IN THE FIJI COURT OF APPEAL
CIVIL APPEAL NO.15 OF 1989

Between:

KISHORE CHAND
GEORGE TRANSPORT LIMITED — Appellant

- and -

BRIJ LAL
RAJNEEL RAKESH LAL
SHALINI RAJINI LAL — Respondents

Mr. V. Parmanandam for the Appellant/Applicant
Mr. V. Maharaj for the Respondents

APPLICATION FOR A STAY OF EXECUTION
PENDING APPEAL

(IN CHAMBERS)

DECISION

This is an application by the Appellant George Transport Limited (Original 2nd named Defendant) for a stay of execution pending appeal.

The Respondents (the Original Plaintiffs) are a father and his 2 sons. They were injured in 1983 whilst travelling as passengers in a bus driven by Kishore Chand (1st Original Defendant) an employee of the Appellant Company who owned the bus. Kishore Chand was charged and convicted in January 1984 for Dangerous Driving. The Plaintiff sued the Defendants for damages for negligence in two separate actions which were subsequently consolidated - Writ No. 274 of 1986 issued by Brij Lal on his own behalf and Writ No. 518 of 1986 as father and next of kin of his infant children Rajneel Rakesh Lal and Shalini Rajini Lal.

No affidavit of service of the writs were filed, but appearances in both cases were entered by Messrs Sherani and Company who were the solicitors for the New India Insurance Company the 3rd Party Insurers of George Transport Limited. On 9th May 1989 judgment by consent was entered in favour of Brij Lal for damages to be assessed. Similarly judgment by consent was entered in favour of Brij Lal's children on 11th July 1986.

When the assessment of damages came up for hearing before the then Chief Registrar on 23.10.86 Mr. Noor Dean appeared as counsel for the Defendants. According to the file record Mr. Dean told the Chief Registrar as follows:-

> "Won't be ready to proceed - all I have is writs (Statement of Claim - No way to verify defence - liability is admitted - have just been instructed today - duty bound to do it properly."

The Chief Registrar adjourned the hearing to 30th October 1986 to enable the defence counsel to prepare his case. Costs of the day for consolidated assessment proceedings were awarded against the Defendants.

On 30.10.86 neither the Defendants nor Mr. Dean appeared although the New India Insurance Company was represented by counsel. The assessment proceeded. The Chief Registrar gave his decision on 2.10.87. He awarded Brij Lal a total of $19,591.15 (inclusive of interest to 30.10.86). His two children were awarded a total of $1030.00. A further sum of $50 was added as costs for the "aborted hearing" of 23.10.86 thus making a grand total of $20,671.15. The costs of the assessment proceedings were ordered to be taxed if not agreed.

On October 14, 1988 the 2nd Defendant moved the High Court to set aside judgment that is a little over a year after the damages were assessed and issued. The application was heard by Palmer J. who in a 6-page judgment dismissed the application with

81

costs. In the course of his judgment Palmer J. stated as follows:-

"The Defendant submitted that the consent judgment was obtained by fraud. It had been obtained by a stranger to the action. It was irregular and therefore the threshold question of how to set aside a consent judgment did not arise.

The Plaintiff submitted that the Insurance Co. had the right to conduct the action. The judgment was regular and requires appeal or fresh action to get rid of it. If there was irregularity it was waived by Mr. Dean's appearance. Defendant should have acted promptly. Affidavit shows no merits.

Counsel told the Chief Registrar, and it is not contested, that the New India Assurance Co. was the Defendant's third party insurer. I find accordingly and also that it was an "approved insurance company" for the purpose of the Motor Vehicles (Third Party Insurance) Act. Under Section 17 of the Act the company had the right to take over the conduct and control of the action on behalf of the Defendant. Nothing in the section requires the company to first seek the insured's approval or consent (so held in Fiji Insurance Co. Ltd. v. Lami Builders Ltd. 274/76 - per Kermode, J.).

It is well established that the insurer under this type of legislation - or policy - has the right to conduct the action in the common interest of itself and the insured (see e.g. Groom v. Crocker 1939 1KB 194, 1938, 2 AER 394). And this is so even if the ultimate judgment exceeds its limit of liability, so long as its conduct of the action is in good faith and without negligence (Hensen v. Marco Engineering 1948 VLR 198, 208).

There is no suggestion that the company here acted other than in good faith or acted negligently. I therefore hold that the judgment was regular.

To set aside a regular consent judgment requires a fresh action. This is clear from the authorities, some of which I reviewed in State Transport Ltd. v. Housing Authority, Civil Action 271/88 (18.1.89).

However, if I am wrong in holding the judgment to be regular and I do have a discretion in the matter I would not exercise it in favour of the Defendant for these reasons:-

Interlocutory judgment was entered 3 years ago. I accept Counsel's statement to the Chief Registrar that the company communicated with the Defendant before this

happened and again when notice of assessment of damages was filed. This was a courtesy which it was not obliged to extend. The Defendant did nothing until the last moment before the assessment in October, 1986. The assessment was issued in October, 1987. The affidavit in support is evasive and inadequate. The Defendant declined 3 separate express invitations by this court to supplement it. I do not accept that the Defendant was taken by surprise in September 1988 by a Section 221 Notice under the Companies Act nor that he made no enquiry from Mr. Dean or anyone else as to what the state of the action was in the 2 years since he instructed Mr. Dean. There has been inordinate delay.

Moreover no defence is being put forward. I note that the Plaintiffs were passengers in the Defendant's bus and that its driver has been convicted in respect of the incident.

Order 2 rule 2 of the High Court Rules provides that an application to set aside for irregularity "shall not be allowed unless it is made within a reasonable time..." and further, that "the grounds of objection must be stated in the summons...."

The present application does not answer either of the requirements. I regard this application as a delaying manoeuvre to keep the Plaintiffs out of their damages for injuries sustained 6 years ago."

On 25.5.89 Mr. Vijaya Parmanandam, Counsel for the Appellants filed a Notice of Appeal with the Fiji Court of Appeal against the judgment of Palmer J. upon the following grounds:-

"1. That the Learned Trial Judge erred in law in treating the matter as a consent judgment when the facts clearly shows that there were no instructions to consent and hence the matter ought to have been treated as a normal setting aside of an application.

2. The Learned Trial Judge erred in law in refusing to set aside the Judgment when the Judgment was in fact irregular.

3. The Learned Trial Judge erred in law in refusing to set aside the Judgment on the basis that no defence to the action was shown when in fact the Judgement was irregular and defective."

On the same day he filed in this Court an application to stay execution.

On 9th June 1989 he withdrew this application on the ground that he ought to have applied to the Court below in the first instance as required by Rule 26(3) of the Court of Appeal Rules. He then filed his

application for a stay order in the High Court on 12th June, 1986. This application was dismissed with costs by Palmer J. on 14th June, 1989. He considered this application too to be a delaying maneouvre. Mr. Parmanandam then on the same day filed a fresh application for a stay order for hearing before a single judge of the Fiji Court of Appeal.

In his affidavit filed in support of the stay application Mr. Maan Singh the Managing Director of the Appellant company states inter-alia:-

> "10. That my Insurers have at all times been willing to meet part of the Judgment debt and to that extent I have no objection if this sum is paid over to the Plaintiffs. I annex a copy of a letter dated 17th July 1989 for my Insurers solicitors marked with the letter "D".
>
> That I am also prepared to pay a sum of $10,000 (Ten Thousand Dollars) into Court in support of this application."

The material part of annexure "D" referred to in Mr. Maan Singh's affidavit, reads as follows:-

> "This is to confirm that our client's New India Assurance Company Limited, liability under the order of the Chief Registrar dated the 2nd day of October 1987 in the above matter is limited to as follows:-
>
> | | | |
> |---|---|---|
> | Brij Lal | - | $ 4,000.00 |
> | Rajneel Rakesh Lal | - | 500.00 |
> | Shalini Rajini Lal | - | 500.00 |
> | Special Damages | - | 30.00 |
> | | | $ 5,030.00 |

From the affidavit of Mr. Maan Singh and that of Brij Lal filed in reply, it is clear that Mr. Maan Singh voluntarily went to the Respondent solicitors's office on 28th June 1989 and made a proposal for the settlement of the judgment debt on terms apparently agreed to between himself and Brij Lal but on the initiative Mr. Maan Singh himself. Amongst the terms proposed were, briefly, that the Appellant company would admit the judgment debt and would pay not less than $11,000 on or

before 31st day of July 1989, and the balance by instalments. But the conditional confirmation by Mr. Vijay Parmanandam of the terms of settlement forwarded to him by Mr. Maharaj and the filing of the stay application led to the collapse of the settlement. (See Annexures "D", "E" and "F"). Mr. Brij Lal's affidavit dated 20th July 1989.

Mr. Maharaj contends that there was never any genuine desire for settlement and that the negotiations were merely delaying tactics.

Having regard to the history of this case and bearing in mind the grounds of appeal, the affidavits filed and the arguments advanced by both sides I am clearly of the view:-

(1) That there was undue delay on the part of the Appellant Company in applying to set aside judgment although it was aware that interlocutory judgment had been entered against it even before assessment proceedings started.

(2) The Appellant Company has not shown and indeed has not even attempted to show that it has a good defence to the original claim for damages arising out of negligence.

(3) That the series of applications and the attempted settlement are indeed indicative of delaying tactics.

(4) That the Appellant has failed to show that special circumstances exist which warrant granting of a stay order. Nor has it been able to satisfy me that in the event of damages and costs being paid there is no reasonable prospect of getting them back if the appeal succeeds.

(5) That the Respondents are indeed suffering an injustice by the continuing delay. Even the amount in respect of which the Insurers have admitted liability has not been paid to the Respondents presumably because of the pendency of an appeal and a stay application.

Furthermore I must bear in mind that additional costs have also been awarded in favour of the Respondents since 2nd October 1987 in respect of subsequent applications.

In the circumstances it would be manifestly unfair to the Respondents if I were to further withhold from them the enjoyment of the fruits of their successful litigation by making a stay order.

Consequently this application is dismissed with costs to the Respondents.

(Sgd) Moti Tikaram

.....

(Sir Moti Tikaram)
Justice of Appeal

10 August 1989