

IN THE COURT OF APPEAL, FIJI
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO. ABU0015 OF 1997S
(High Court Civil Action No. 225 of 1988)

BETWEEN:

SURESH CHARAN AND ANURADHA CHARAN

Appellant

AND:

THE HOUSING AUTHORITY

Respondent

Coram:

The Rt. Hon. Sir Maurice Casey, Presiding Judge
The Hon. Sir Mari Kapi, Justice of Appeal
The Hon. Justice Sarvada Nand Sadal, Justice of Appeal

Hearing:

Wednesday, 24 February 1999

Counsel:

Mr. Suresh Charan in Person as Appellant
Mr. Vijay Maharaj for the Respondent

Date of Judgment:

Friday, 26 February 1999

JUDGMENT OF THE COURT

On 28th August 1998 this Court gave judgment dismissing the appellants' appeal against the decision of Scott J. of 13 September 1996. He had dismissed their action against the respondent authority on the grounds that they had failed to prosecute their claim for damages arising out of alleged faults in the construction of a house, in proceedings issued in March 1988. That claim has been caught up in a network of interlocutory applications and appeals, interspersed with lengthy delays.

The appellants now move for orders setting aside the appeal judgment and directing that the appeal be reheard; and/or alternatively that they be granted leave to appeal to the Supreme Court.

THE MOTION TO SET ASIDE

This is based on the inherent jurisdiction of the Court referred to in the Australian High Court decision in Autodesk Inc. v Dyson (1992-93) 176 CLR 300. The grounds in the motion may be summarised as a misapprehension by their Lordships that a fair trial was not possible; that they failed to take into account contributing delay by the respondent and to appreciate the appellants' explanations for delay; and that there was a serious denial of justice in refusing to allow an oral re-hearing on the facts and law. Two affidavits were filed in support adding to and expanding these grounds.

In Charan v. Suva City Council (Civil Appeal 6/94; Judgment 12 September 1996) the Supreme Court, dealing with a similar application by the present appellants, held that a Court of final appeal may set aside a judgment of its own in rare and exceptional cases, citing comments by Mason C.J. at p.302 of Autodesk. In Charan v. Shah & Ors (Civil Appeal 29/94; judgment 19 May 1995) this Court accepted it had such a power before entry of any formal order on its judgment. In the present case the formal order dismissing the appeal was filed on 28 August 1998 and sealed on 31 August, the same day on which the present motion was filed. Although Mr Charan submitted that he had filed it before the order was sealed, he offered no evidence by affidavit or otherwise to confirm this, and the natural inference Mr Maharaj asked us to draw was that the order had been sealed before the motion was filed. If so, this Court had no jurisdiction to entertain it. On the Court record we conclude that on balance of probability the order dismissing the appeal had been sealed before the appellants' motion came in. Accordingly, it must be dismissed. Nevertheless, we heard submissions from Mr Charan on the merits of the application.

There have been a number of pronouncements by the High Court of Australia emphasizing the exceptional circumstances in which the jurisdiction to review a decision may be invoked. At p.303 of Autodesk Mason C.J. pointed out that the power is not to be exercised for the purpose of re-agitating arguments already considered by the Court; nor is it to be a “a backdoor method by which unsuccessful litigants can seek to re-argue their cases”. To like effect is the extract from the decision of the same Court in Wentworth v Woollahra Municipal Council (1982) 149 CLR 672, 684 cited at p.317 of Autodesk:

“The circumstances in which this Court will reopen a judgment which it has pronounced are extremely rare. The public interest in maintaining the finality of litigation necessarily means that the power to reopen to enable a rehearing must be exercised with great caution. Generally speaking, it will not be exercised unless the applicant can show that by accident without fault on his part he has not been heard”.

In re - Harrison [1955] Ch 260 provides an illustration of a situation in which review of a judgment of a Court from which an appeal lies may be justified; in that case, after giving his judgment (and before it was perfected), the Judge discovered a recent House of Lords decision to the contrary. Rather than letting it go forward to an inevitable result on appeal, he was held justified in setting it aside.

In his wide-ranging submissions Mr Charan pointed to numerous facts which he claimed this Court had ignored or misunderstood. Some of his assertions are obviously disputable, such as his criticism of Fatiaki J’s chronology relied on by the Court, which recorded in its judgment that he was unable to identify

any errors in it. Another was his insistence that he had not been served with a statement of defence, when there was a regular affidavit of service on the Court file. The Court's conclusion that the appellants had been responsible for inordinate delay was one based on its overall view of the evidence, in the light of the statement it cited from Zimmer Orthopaedic Ltd. v. Zimmer Manufacturing Coy (1968) 2 All ER. 309, that it is for the plaintiff to get on with the action and to see it is brought to trial with reasonable despatch.

The application to set aside this Court's judgment is misconceived. We are satisfied that Mr Charan is seeking to use this procedure to relitigate virtually every factual issue determined in the appeal. In effect he was conducting a fresh appeal to the Court, and the authorities we have referred to make it clear that this cannot be done.

The proper course is for the appellants to exercise whatever appeal rights they might possess, and we now turn to that application.

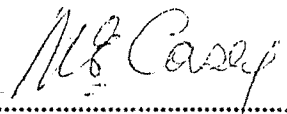
APPLICATION FOR LEAVE TO APPEAL

This is put forward in reliance of s.122(2)(a) of the 1997 Constitution which Mr Charan acknowledges is the appropriate provision, and it provides that an appeal to the Supreme Court may not be brought from a final judgment of the Court of appeal unless it gives leave to appeal on a question certified by it to be of significant public importance. Although he submitted that any error of this Court, whether of law or of fact, gives rise to such a question, we cannot agree that the section is to be understood in this way. To do so would result in virtually

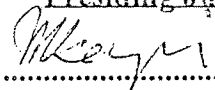
unrestricted rights of appeal to the Supreme Court, whereas the intention is clearly to confine their scope. The questions in the present appeal are of importance to the parties only, and do not satisfy the requirement of s.122(2)(a). Accordingly, leave to appeal must be refused.

Result:

- 1. The motion for orders setting aside this Court's judgment of 28 August 1998 and for a rehearing is dismissed.
- 2. The motion for leave to appeal to the Supreme Court is dismissed.
- 3. The respondent will have \$750 for its costs and disbursements.



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Sir Maurice Casey
Presiding Judge



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Sir Mari Kapi
Justice of Appeal



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Mr Justice S. N. Sadal
Justice of Appeal

Solicitors:

Appellant in Person
Messrs. Maharaj & Associates, Suva for the Respondent