

IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO. ABU0022 OF 1997

(Suva High Court Civil Action No. HBC0233 of 1993)

BETWEEN:

PETER SUJENDRA SUNDAR

(f/n Ram Sundar)

1<sup>st</sup> Appellant

CONCAVE INVESTMENT LTD.

2<sup>nd</sup> Appellant

and

CHANDRIKA PRASAD

(f/n Badri Maharaj)

Respondent

*Dr M.S. Sahu Khan* for the Appellants

*Mr H. Nagin* for the Respondent

DECISION

(Extension of time to file Notice and Grounds of Appeal)

The 1<sup>st</sup> and 2<sup>nd</sup> Appellants were 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs in the Court below.

On 28 November 1996 Scott J. dismissed the Plaintiffs' claim and the Defendant's counterclaim.

On 11 December 1996 the Respondent sealed the High Court's judgment but did not serve it on the Appellants.

On 9 April 1997 the Appellants also sealed the judgment.

On 2 May 1997 the Appellants filed a Notice and Grounds of Appeal in the Fiji Court of Appeal.

On 26 May 1997 the Appellants filed summons for security for costs as required by Rule 17 of the Court of Appeal Rules. When the matter came before the Deputy Registrar on 5 June 1997 to fix the security of costs Counsel for the Respondent took objection to the proceedings on the ground that the appeal had been filed out of time.

Under Rule 16 of the Court of Appeal Rules the Appellants had 6 weeks within which to file their appeal; the 6 weeks period starts to run from the date on which the judgment or order of the Court below was signed, entered or otherwise perfected.

Mr Nagin's argument therefore was that the 6 weeks period started to run from 11 December 1996 and therefore the Appellants were well out of time. As Mr Nagin's client was not willing to consent to the late appeal Dr Sahu Khan applied on 26 August 1997 to a single judge for leave to appeal out of time.

Paragraphs 5 to 13 of Manju Lata's affidavit dated 15 October 1997 filed in support of the application read as follows:-

5. THAT the First Appellant was married to Vijay Kumar's sister and Vijay Kumar is my husband and accordingly, we are all families and Vijay Kumar is also a director and shareholder of the Second Appellant Company.
6. THAT my husband's mother died on the 21st day of November, 1996 and the Judgment was I verily believe delivered on the 28th day of November, 1996 and accordingly, the matter for appeal could not be discussed amongst the Appellants and our Solicitors.
7. THAT further, the First Appellant's wife who was my sister-in-law was very ill and suffering from terminal cancer and after her mother's death she became extremely ill and eventually died on the 21st day of December, 1996.
8. THAT religious rites pertaining to both the deaths had to be performed according to the Hindu religion.
9. THAT after the death of his wife (being my husband's mother) the father of Vijay Kumar namely Narayan Prasad became very sick and suffered heart attack and had to be admitted in hospital five times and he is 85 years of age and accordingly, not only the religious rites of the two deaths in the family which took place within such short period and also the serious illness of my husband Vijay Kumar's father Narayan Prasad all the family members were involved and accordingly it did not give us much time to discuss the matter of appeal and to give full instructions to the Solicitors in the matter.
10. THAT accordingly, according to our religious rites all the rites had to be completed and attended to and the matter of appeal could not be discussed.
11. THAT it was only after all that that we were able to discuss the issue of the appeal herein.
12. THAT accordingly, it was then that the Solicitors were instructed to appeal in the matter in or about April, 1997.
13. THAT although the Order was sealed by the Respondent on 10th day of December 1996 it was not served on the Appellants or their solicitors at all."

In his written submissions Dr Sahu Khan has inter alia submitted as follows -



4. EVEN the excuse of death in the family does not explain the 6 to 7 months delay. The two deaths that the Appellant's talk about happened on 21<sup>st</sup> November, 1996 and 21st December, 1996 respectively.

5. SURELY Hindu Religion does not stop discussion on appeals for 6 months. In Hindu Religion the official mourning period is only 13 days. Even then all important business does not stop for that period. People still go about their work in the 13 day period."

I am unable to find any Rule or Practice Direction that require a party sealing or perfecting a judgment to serve a copy thereof on the other party. In the absence of any such Rule or Practice Direction the prudent thing for any prospective appellant to do is to search the file or make an application, if possible within time, for extension of time within which to appeal.

However, I agree that it makes good sense that as a general rule any party perfecting a judgment should automatically serve a copy on the other party even if there is no Rule requiring this to be done. Everyone will benefit from such a practice. Nevertheless in the absence of any such Rule the onus always remains with the Appellants to act expeditiously and in compliance with the prescribed Rules.

As has been said in the past on many occasions that the object of fixing times under the Court Rules is to "achieve a timetable for the conduct of litigation in order to achieve finality of judicial determination" (see observations of McHugh J. in Gallow v Dawson (1990) 64 ALJR 458 at 459.

I do not think Counsel for the Appellants can justifiably lay any blame for the delay on the Counsel for the Respondent.

The factors that are normally taken into account when dealing with an application for leave to appeal out of time are -

- (a) the length of the delay;
- (b) the reasons for the delay;
- (c) the degree of prejudice to the Respondent if the application is granted;
- (d) the prospect of the intended appeal succeeding if application is granted.

Nevertheless in the last analysis a Court cannot overlook a determining factor namely that an Appellant will or is likely to suffer an irreparable serious injustice if an extension is not granted.

Whilst a delay of 3 months might have been reasonable in this case, the delay of over 6 months has not been satisfactorily explained. Nor can I rule out a certain amount of prejudice to the Respondent if leave is granted. But the Appellants' undertaking that if they succeed on appeal they will be content to claim damages only, mitigates the element of prejudice.

Furthermore the Appellants do appear to have an arguable case. Grounds 1 and 2 of the proposed appeal are as follows -

1. *THAT the Learned Trial Judge erred in law and in fact in not granting the application of the Appellants for the appointment of a special examiner and/or in the taking of evidence of the First named Appellant by way of commission in Australia upon the grounds presented by the Appellants.*
2. *THAT the Learned Trial Judge erred in law and in fact in not granting the adjournment sought on behalf of the Appellants to enable the First Appellant to give evidence as he was not able to be present at the hearing of the matter.---*

It is not in dispute that the 1<sup>st</sup> Appellant was an important witness in the trial before the High Court and he could not come from Australia to give evidence because of reasons beyond his control.

In the circumstances I have reluctantly come to the conclusion that an irreparable serious injustice might occur if leave is not granted. But the Appellants are not entitled to unconditional leave to appeal out of time. Leave to appeal out of time is therefore granted on the following conditions -

- (1) The Appellants are to pay to the Respondent in any case the sum of \$400.00 within 14 days by way of costs in respect of proceedings in the Court of Appeal so far.
- (2) The Appellants to notify the Registrar within 14 days that costs as ordered have been paid.
- (3) That the Appellants deposit in Court within 14 days the sum of \$500.00 by way of security for costs.
- (4) That the Appellants deposit into Court within 14 days a further sum of \$485.00 towards the cost of preparing the appeal record.

- (5) If the above conditions (or any of them) are not complied within time, this Application will be deemed to have been dismissed with costs and the Notice of Appeal will also be deemed to have lapsed.
  
- (6) That upon compliance with conditions (1), (2), (3) and (4) above, the Notice of Appeal filed on 2/5/97 is to be treated as having been filed in time by virtue of conditional leave granted herein.



**Sir Moti Tikaram**  
**President, Fiji Court of Appeal**

Suva  
10 November 1997

