

IN THE FIJI COURT OF APPEAL

327

CIVIL JURISDICTION

CIVIL APPEAL NO. 3 OF 1992  
(High Crt Action No. 659 of 1985)

BETWEEN:

1. SURESH SUSHIL CHANDRA CHARAN
2. ANURADHA CHARAN Appellants/Applicants

and

SUVA CITY COUNCIL Respondent

*Mr Suresh Charan in person for both Applicants*  
*Ms T. Jayatilleke for the Respondent*

Date and Place of Hearing: 14th July, 1994, in Chambers, Suva  
Date of Decision: 21st July, 1994

**DECISION**  
(In Chambers)

On the 17/6/94 the Applicants filed a motion for an order that they "be allowed to accept the monies payable pursuant to the decision of the Court of Appeal dated 24/5/94 without prejudice to their right of appeal to the Supreme Court".

The 1st named Applicant is the husband of the 2nd named Applicant Anuradha Charan.

14th July, 1994 was assigned as the date of hearing for this motion.

By letter dated 27th June, 1994 Applicant Suresh Charan requested the Registrar that the motion be heard before the 4th of July, 1994 "as I am obliged by rules of the Court to file my appeal on or before the 4th of July 1994, and sealing of the order will prevent hearing of the application".

I granted the request on 28/6/94 for an earlier hearing, i.e. on the same date on which the written request was actually received in the Registry and ordered that the motion be brought forward for hearing at 9.00 a.m. on Friday 1st July, 1994. Subsequent events show that I ought not to have granted the application as the request for an earlier hearing of the motion was really meaningless.

On 5th July, 1994 the Applicants filed for sealing the order in the judgment of the Court of Appeal delivered on 24/5/94. On the same date, i.e. 5/7/94 they filed a Notice of Appeal to the Supreme Court which I understand they were entitled to do as a matter of right under Section 8(1)(b) of the Supreme Court Decree, 1991 if the matter in dispute is \$20,000 or upwards in value.

As far as the present motion is concerned the Applicants did not serve it on the Respondent until 29th of June, 1994 and

therefore the service was short in that 2 clear days were not allowed for (see O.8 R.(2)(2)).

The Respondent nevertheless appeared on Friday 1st July, 1994 by its Counsel Ms Jayatilleke but complained of short service and asked for an adjournment to file an affidavit in reply.

If the Applicants were not in a position to uplift and serve the documents in time then the proper course for them was to ask for another date.

On 1st July, 1994 I also indicated to the Applicant Suresh Charan that there was no need for the motion before me as all that the Applicants had to do was say in their letter of acceptance to the Suva City Council that they were accepting the cheque tendered in purported satisfaction of the Court's judgment without prejudice to their right of appeal. Of course there was nothing to stop them from returning the cheque if the amount was inadequate or if they felt they would compromise their right of appeal if the cheque was to be accepted only as full and final satisfaction of the judgment debt. Mr Charan said he was satisfied with my observations and wished to withdraw his application on condition that each party paid its own costs.

Ms Jayatilleke submitted that it was only proper that the Applicants pay the Respondent's costs for the day because of the

short service and as the application was unnecessary.

Mr Charan said that unless the Respondent agreed to pay its own costs he would proceed with the application. I then adjourned the hearing to 14th July, 1994, granted leave to Applicant to file and serve supplementary affidavit on or before 4th July, 1994 and also ordered the Respondent to file an affidavit in reply before 11 July, 1994.

When the hearing commenced on 14/7/94 Mr Charan argued in support of his motion but finally at his own initiative said that the issue was now a "dead one" as he had already filed the Notice of Appeal and had written to Suva City Council rejecting the payment. He also said that the proper avenue open to him was to enforce the Court of Appeal judgment as his appeal was directed to seeking a larger sum than awarded.

The only issue before me therefore is that of costs.

However, the affidavit deposed to by Mr Charan and filed by him on 12/7/94 without leave is a matter of great concern to this Court because the contents are prima facie irrelevant, scandalous and an abuse of due process of law. Ms Jayatilleke had every right to complain about the filing of the affidavit without leave as well as about the contents as they constituted a personal attack on her character and professional integrity.

Ms Jayatilleke has indicated that she proposes to take her own action regarding the allegation against her. So I have allowed the offensive affidavit to remain on the file but reserve the right to take such action or make such order or orders as I may deem appropriate.

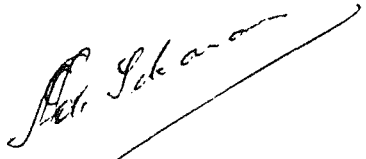
I have examined all relevant documents and have considered submissions made by both sides. There is no doubt in my mind that the application was made without any reasonable cause. Even if there was some justification for bringing the motion and even if a single judge had jurisdiction to make the order sought the Respondent is entitled to its cost for the proceedings on 1st July, 1994 because of short service. A further hearing date had to be assigned because of Mr Charan's insistence that each party pay its own costs as a condition for withdrawing his motion.

Having already filed the Notice of Appeal and having already allegedly returned S.C.C.'s cheque Mr Charan needlessly persisted in making submissions on 14/7/94 in support of his motion but suddenly made a volte-face and abandoned the motion and withdrew it. The Respondent had filed an affidavit in reply and had by its Counsel come prepared to oppose the application. I see no reason why the Applicants should not be mulct with costs for the proceedings on 14/7/94 also.

In awarding costs the Court is entitled to take into account, inter alia, the conduct of the parties provided it is linked to the proceedings before the Court.

Order

Motion withdrawn and dismissed with full costs of the proceedings to the Respondent. Costs to be taxed if not agreed upon.

  
Sir Moti Tikaram  
President, Fiji Court of Appeal