

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. 25 OF 1990
(Lautoka Judicial Review No. 1/88)

BETWEEN:

YUSUF MOHAMMED Appellant

and

LACHMAN SINGH
SUREND PRASAD Respondents

Counsel for the Appellant/Applicant: Mr S.D. Sahu Khan
Counsel for the Respondents : Mr V.P. Mishra

Dates and Place of Hearing: 17 February 1995, 8 May 1995 and 22 May 1995, Suva

Delivery of Judgment : 25 May 1995

JUDGMENT OF THE COURT

On 15 May 1990 the Appellant Yusuf Mohammed filed a Notice of Appeal in this Court through his Solicitors Messrs Sahu Khan & Sahu Khan. The appeal seeks to set aside a decision of the Lautoka High Court given on 30 March 1990 whereby it granted certiorari of, and quashed, an interlocutory order made by the Agricultural Landlord & Tenant Tribunal in Reference No. WD 138 of 1986.

After filing the appeal the Appellant failed to apply to the Registrar to fix security for costs as required by Rule 17(1)(c) of the Court of Appeal Rules. The whole of Rule 17 reads as follows:-

"17.-(1) The appellant shall-

- (a) upon filing the notice of appeal, pay to the Registrar the fee for setting down the appeal;*
- (b) upon request by the Registrar deposit with the Registrar such sums as he shall assess as the probable expense for the preparation, certification and copying of the record; and*
- (c) within 30 days of service of the notice of appeal, apply to the Registrar to fix the amount and nature of the security to be given by him for the prosecution of the appeal, and for the payment of all such costs as may be ordered to be paid by him, or, as the case may be, to dispense with such security.*

(2) In the event of non-compliance with paragraph (1) or in the event of any security required to be given not being given, or being only partly given, within the time directed, or within such extended time as a judge of the Supreme Court may allow, all proceedings in the appeal shall be stayed, unless the Court of Appeal shall otherwise order, and the appeal shall be listed for the next, or any subsequent, sitting of the Court of Appeal for a formal order of dismissal."

Indeed the Appellant took no further steps to have the appeal listed for hearing.

On 5 March 1992 this Court issued a "Call-Over" Notice returnable on 30 March 1992. The endorsement of service on the reverse side of the Notice on the Court file shows that the Notice was served on the office of Messrs Mehboob Raza & Associates, the then City Agents for Messrs Sabu Khan & Sabu Khan. But the endorsement is not signed.

On 30 March 1992 there was no appearance by or on behalf of the Appellant. Mr V.P. Mishra appeared for the Respondents.

The then President of the Court Helsham J. "struck out" the appeal.

On 1 April 1992 the Registrar wrote to Messrs Sahu Khan & Sahu Khan as follows:-

*"re : CIVIL APPEAL NO: 25/90 - YUSUF MOHAMMED v. LATCHMAN
SINGH & SUREND PRASAD*

The above appeal was for call-over on Monday 30th March, 1992 at 10.30 a.m. and because of your non-appearance or appearance made on your behalf, the same was struck out with liberty to apply to have this matter restored to the list."

As far as the Court record is concerned there was no response from Messrs Sahu Khan & Sahu Khan. This Court then of its own motion listed the appeal for dismissal on 17 February 1995 and issued a 'Summons to Show Cause' why the appeal should not be dismissed for want of prosecution. Over 5 years have now elapsed from the time the Notice of Appeal was filed. Lachman Singh, one of the Respondents, has in the meantime died.

On 17 February 1995 Mr A. Khan appeared for the Appellant and Mr V.P. Mishra for the Respondents. The Court was

constituted by two judges, the President of the Court being of the opinion that it was impracticable to constitute a Court of 3 judges. This is permitted by S.6(2) of the Court of Appeal Act. Furthermore, there was no objection by either Counsel.

Mr Khan contended that the solicitors for the Appellant had sent a reply to the Registrar on 24 April 1992. The gist of the reply was -

- (a) that they were not informed that the matter was listed for call-over on 1 March 1991;
- (b) that a request was made to restore the appeal to the list.

As already indicated there is no record of any such letter being received by the Court Registry. Mr Mishra also informed the Court that he certainly did not receive a copy of the alleged letter from Messrs Sahu Khan & Sahu Khan. He further pointed out that no application for fixing the amount and nature of security for costs was ever made. He, therefore, objected to any restoration.

The Court then gave Counsel for the Appellant an opportunity to rectify the situation by ordering the Appellant

to file and serve by 10 March 1995 a notice of motion supported by an affidavit applying for the appeal to be restored to the hearing list.

The Court also decreed that if the above order was not complied with the appeal would stand dismissed.

The Appellant failed to comply with the Court's order within the time stipulated. He did, however, file a notice of motion supported by affidavit on 14 March 1995. The matter was then listed for hearing on Monday 8 May 1995. In the meantime on 31 March 1995 the Respondents sealed the Court's Order of 17 February 1995.

Messrs Mishra & Co. also protested by letter dated 13 April 1995 that the motion should never have been accepted. It was accepted through an oversight. But as the matter was already listed it came up for hearing on the scheduled date, i.e. on 8 May 1995. However, the application was again adjourned to 22 May 1995 to enable Counsel for the Respondents to file an affidavit in reply. On 22 May 1995 Mr S.C. Sahu Khan, who appeared for the Appellant, sought a variation of the Court's Order of 17 February 1995 to extend to 14 March 1995 the time for filing the notice of motion. He said that Mr A. Khan, his City Agent, had misinformed him of the date by

which the notice had to be filed. Mr Mishra opposed the application, saying that because the Order had been perfected by sealing, it could not be disturbed. Therefore, there was no need for him to file an affidavit in reply.

Generally, even when an Order has not been perfected, a Court will not vary it except for good cause. This was a matter which this Court discussed fully in Charan v Shah (Civil Appeal No. 29 of 1994: judgment delivered on 19 May 1995). The Appellant did not allege that the Court or the parties had had any misconceptions of fact or law when the Court made its Order.

The Order we made on 17 February 1995 was a self-executing one. In our view we should not, on the facts of this case, set aside our Order and reopen the matter to vary it. The Order took the form of a judgment or decision once the condition precedent was not complied with. There is no room here for the application of the 'Slip-Rule'. (See O.20 r.10 of the High Court Rules 1988.) Nor is there any question of misapprehension as to any question of law or fact on the part of the judges involved.

There are in our view no merits in the present application for the following reasons viewed in their totality:

- (1) Appellant's failure to prosecute the appeal before Helsham P. made his Order on 30 March 1992. A period of nearly two years had elapsed from the time of filing of the Notice of Appeal to the 'Call-Over' on that date.

- (2) Even if the Appellant had not received notice of "Call-Over" he did receive the Registrar's letter dated 1 April 1992 (already quoted). Although Appellant's Counsel says he wrote to the Registrar asking for restoration of the appeal no such letter was received by the Court. Nor was a copy served on the Respondents. The Appellant took no further steps when he did not hear from the Registrar. The proper course for him or his Counsel was to enquire and then file an inter partes motion supported by an affidavit seeking restoration of the appeal to the list. He allowed matters to drag on for nearly three years until he received a notice to show cause with 30 March 1995 as the return date. The delay has been inordinate and inexcusable and to allow the appeal to proceed would be to allow an abuse of the process of the Court.

(3) The appeal has its genesis in a landlord and tenant dispute that goes back to at least 1986. It is directed to reopening a matter that the High Court found to have been settled in 1986. Prima facie the prospects of success, if the appeal were to be heard, appear to be minimal; if it were successful, the unfairness and prejudice to the surviving Respondent would be enormous bearing in mind that the other Respondent is already dead.

We would add that the Appellant did not apply to vary the Court's Order of 17 February 1995 until we suggested during the hearing on 22 May 1995 that he should do so. Mr Sahu Khan then made the application orally. For the reasons we have given above we are satisfied that the Order should not be varied now, even if (contrary to Mr Mishra's submission) that is possible.

The application before us for variation of the Order of 17 February 1995 is dismissed with costs to the Respondents. The appeal, therefore, stands dismissed with effect from 11 March 1995.

M. T. Karam

 Sir Moti Tikaram
President

I. R. Thompson

 Mr Justice Ian Thompson
Judge of Appeal