave - whether refusal of leave by High Court final or interlocutory.

The High Court refused leave to move for Judicial Review. The appellant sought to review the application in the Court of Appeal. HELD: (1) The Court of Appeal has no power to grant leave. (2) A refusal of leave by the High Court is an interlocutory order.

Case cited:

White v. Brunton [1984] QB 570

Appeal against refusal of leave by the High Court to move for Judicial Review

Appellant in person
D. Singh for the 1st & 3rd Respondents
Mrs. T. Jayatilleke for the 2nd Respondent

JUDGMENT OF THE COURT

In 1984 the applicants commenced proceedings in the court which was then the Supreme Court and which is now the High Court against the second respondent in respect of goods allegedly wrongfully distrained by bailiffs acting for the second respondent. In 1990 the applicants commenced proceedings in the Magistrates' Court in Suva in respect of some of those goods, that is to say the perishable goods. In June 1994 the first respondent, who was the Magistrate presiding at a hearing of those proceedings in the Magistrates' Court, discovered that the subject matter of those proceedings was included in the subject matter of proceedings commenced in the Supreme Court in 1984 in which the trial was then proceeding. On the basis that it was an abuse of the processes of the Court to pursue the same claim contemporaneously in two different courts, the first respondent struck out the applicants' claim.

Subsequently, but in consequence of his having done that, he ordered the applicants to pay the second respondent its costs incurred in the proceedings up to that date and also to repay to the second respondent an amount which the second respondent had paid to the applicants pursuant to an order for the payment of costs in respect of interlocutory matters in the proceedings. The second respondent then obtained a judgment debtor summons in order to enforce the

payment of that money. On 17 July 1994 the applicants applied to the High Court by ex parte summons for orders inter alia staying the proceedings on the judgment debtor summons and the enforcement of the order for payment of the costs by the applicants to the second respondent. On 20 July 1994 the applicants sought leave of the High Court to apply for review of the first respondent's decisions. The summons and the request for leave came before Byrne J. He dismissed with costs the application for leave for judicial review and made none of the stay orders requested. His reason for refusing leave was that the applicants had not exhausted the appeal avenues available to them.

The application in these proceedings relates to the dismissal of the application for judicial review. The applicants seek to have this Court decide that leave should be granted for the judicial review sought and to make a finding that His Lordship erred in law in refusing to grant the application for stay of execution of the judgment of the Magistrates' Court.

The proceedings in this Court were commenced by a notice of motion by which the applicants made "application for an order for leave of the Court of Appeal pursuant to the Order 53 Rule 3(2) of the High Court Rules, 1988 to apply for judicial review ..... by way of an appeal against the decision of Byrne J." The motion appears to assume that the procedure by which a person dissatisfied with refusal of leave to apply for judicial review is the same in Fiji as in England. In England the application for leave can be renewed before the Court of Appeal (O.59 r.14(3)) which may then grant or refuse leave. In Fiji this Court, as a creature of statute, has the powers conferred on it by statute. It is given no power to entertain a renewed application for leave. A person dissatisfied with refusal of leave by the High Court may appeal to this Court (Court of Appeal Act (Cap.12) section 12(1)). But, by reason of section 12(2)(f), such an appeal does not lie without the leave of this Court or of a judge of it, if the order refusing leave is an interlocutory order. However, in view of the provisions of rule 6 of the Court of Appeal Rules, read together with O.2 r.1 of the High Court Rules, we permitted Mr Charan to apply to amend his notice of motion so as to make it an application for leave to appeal against Byrne J.'s order.

Although the parties presented arguments on the basis that Byrne J's order was an interlocutory order and not a final order, we consider it desirable to deal with that question as the order did effectively conclude the proceedings in the High Court. Generally it may be said that an order is an interlocutory order if it is not a final order. However, neither term is defined by statute in Fiji, unlike in England where since October 1988 O.59 r.1A has provided how an order is to be identified as interlocutory or final. Before 1988, however, no such statutory assistance was provided in England and the Courts had been required to undertake the task of identification by reference to the general principles

underlying the common law. They found that there were two possible alternative approaches, the "order approach" and the "application approach". The "order approach"

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required the classification of an order as interlocutory or final by reference to its effect. If it brought the proceedings to an end, it was a final order; if it did not, it was an interlocutory order. The "application approach" looked to the application rather than the order actually made as giving identity to the order. The order was treated as final only if the entire cause or matter would be finally

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determined whichever way the court decided the application. Although the "order approach" was preferred by the English Court of Appeal in some early decisions, it was the "application approach" which prevailed. By 1984 that Court had no doubt of that when it gave its judgment in White v Brunton [1984] Q.B. 570.

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Although the courts in Fiji are not bound by decisions of the English Courts in which the common law has been developed or expounded, it is generally helpful to the orderly development of the law in Fiji to follow decisions of the English courts, unless there are strong reasons in any particular case for not doing so. We can discover no such strong reasons in the present instance and have come to the conclusion that the "application approach" should be adopted. On that

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basis the order refusing leave to apply for judicial review was, we are satisfied, an interlocutory order. Consequently the applicants require leave to appeal against it.

Documents brought to our notice by Mr Charan disclose that in 1990 Byrne J., in the proceedings in the High Court in respect of the illegal distraint, apparently

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expressed the view that, by reason of the provisions of section 4(2) of the Distress for Rent Act (Cap.36), the applicants should have brought proceedings in a Magistrates' Court in respect of the illegal distraint of the perishable goods. They disclose also that, although the applicants commenced proceedings in the Magistrates' Court, they contended that they were entitled to have the whole of their claim decided by the High Court, that in November 1993 Mr Charan, in

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the course of giving evidence in the High Court proceedings, informed Byrne J. that he intended to withdraw the claim in the Magistrates' Court but that by April 1994 he had not done so and that Miss Jayatilleke submitted to Byrne J. that the High Court should not deal with the part of the claim which related to the perishable goods. It was nevertheless at Miss Jayatilleke's insistence that two months later Mr Shah struck out the claim in the Magistrates' Court.

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At the time when we heard Mr Charan's application to amend the applicants' motion, Byrne J. had not delivered his judgment in respect of their claim. We did not know whether he intended to deal with the whole of the claim, as they wanted, or only the part not concerned with the perishable goods, as Miss Jayatilleke was urging in April 1994. It appeared to us that, if he adopted the

latter course, the applicants would be out of time to commence new proceedings in respect of the perishable goods in a Magistrates' Court and Miss Jayatilleke informed us that the second respondent would oppose an extension of time being granted for them to do so. In those circumstances we took the view that it would

not be fair for us to decide whether or not to allow the applicants to amend their motion until we knew whether Byrne J. had dealt with the whole of their claim or not. We informed the parties that we would reserve our judgment until after Byrne J. had delivered his.

Subsequently His Lordship delivered his judgment and we were provided with a copy of it. He dealt with the part of the applicants' claim which related to the perishable goods and gave judgment in their favour in respect of them, although not for the amount to which they contended that they were entitled. The Magistrates' Court would, therefore, no longer be able to deal with the matter, it being *res judicata*. Even though when the learned magistrate made his order that was not known to him, no useful purpose would be served now by a review of his order to strike out the applicants' action.

So far as the orders in respect of costs are concerned, we are unable to discern that there was any jurisdictional error; the learned magistrate, having stated that he was striking out the action as an abuse of process, was asked by the parties to award costs. He clearly had power to do so. He set a date when he would hear submissions and the parties were aware of that. We can discern no evidence of any breach of natural justice. Nor can we see any error of law on the face of the record which might justify an application for judicial review.

The Magistrate may possibly have erred on the merits in making the orders which he did in respect of costs. But any such error would not afford grounds for judicial review. It might have afforded grounds for an appeal against those orders; but the applicants did not give notice of an intention to appeal against them.

We have come to the conclusion, therefore, that, if we permitted Mr Charan to amend the applicants' notice of motion so as to make it an application for leave to appeal against Byrne J.'s order refusing leave to apply for judicial review, no useful purpose would be served thereby. For the reasons we have stated above the applicants could not succeed in obtaining such leave.

We turn now to the question of the costs of these proceedings. Normally costs follow the event; in the present case, however, the situation is rather unusual. Miss Jayatilleke was submitting to Byrne J. that the High Court should not deal with the part of the applicants' claim which related to the perishable goods. That could only be on the basis earlier mentioned by His Lordship that the proceedings should have been brought in the Magistrates' Court for those

goods. Miss Jayatilleke was nevertheless submitting in the Magistrates' Court that the claim should be struck out there because it was before the High Court. As a result the applicants were in a cleft stick. Understandably, they wanted to see what Byrne J. decided about the perishable goods. In the result it appears that those goods were dealt with in the High Court.

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The motion for review or for leave to appeal before us had the effect of keeping the situation open until Byrne J. delivered the substantive decision. To that extent the applicants have succeeded, even though in the end result the motion is dismissed. We are, therefore, of the view that each party should bear its own costs in this application.

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Decision

The applicants' request to be permitted to amend their notice of motion is refused and the motion is dismissed.

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Each party is to bear its own costs in this application.

(Appeal dismissed.)

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