IN THE FIJI COURT OF APPEAL
Civil Appeal No. 10 of 1987

Between:

SINGH ENTERPRISES LIMITED — Appellant

- and -

GOPAL GOUNDAR AND ANOR. — 1st Respondents

Mr. H. Patel for the Appellant
Dr. M.S. Sahukhan for the Respondents

Date of Hearing: 17 May 1988
Delivery of Judgment: 8 July 1988

RULING OF THE COURT

Dr. M.S. Sahukhan, Counsel for the 1st Respondents/Defendants has raised two preliminary objections, the first of which is that the Appellant has no right of appeal to this Court. He argues that Dyke J's judgment dismissing the Appellant/Plaintiff's application to enter judgment against the Respondents/Defendants under Order 14 of the Rules of the Supreme Court (now High Court) is tantamount to an order granting the Respondents/Defendants unconditional leave to defend. If this is held to be so then there is no doubt that by virtue of sub-section 2(b) of section 12 of the Fiji Court of Appeal Cap. 12 the Appellant Company is precluded from appealing to this Court.

Section 12(2)(b) of the Court of Appeal Act provides that no appeal shall lie from an order of the judge giving unconditional leave to defend an action.

Dr. Sahukhan relies on the decision of the English Court of Appeal in the Commissioners of Customs and Excise v. Anco Plant and Machinery Company Limited (1956) 3 All E.R. 59, to support his first ground of objection.

If Dr. Sahukhan is correct in his submission then this Court indeed has no jurisdiction to hear the appeal.

In the Anco case the Plaintiff endeavoured to pursue concurrently remedies under R.S.C. Order 14 as well as R.S.C. Order 14B. The latter Order was similar to our Supreme Court (now High Court) Rule 20 of Order 18 providing for procedure for trial without pleadings. The Master made an order under Order 14 giving Defendant conditional leave to defend. The Defendant appealed to a Judge who allowed the appeal and made an order under R.S.C. Order 14B i.e. that the action be entered for trial without further pleadings. The Plaintiff then appealed to the Court of Appeal which allowed the appeal.

The following observations of Jenkins L.J. at P61 of the Report encapsulates the ratio of the judgment -

> "The position was that Master HARWOOD made an order giving the defendants conditional leave to defend. Counsel for plaintiffs admits that that was an order which could only be made under R.S.C., Ord. 14. The order which came before COLLINGWOOD, J., allowed the appeal and gave the appropriate directions under R.S.C., Ord. 14B. It seems to me that, by allowing the defendants' appeal from an order giving conditional leave, what the learned judge did was to grant unconditional leave to defend; and, if that is right there is an end of the application, because of the prohibition against any appeal from such an order contained in s. 31(1)(c) of the Act of 1925."

On a hearing of a summons under Order 14, several courses are open to the Judge. He may -

(a) dismiss the plaintiff's application; or

(b) give judgment for the plaintiff; or

(c) give the defendant leave to defend the action, either

(i) unconditionally, or

(ii) on terms.

If the summons is dismissed, the parties are restored to the same position in the action as that in which they were before the application for summary judgment was made (see Supreme Court Practice 1985 note 14/7/5).

Dismissal may be for either of two reasons: that the case is not within Order 14 at all or that "it appears to the Court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend" (0.14 r.7(1)).

In the present case the main reason given by Dyke J. for dismissing the application was because the statement of claim was defective and by necessary implication the application was outside the purview of Order 14. The following passage from his decision makes this clear.

> "Now the statement of claim is far from clear because the two guarantees are said to be security against money owed by the first defendant to the plaintiff, and the money said to be owed by the first defendant to the plaintiff is put at $10,660.31. Why then is the plaintiff claiming $10,660.31 from the first defendant $6,000 from the second defendant and $7,000 from the third defendant - a total of $23,660.31? That is what the statement of claim states. And that is what the plaintiff is claiming in separate applications for summary judgment in accordance with Order 14 rule 2.
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> If I have that wrong the plaintiff has itself to blame for not making the claim intelligible. It may be that the total amount claimed by the plaintiff is $10,660.31 and that he first of all claims it from the first defendant, and failing that seeks to recover that amount from either the second or third defendants under their guarantees or from both of them. If that is so the statement of claim should have made it clear, and may well require amendment.
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> On that ground alone the applications by the plaintiff for summary judgment must fail."

We think it is clear that where an application under 0.14 is adjudged irregular in terms of r.7(1) the application would be dismissed with costs.

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The following statement in the Supreme Court Practice 1985 at page 136 (note 14/3-4(1)) put the obligations of the parties quite clearly:-

> "In every summons under O.14 the first considerations are (a) whether the case comes within the Order, see n. "Dismissal where the case is not within the Order", para. 14/7/2 and whether the plaintiff has satisfied preliminary requirements for proceeding under O.14, see n. "Preliminary requirements", para. 14/1/2. If the plaintiff fails to satisfy either of these considerations, the summons may be dismissed; if, however, these considerations are satisfied, the plaintiff will have established a prima facie case, and he becomes entitled to judgment. The burden, as it were, then shifts to the defendant to satisfy the Court why judgment should not be given against him."

If the application is regular on its face indicating a prima facie case of liability on the part of the defendant, the burden is on the latter to satisfy the Court in terms of O.14 r.3(1) as regards either of these two situations:-

(i) that there is an issue or question in dispute which ought to be tried; or

(ii) that there ought for some other reason to be a trial of that claim or part of the claim.

These situations are contemplated by O.14 r.4 and in particular paragraphs (1) and (3) which provide as follows:-

> "4.-(1) A defendant may show cause against an application under rule 1 by affidavit or otherwise to the satisfaction of the Court."
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> " (3) The Court may give a defendant against whom such an application is made leave to defend the action with respect to the claim, or the part of a claim, to which the application relates either unconditionally or on such terms as to giving security or time or mode of trial or otherwise as it thinks fit."

In the present case and in the light of Dyke J.'s finding noted above the application could not be said to have proceeded to the point where the defendant was procedurally obliged to show cause

and satisfy the Court in terms of 0.14 of rules 3 and 4. These two rules are complementary and contain the heart of the 0.14 procedure (see Supreme Court Practice 1985 note 14/3-4/1).

The distinguishable feature between the two cases is that in the Anco case the order under 0.14B was clearly tantamount to giving unconditional leave to defend because it approved the hearing of the action without further proceedings.

In the instant case the 0.14 application was dismissed on its merits under 0.14 r.7.

In our view under r.4 of 0.14 the question of granting leave to defend conditionally or otherwise only arises where the application is a proper one and a prima facie case is raised by the plaintiff and where defendant shows cause why order should not be made.

In these circumstances we are of the view that Dr. Sahukhan's submission that Dyke J's judgment was tantamount to giving Respondents/ Defendants unconditional leave to defend, was misconceived. The first ground of objections must therefore fail.

Dr. Sahukhan's second and alternative ground of objection is that the Appellant has no right to have his appeal heard because the appeal is against an interlocutory order or judgment which requires leave and no such leave has been obtained. There is no doubt in our minds that Dyke J's judgment was an interlocutory one because it neither finally disposed of the rights of parties nor did it finally dispose of the matter in dispute. As such leave to appeal from the judgment was required because sub-section 2(f) of section 12 of the Act insofar as relevant to these proceedings provides that no appeal shall lie:-

> "(f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge....."

It is common ground leave was not sought from the Court below nor has a formal application for leave been filed in this Court.

Mr. H. M. Patel, Counsel for the Appellant has submitted that section 17 of the Act gives this Court very wide powers to grant leave and asks this Court's indulgence to exercise discretion in favour of the Appellant by granting such leave on his verbal application.

Dr. Sahukhan has countered this argument by saying that this Court has no power to deal with the application for leave because under Rule 26(3) of the Court of Appeal Rules, the application should in the first instance be made to the Court below. Rule 26 in full reads as follows:-

> "(1) Every application to a judge of the Court of Appeal shall be by summons in chambers, and the provisions of the Supreme Court rules shall apply thereto.
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> (2) Any application to the Court of Appeal for leave to appeal (whether made before or after the expiration of the time for appealing) shall be made on notice to the party or parties affected.
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> (3) Wherever under these rules an application may be made either to the Court below or to the Court of Appeal it shall be made in the first instance to the Court below."

We are satisfied that this Court has the power to entertain an application seeking leave to appeal even though the application is required to be made in the Court below in the first instance as prescribed by Rule 26(3) of the Court of Appeal Rules. In short this Court has the power to waive certain rules and give leave in appropriate cases subject to such terms as may be warranted in the interest of justice or to avoid further delay. We say this having regard to the wide powers vested in this Court by sections 13, 16 and 17 of the Court of Appeal Act. These read as follows:-

> "Section 13:
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> For all the purposes of and incidental to the hearing and determination of any appeal under this Part and amendment, execution and enforcement of any order, judgment or decision made thereon, the Court of Appeal shall have all the power, authority and jurisdiction of the Supreme Court and such power and authority as may be prescribed by rules of Court. (Amended by 37 of 1965, s.9.)

Section 16:

Subject to the provisions of section 17, the Court of Appeal shall not entertain any appeal made under the provisions of this Part unless the appellant has fulfilled all the conditions of appeal as prescribed by rules of Court.

Section 17:

Notwithstanding anything herein before contained, the Court of Appeal may entertain an appeal made under the provisions of this Part on any terms which it thinks just."

Having said that we have the power to waive certain rules in appropriate cases we ought to emphasise that this court's powers will not be exercised lightly and the applicant will bear a heavy burden in satisfying this Court that the relevant rules ought to be waived or relaxed.

Dr. Sahukhan referred us to this Court's decision in Graham & Co. v. British American Insurance Co. Ltd. in Appeal No. 25 of 1978. This was an appeal against an order by the Chief Justice refusing to dismiss an action for want of prosecution.

At the hearing, the Court of Appeal (per Gould V.P.) noted that the appeal was against an interlocutory order and no leave had been obtained. Thereupon Dr. Sahukhan verbally sought leave to appeal. In refusing leave the Court ordered as follows:-

"COURT: The Appellant had ample notice that leave to Appeal was necessary and disregarded it. We therefore do not give leave to appeal at this late date.

Had we been in a position to deal with the matter on the merits we are firmly of the opinion that there was no reason at all for this Court to interfere with the Chief Justice's exercise of his discretion.

BY COURT: Application for leave to appeal refused. Appeal struck out with costs to the respondent."

Dr. Sahukhan had cited the decision in Graham & Co's appeal in support of his argument that this Court has no power to deal with

an application for leave when the application should have been made first in the Court below. In fact the decision is a precedent for the contrary view that this Court has the power but as we have said such power will not be exercised lightly. We have already heard Mr. Patel's argument in support of his application although we had not formally entertained his application to be heard. We however have no hesitation in refusing his application for leave to appeal because this appeal is against an interlocutory order which cannot be appealed against without leave. No reason have been advanced why an application was not made in the Court below nor why no formal application was filed in this Court. Mr. Patel cannot argue that he is taken by surprise in respect of the 2nd ground of objection as he was in respect of the 1st ground which involved a novel point.

Furthermore we are of the clear view that had we been in a position to deal with the application for leave on merits we would have no grounds to interfere with Dyke J's decision to refuse summary judgment. Where on the face of the record it is patently clear that the appeal is without merit this fact can be taken into account in deciding whether or not leave to appeal should be granted.

Leave to appeal at this late stage is refused. The appeal is therefore struck out with costs to the 1st Respondents.

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President, Fiji Court of Appeal

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Justice of Appeal

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Justice of Appeal