

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

CIVIL APPEAL NO. ABU0005 OF 1999
(Lautoka High Court Civil Action No. HBC0001 of 1989L)

In Chambers

BETWEEN: **FIJI DEVELOPMENT BANK**
of 360 Victoria Parade, Suva in Fiji
Appellant
(Original Second Defendant)

AND: **MANILAL INDUSTRIES**
LIMITED a limited liability
company having its registered
office at Lautoka in Fiji
First Respondent
(Original Plaintiff)

AND: **FIJI INSURANCE COMPANY**
LIMITED a limited liability
company having its registered
office at Suva in Fiji
Second Respondent
(Original First Defendant)

DECISION
(Whether writ renewal Order was interlocutory
or final and if interlocutory whether leave
to appeal should be granted)

There are two substantive applications before me. The first is by Manilal Industries Ltd. (the First Respondent) asking that the appeal filed by Fiji Development Bank on 11 February 1999 be struck out as it is an abuse of Court process because it was filed without leave of the trial judge or the leave of this Court, such leave being a prerequisite by virtue of Section 12(2)(f) of the Court of Appeal Act as the appeal is from an interlocutory Order. The other application is by the Appellant asking that leave to appeal be granted if

leave is required and the time for appealing be extended. The Appellant however argues that no leave is necessary because the Order appealed from was a final Order. Parties have agreed that if the appeal is held to be from a final Order then the Notice of Appeal must be treated as having been filed in time having regard to the intervening gazetted legal vacation period.

In the Court below Manilal Industries Ltd. was the Plaintiff and Fiji Development Bank was the Second Defendant. Fiji Insurance Company Limited (the First Defendant) was not involved in the proceedings before me.

The relevant part of Section 12(2)(f) of the Court of Appeal Act provides -

"(2) No appeal shall lie-

- (a) -----*
- (b) -----*
- (c) -----*
- (d) -----*
- (e) -----*
- (f) without the leave of the judge or of the Court of Appeal from any interlocutory order or interlocutory judgment made or given by a judge of the Supreme Court, except in the following cases, namely:-*
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The first question to decide is whether the Order made by Justice Madraiwiwi on 20 November 1998 was a final or an interlocutory Order. The Order as sealed on 11 November 1998 reads as follows:-

"UPON an application dated 17th March, 1998 made by the Plaintiff to renew the Writ herein, and the said application having been listed by consent for hearing this day AND on hearing Mr. G.P. Shankar of Counsel for the Plaintiff, Mr. A. Patel of Counsel for 1st Defendant there being no appearance by or on behalf of Fiji Development Bank the 2nd Defendant IT IS ORDERED that the Writ of Summons as amended on 11th day of June, 1993 be and is hereby RENEWED for service on Fiji Development Bank the 2nd defendant AND it is further ordered that costs be cost in the cause."

Both sides have filed written submissions and have agreed that a decision be given on the basis of written arguments without oral hearing.

In asking this Court to hold that the Order in question was an interlocutory one the First Respondent relied primarily on the "application approach" as adopted by this Court in Suresh Sushil Chandra Charan & Anor. v Syed M. Shah and Others FCA Civil Appeal No. 29 of 1994.

Charan's Case followed the decision of the English Court of Appeal in White v Brunton [1984] 570.

The Appellant concedes that the Order in question as made by Madraiwiwi J. is an interlocutory Order because its effect "is to progress the proceedings in the Lautoka High Court". But it argues that had the Order been made in favour of the Appellant, i.e. by refusing the renewal application, then that would have been an end of the First Respondent's action. It is the Appellant's contention that the Order in question must be treated as final presumably on the basis of the "application approach".

It was said in Charan's Case that the "application approach" looks to the application rather than the Order actually made as giving identity to the Order and that the Order was treated "as final only if the entire cause or matter would be finally determined whichever way the court decided the application".

In my view the Order in question is an interlocutory one because the test of finality is not met in that the Order will only be final if the application is refused and not if it is granted. The test is that the effect of the Order should be to finally dispose of the entire cause or matter whichever way the Court decides the application, i.e. whether by granting it or by refusing it.

Since I hold that the Order was interlocutory it must follow that the appeal was lodged without leave and hence leave is required for both leave to appeal and leave to appeal out of time. Both leave applications are opposed by the First Respondent.

I will deal with the leave to appeal application first.

In my view the issue proposed to be raised in the appeal is not one of any general importance. The appeal does not involve a difficult question of law. It does not have the effect of altering the substantive rights of the parties or any one of them. No injustice is likely to result if the litigation proceeds in the High Court. Indeed it is desirable that it should continue there without being fragmented and without further delay. In the circumstances outlined it would be against the Court's policy to grant leave from an interlocutory Order.

The Appellant will have an opportunity in the Court below to raise any preliminary objection it wishes to raise.

Furthermore there is merit in the First Respondent's contention that the proper course for the Appellant to follow was to apply to the High Court judge to set aside the Order in question if it had good cause to show why it was not represented at the hearing of the application by Madraiwiwi J. As matters stand there is no satisfactory explanation why the Appellant was not represented.

In the circumstances the application for leave to appeal is refused. It follows that the application for leave to appeal out of time should also be dismissed. It is formally dismissed.

Although as a single judge I cannot in the present situation formally strike out or dismiss the appeal, my decision i.e. holding the Order to be interlocutory and dismissing the leave applications, nevertheless have the same effect. In terms of Section 12(2)(f) of the Court of Appeal Act no appeal now lies to the Court of Appeal. The Notice of Appeal lodged by the Appellant is therefore incompetent and cannot be processed any further. The First Respondent must therefore be deemed to have been successful. It is therefore entitled to costs against the Appellant and I fix them at \$300.00.

Dated at Suva this 14th day of May 1999.



Moti Tikaram

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Sir Moti Tikaram
President, Court of Appeal, Fiji

Solicitors:

Messrs R. Patel & Co. for the Appellant
Messrs G.P. Shankar & Co. for the First Respondent