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

CIVIL APPEAL NO. ABU0043 OF 2001S
(Lautoka High Court Civil Action No. HBC 139 of 1996)

BETWEEN: MOHAMMED YAKUB KHAN
s/o Rahemat Ali Khan,
MOHAMMED NASIR KHAN,
MOHAMMED IQBAL KHAN,
MOHAMMED MUKTAR KHAN,
MOHAMMED AZAD KHAN,
(all sons of Mohammed Yakub Khan)

Appellants/
Original 1st Defendants

AND: AMBARAM NARSEY PROPERTIES LIMITED

First Respondent/
Original Plaintiff

AND: LAUT0KA CITY COUNCIL

Second Respondent/
Original 2nd Defendant

Chamber: The Hon. Justice Devendra Pathik
Justice of Appeal

Counsel: Dr. S. Sahu Khan for the Appellants
Mr. B.C. Patel and Mr. C.B. Young for the First Respondent
Mr. Anu Patel for the Second Respondent

Date of hearing: 22nd & 28th August 2001

Date of decision: 26th September 2001

DECISION

Chamber application for:

(i) leave to appeal from an interlocutory order

(ii) stay of proceedings pending appeal

Application

By **Notice of Motion** dated 17 August 2001 the appellants have applied to this Court for the following orders:

(i) *that leave be granted to the Appellants to appeal against the Order of the Honourable the High Court on the 17th and 19th days of April, 2001*

(ii) *that until the determination of the Appeal or further order of the Court that all proceedings in the High Court in this matter be stayed*

(iii) *Such further or other orders as to this Honourable Court seems just.*

(iv) *costs*

Events subsequent to the application

The appellants (the original first defendants) applied to Gates J, the trial judge, for leave to appeal and stay of trial against an interlocutory order which was made by him on 19 April 2001 in the midst of 'this lengthy trial' as the Judge put it. The hearing of the Motion herein was heard on 20 April 2001 and the Ruling thereon was given on Thursday 6 August 2001, that is some four months after. The trial was to resume on Monday 20 August 2001.

His Lordship made an Order stating: *'I therefore decline to give leave to appeal and accordingly there can be no stay, the trial will proceed as fixed on 20 August 2001 and other dates as pre-arranged with counsel'*.

The above order prompted Dr. Sahu Khan to file a motion for leave to appeal and a stay allowing only one working day before the resumption of the trial.

The motion came before this Court on Friday 17 August on an ex parte basis as it was not possible to hear it inter partes before 20 August hence an interim stay was ordered and the Motion was to be heard inter partes on 4 September after service of all documents on the Respondents. The stay was only temporary until further order of this Court.

Thereafter by Summons dated 20 August the first Respondent (the original plaintiff) applied to this court for the following Orders and the date for hearing was given for 22 August:

> *That the ex parte Order dated 17 August, 2001 ("the Stay Order") made by this Court to appeal staying all proceedings in Lautoka High Court Action No. HBC0139 of 1996L until further order be set aside so that the hearing of the said Lautoka High Court action can resume and be continued on the dates already assigned.*
>
> *That the time for service be abridged to one day so that this Summons can be heard on Wednesday 22 August, 2001 as an urgent application.*
>
> *That, should time be abridged, this Summons be fully argued and heard on the first assigned date due to the urgency of the matter.*
>
> *That the Appellant pay the costs of this application and such costs be summarily fixed by this Court.*

The grounds for the application are that the Stay Order: (a) will cause prejudice and grave hardship to the First Respondent and (b) it is unsustainable at law both procedurally and substantively.

The Issue

The issue for the Court's determination is whether the appellants ought to be granted leave or not to appeal against the interlocutory orders of Gates J in the High Court at Lautoka made on 17th and 19th April 2001. The appellants also seek an order for stay of all proceedings in the High Court in this matter pending the determination of the appeal.

Appellant's submissions

The main ground of complaint relates to the learned trial Judge's order pertaining to the calling and recalling witnesses in the Order stated by His Lordship. On this aspect Dr. Sahu Khan for the appellants submits that '*a discretion lies absolutely with counsel to call what witnesses he chooses and in what sequence he chooses and if the Court orders counsel to call witnesses contrary to the desire of counsel or the party calling the witnesses, miscarriage of justice would result and in such event if the matter goes on appeal the Court of Appeal would order retrial before another Judge*'. For this proposition he relies heavily on the case of **Briscoe v Briscoe** [1966] 1 All ER 465 before Karminski and Lane J.J. in the Probate, Divorce and Admiralty Division.

Dr. Sahu Khan says that the trial judge ordered that the appellants call other witnesses and to stand down the witness **Suresh Chandra** whose re-examination by him had concluded. The appellants objected to that being done and sought leave of the Court to appeal against that Order. He argues that the trial Judge does not say

in his Ruling as to why the '*circumstances*' in this case are '*different*' from Briscoe (supra). He says that a very important principle of law is involved and he would like it decided by the Appeal Court.

Dr. Sahu Khan emphasized that the trial Judge made an order "*for us to call other witnesses and then this witness's cross-examination will continue. We are saying hold on, that is wrong. I should be allowed to finish this witness in cross-examination or whatever Sir, before I call my next witness*". He said that he does not want to see what happened in Briscoe (supra) which will mean that '*we have to go through the whole trial all over again my Lord. And we want to avoid that Sir*'. He says that although the Judge ruled that Suresh Chandra can be recalled by 2nd Respondent after amendment to defence was allowed, he wants to '*finish Suresh Chandra first*'. Counsel wants '*look recall Suresh, finish his evidence completely before we are going to proceed with other witness*'.

Dr. Sahu Khan submits that he is not asking the Court to rule whether the judge was right or wrong. It was not a discretionary matter for the Judge but a point of law. He says that the Court has no discretion to dictate terms to parties or counsel as to what order of witness he should be calling for '*counsel decides his own strategies*'. He concludes by submitting that he wants "*to have determined by the Appeal Court whether in any civil case, in any shape or form whether by way of recall or whatever, here the court has already ordered to recall the witness after discovery given. And what we are saying is O.K. recall but, please do all that, before I call my next witness. The Court says no, you call your next witness*".

First Respondent's submissions

The First Respondent opposes the application for leave to appeal and applies to set aside the order staying all proceedings in the action as the order is

unsustainable at law both procedurally and substantively. Through its counsel it says that the stay order will cause prejudice and grave hardships to it and the balance of convenience lies in its favour.

Mr. B.C. Patel submitted that Briscoe (supra) dealt with normal order of witnesses not with recall of witness and that the learned Judge was entitled at law and he correctly exercised his discretion (**Fallon v Calvert** [1960] 1 All E.R. 281 at 283 D 59 C.A.). The appellants have failed to comply with discovery orders. They will not be left without a remedy if at the end of the trial they suffer miscarriage of justice (**Kelton Investments Ltd v Civil Aviation Authority of Fiji and Motibhai & Co. Ltd.**, Civ. Appeal No. 34 of 1995, FCA).

The learned counsel submits that the Judge's order is either an *interlocutory order* which is appealable with leave or it is an *incidental ruling* which is not appealable with or without leave. He says that there is no difference between this ruling and ruling given in the course of a trial that certain evidence is inadmissible (**Duke Group Ltd v. Arthur Young** [1990] 54 SASR 511, **McKenzie v Findlay** [1966] VR3 and **National Australia Bank v Russell** [1990] VR 929).

The learned counsel submits that a party who appeals against an order made in the exercise of a discretion upon a matter of practice and procedure undertakes "*a formidable task*" (**Lenijamar Pty Ltd v. AGC (Advances) Ltd.** [1990] 98 ALR 200 at 206). He says that there can be no appeal against a consent order giving 'discovery' (**Purcell v Tregell** [1970] 3 All E.R. 671), and like contract, it can only be set aside on the grounds of mistake or misrepresentation and that no such grounds are pleaded or made out.

Mr. Patel submits that the balance of convenience lies in the refusal of leave.

Second Respondent's submission

Mr. Anu Patel for the second respondent submitted that he wishes to adopt Mr. B.C. Patel's argument in full. However, he highlighted certain other matters. He said that after amendment was allowed both the second respondent was given leave to recall any relevant witness for further cross-examination. As far as witness Suresh Chandra is concerned he was to be recalled by second respondent and that he be interposed after full discoveries of necessary documents were made. Mr. Patel said that in his view the proper course would be for the appellants to wait for the outcome of the judgment in the High Court and then appeal. He said that he would in no way interfere with Dr. Sahu Khan's discretion as to how and in what order he would call his witnesses. In answer to a question from the Court he said that the Judge did not restrict him which witness he calls and in which order. The problem for Dr. Sahu Khan in a nutshell is interposing Suresh Chandra after discovery. To Court he said that there is nothing to appeal against. He submits that the argument relying on Briscoe (supra) is doomed to fail.

Mr. Patel urges the Court to express the view that the appeal is one, "**obviously destined to fail or obviously merely for purposes of delay**" (**Sewing Machines Rentals v Wilson** 1995 3 All E.R. 553 at 555).

Consideration of the issue

For the determination of the issue before me I have the benefit of oral and written legal submissions with authorities from counsel in this matter for their respective parties. Apart from that I have for my consideration the two affidavits in support of the appellants' motion sworn by Mohammed Nasir Khan on 17 and 27 August 2001; and two affidavits of Arun Narsey sworn 20 and 21 August 2001 in support of the first Respondent's summons.

The trial had already lasted 30 sitting dates and had been listed for continuation for various dates in August, September and October 2001 involving a further 28 days. Although the application for leave to appeal against the Court's interlocutory orders of 16 April and 19 April was heard on 20 April 2001, the Ruling thereon was not given until 16 August 2001 despite numerous requests from Counsel for the appellants for an early Ruling..

The Ruling impugned

It is the Ruling of 19 April 2001 which is impugned and it was pursuant to that that the appellants sought leave of the trial Judge to appeal.

This is the **Ruling:**

> *Tomorrow, a Friday, I am told Mr. Chandra is not available; but more significantly discovery has not yet been possible. When counsel have sifted the necessary documents the completion of the examination can proceed and be completed. He is being recalled at the request of counsel for the 2nd Defendant on the limited issue of whether he was an independent contractor.*
>
> *Dr. Sahu Khan says the court should not force him to change the proper order of calling his witnesses. He has cited* ***Briscoe v. Briscoe [1966] 1 All E.R. 465*** *and read out observations from the judgments in support [p 466]. Those observations seemed only right and proper. However the* <u>*circumstances here are slightly different.*</u> *Indulgence has been granted to the 1st Defendants to permit a late amendment of their pleadings. Consequent upon that, a witness has to be recalled for questioning by the 2nd Defendant's counsel at the least. The 1st Defendants' order of calling witnesses in the presentation of this case remains a matter for 1st Defendants' counsel. But where a witness is to be recalled he may have to be interposed as conveniently as possible.*
>
> *In the result, the 1st Defendants' defence evidence will proceed tomorrow in counsel's choice of order of his witnesses. The*

> *recall of Suresh Chandra will be interposed after discovery. So tomorrow the next witnesses, either Mr. Nasir Khan or the defence surveyor, will take the stand. It is important we do not lose a court day for evidence.* (underlining mine for emphasis)

The application for leave to Court of Appeal is made under **section 12(2)(f)** of the **Court of Appeal Act** and under the inherent jurisdiction of this Court. The said section provides (inter alia):

> **12(2) No Appeal shall lie -**
>
> **(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 (now High Court) except in the following cases, namely: ...."**

In short, the appellants intend to appeal firstly, against the order of 20 April 2001 giving discovery and secondly, order of 19 April 2001 requiring them to proceed with the case by calling other witnesses pending recall of Suresh Chandra. The appellants did not want to proceed with the hearing on 20 April 2001 by calling other witnesses until Suresh Chandra was recalled and his further cross-examination completed. They complain that the Judge's order interferes with their right to call witnesses in the order they please.

On 17 April 2001 despite objection from the Respondents, the Judge granted leave to the appellants to amend their Defence and to plead "*unambiguously*" that Suresh Chandra was an independent contractor and not an employee. As a consequence of the amendment, the necessity arose to order recall of Suresh Chandra by the Second Respondent for further cross-examination on the newly pleaded issue. However, in order to effectively cross-examine the witness discovery order was made by consent (as the Judge has stated).

It is borne out from the affidavit evidence that on 19 April 2001 the Judge then ordered that pending discovery and recall of Suresh Chandra the Appellants should proceed with their witnesses so as not to waste allocated hearing time. The appellants indicated that their next witness would be a surveyor. That witness was to be called when hearing resumed the next day which was 20 April 2001.

In these circumstances, in making the orders which are the subject-matter of the complaint, the Judge has not violated the rights of the appellants to call witnesses in the order they liked. But because the indulgence was given by granting the amendment to the appellants at such a late stage, it necessitated the making of the said orders in relation to discovery and recall of witness Suresh Chandra.

The law

The issue before me is as I have already stated hereabove. However, in the process of the submissions presented counsel raised the matter of form of commencement of this application whether it should be by motion or summons and also that stay order ought not have been made. These peripheral matters pale into insignificance and are not fatal to prevent me in considering the real issue before me and this is what I propose to do rather than consider or dwell on these incidental matters.

Recall and calling of witnesses

It is not disputed that the judge had the power to allow amendment. In doing so the Court bears in mind the guiding principle of cardinal importance that generally speaking amendment ought to be allowed "**for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings**" (vide per **Jenkins, L.J.** in **G.L. Baker,**

Ltd v Medway Building & Supplies, Ltd [1958] 1 W.L.R. p.1231. It was quite in order for the appellants to make the application for amendment, as was said by **Bowen, L.J.** in **Cropper v Smith** (1884), 26 Ch.D. at p.710-711:

> *"It seems to me that as soon as it appears that the way in which a party has framed his case will not lead to a decision of the real matter in controversy, it is as much a matter of right on his part to have it corrected if it can be done without injustice, as anything else in the case is a matter of right"*

In this case amendment was applied for by the appellants and it was granted with certain directions as to the order of calling of witnesses which was done bearing in mind the interests and rights of the parties in all the circumstances of this case. At the same time the said Ruling stated '*the 1st Defendant's order of calling witnesses in the presentation of this case remains a matter for 1st Defendants' counsel*'. There is therefore no interference with the order in which the other witnesses are to be called.

The amendment was allowed at a late stage in this case, namely after two of the defence witnesses were called and re-examined by Dr. Sahu Khan. The dispute arises because the Judge after allowing the amendment permitted the second witness **Suresh Chandra** to be recalled after 'discovery' by the Second Respondent. In **Brown Esq. v Giles** 1 Car & P118, 1823 it was held that "**in civil cases, the judge will allow the plaintiff's counsel after he has closed his case, to recall a witness to prove a point omitted to be proved in the proper place**". Although the application was made late it was well within the powers of the Judge to consider and allow the amendment as stated by **Bramwell, L.J** in **Tildesley v Harper** 10 Ch.D. pp.396, 397:

> *"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder, he had done some injury to his opponent which*

> *could not be compensated for by costs or otherwise". "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side."*

When allowing the amendment it is important to note the following statement from the Ruling of 17 April 2001 and it was well within His Lordship's powers to do so:

> *"In the result, the 1st Defendants' defence evidence will proceed tomorrow in counsel's choice of order of his witnesees. The recall of Suresh Chandra will be interposed after discovery. So tomorrow the next witnesses, either Mr. Nasir Khan or the defence surveyor, will take the stand. It is important we do not lose a court day for evidence."* (emphasis mine)

The earlier Order in the Ruling on 17 April 2001 allowing the amendment read:

> *"In the result, the 1st Defendant is given leave to file an amended statement of defence as proposed in the summons. Leave is given to the Plaintiff and to the 2nd Defendant to have any relevant witness recalled for further cross-examination on the issue now unambiguously pleaded. Leave is also given to the Plaintiff to re-open its case to call or receive witnesses on the same issue. The plaintiff and 2nd Defendant are to have their costs occasioned by this amendment, which are to be borne by the 1st Defendants."*

After the amendment Dr. Sahu Khan did not consider it necessary to apply for an adjournment but instead filed a motion dated 20 April 2001 'in the middle of this lengthy trial', as the Judge says, seeking leave to appeal to Court of Appeal and a stay of orders made on 17th and 19th April 2001. Unfortunately for some reason the decision in this motion was not delivered within a reasonable time i.e. not until 16 August 2001 i.e. three days (weekend in between) before the trial was to resume.

No one doubts that just as in a criminal case, so in a civil case the defendants (the appellants) as in this action have a discretion as to the calling of witnesses and were not obliged to call witnesses for no purpose other than to assist the other party in their endeavour to destroy their case (**Regina v Taylor (David) The Times Law Reports**, 11 December 1995 p.663; Court of Appeal. However, the judge's "**power to direct the prosecution to call witnesses was also discretionary. There was no basis on which the exercise of the judge's discretion could be criticised.**" (**Taylor**, ibid **Roch, L.J.**) Although, it is accepted that a judge has nothing to do with the getting up of a case, that was not the position in the instant case, it was still up to the appellants who they call as their witness except that the witness Suresh Chandra was to be interposed in the exercise of the Judge's discretion when granting indulgence to defendants by allowing the amendment.

On the exercise of discretion on a point of practice and procedure, the following passage from judgment of the High Court of Australia in **Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc.** [1918] 148 CLR 170 at 177 wherein is repeated with approval the oft cited statement of **Sir Frederick Jordan** in **Re Will of FB Gilbert** (dec'd) [1946] 46 SR (NSW) 318 at 323 is pertinent:

> *"...I am of the opinion that,...there is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the orders of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercises of discretion in interlocutory applications from a judge in chambers to a Court of Appeal."*

In considering the issue of the calling of a witness I think it is pertinent to have regard to the following passage from the judgment of **Fletcher Moulton L.J**

in In re Enoch and Zaretzky, Bock & Co's Arbitration [1910] 1 K.B. 327 at 333, Court of Appeal and consider how it fits in with present case:

> *"I say that it would be destructive of the fundamental principles of our laws of procedure for the reason that if, according to the dictum, witnesses were called against the will of one of the parties, the civil rights of a man might be decided by evidence given by persons whose personal credibility and the accuracy of whose statements he would have no right to test by cross-examination; because the Court of Appeal laid down that if a judge calls a witness, neither party can cross-examine him as of right. Such a proposition may be most reasonable if the witness has been called with the assent of both parties, because he cannot be called a witness of either party. But it would lead to consequences which I do not like to contemplate if the dictum were supposed to apply to cases where a judge calls a witness to the facts of the case without the consent of the parties and then refuses, or has the power to refuse, to allow any cross-examination. I think, therefore, that the dictum refers only to cases where a judge has called a witness with the acquiescence of both parties, and has done so in order to get over the difficulty that if either party calls a witness he is supposed to be responsible for his personal credibility, though not for the accuracy of his statements, for it is well known that if a party calls a witness he may not attack his general credibility. There may in some cases be a person whom it would be desirable to have before the Court; but neither party wishes to take the responsibility of vouching his personal credibility, or admitting that he is fit to be called as a witness. In such a case the judge may relieve the parties by letting him go into the box as a witness of neither party; and, of course, if the answers are immaterial he may refuse to allow cross-examination. But the dictum does not lay down, and in my opinion it is certainly <u>not the law</u>, <u>that a judge</u>, or any person in a judicial position, such as an arbitrator, <u>has any power himself to call witnesses to fact against the will of either of the parties</u>."* (emphasis mine).

The situation in this case is quite different as already stated earlier on. It is not the Judge who is directly or indirectly ordering a particular witness to be called. "It is not accurate to say a judge ever in a civil action has a witness of his own" (Enoch, ibid p.337 - Farwell L.J.) In the circumstances of this case he has merely

in the exercise of his discretion consequent upon the amendment of the pleadings stated in what manner the witnesses are to be called. The appellants did suggest that they were going to call the surveyor. It was in the discretion of the learned Judge whether he would recall the witnesses (**Adams v G. Bankart** and **G.T. Bankart** Exch. of Pleas 1835, 149 E.R. p. 1254) and when he is to be recalled, in the circumstances of this case. I see nothing wrong with that.

When an interlocutory application is made during the trial, and which happens many a time, it is left to the discretion of the learned judge to give a Ruling, and the Appeal Court will be loath to interfere with the exercise of that discretion unless of course the Ruling is wrong in principle or wrong in law. On recall of witness **Lord Chelmsford** in **Shedden and Shedden (apps) v The Attorney-General, Robert Shedden Patrick, and Another (resps), The Law Times Reports** (1870) Vol XXII, N.S. 631, at 634, **House of Lords** said:

> *"The permission to recall a witness is entirely in the discretion of the judges, a discretion usually exercised with great caution, on account of the obvious danger of the proposed evidence being skillfully applied to supply any deficiencies which might have been left in the case upon the former proofs".*

Grant of Leave

In considering the matter of whether to grant leave or not from an interlocutory order, I am not unmindful of the fact that:

> "I am dealing with an application for leave to appeal and not with the merits of an appeal. It will therefore not be appropriate for me to delve into the merits of the case by looking into the correctness or otherwise of the Order intended to be appealed against. However if prima facie the intended appeal is patently unmeritorious or there are clearly no arguable points requiring decision then it would be proper for me to take these matters into

consideration before deciding whether to grant leave or not". (The Fiji Public Service Commission v Manuvavalagi Dalituicama Korovulavula FCA Civ. Appeal No. 117 of 1989 at p.5)

I have dealt with the subject of leave (sitting as single Judge of Appeal in **Edmund March v Bank of Hawaii & others** Civ. Appeal 25/2000 - 10 October 2000) and referred to principles involved in granting leave.

The following statement of principle by **Sir Moti Tikaram**, the then President Fiji Court of Appeal in **Totis Incorporated Spor (Fiji) Limited, Richard Evanson v John Leonard Clark & John Lockwood Sellers** in Civ. Appeal No. 35 of 1996S p.15 is apt. to bear in mind:

> **"It has long been settled law and practice that interlocutory orders and decisions will seldom be amenable to appeal. Courts have repeatedly emphasised that appeals against interlocutory orders and decisions will only rarely succeed. The Fiji court of Appeal has consistently observed the above principle by granting leave only in the most exceptional circumstances".**

In the matter of **grant of leave to appeal** against interlocutory orders the Appeal Court (**Thompson J** sitting as a single Judge in **K.R. Latchan Brothers Limited v Transport Control Board and Tui Davuilevu Buses Limited** Civil Appeal No. ABU0012 of 1994) summed up the criteria, and this is apt:

> *"The granting of leave to appeal against interlocutory orders is not appropriate except in very clear cases of incorrect application of the law. It is certainly not appropriate when the issue is whether discretion was exercised correctly unless it was exercised either for improper motives or as result of a particular misconception of the law. The learned judge has given full reasons for the order he has made. There is no suggestion of impropriety in the appellant's affidavit. There is an allegation of misconception of the law, but if there was a misconception of the law, it is not a clear case of that. That matter can be made a ground of appeal in any appeal against*

> *the final judgment of the High Court, if the appellant is unsuccessful in the proceedings there."*

Bearing in mind the nature of the application and because the parties have argued at length on the merits, my decision is likely to give the impression that I have gone into the merits as well in deciding on the issue. Going into the merits is not one of the things the Court delves into at this stage as already stated hereabove. However, it was unavoidable in all the circumstances of this case based on the nature of the evidence presented to encroach into the boundary of merits to some extent and may be to a large extent.

One other factor which led me to a consideration at some length and touch on merits and give a considered view because of what **Sir Moti Tikaram** the then President of Court of Appeal sitting as a single judge said on 24 February 2000 in **Suresh Charan v Bansraj** in Civ. Appeal No. 42 of 1999. He said:

> "In my view there is now no right in the aggrieved party to seek a review of a single judge's order by going to the full Court in civil matters. The Legislature in my view has purposely and deliberately taken away that right in civil matters. Sections 20 and 35 of the Act were reviewed following recommendations made by the Beattie Commission whose Report was adopted by the Parliament (see "Commission of Inquiry on the Courts" - Parliamentary Paper No. 24 of 1994). Extensive submissions were made to the Commission on Sections 20 and 35 of the Court of Appeal Act. It is important to note that in criminal matters the Parliament decided to retain the aggrieved party's right to ask for review by the full Court in certain circumstances only. (See Section 35 as repealed and revised by Act No. 13 of 1998 in particular 35(3).)"

Dr. Sahu Khan has suggested that there is an important question of law involved in the proposed appeal. I am not convinced that there is. In this regard in

K R Latchan (supra ibid) at p.5 of the Decision the Full Court of Appeal it is stated as follows and that is the principle which ought to be applied in this application:

> "The control of proceedings is always a matter for the trial Judge. We adopt what was said by the House of Lords in *Ashmore v Corp of Lloyd's* [1992] 2 All E.R. 486 -
>
> > *'Furthermore, the decision or ruling of the trial judge on an interlocutory matter or any other decision made by him in the course of the trial should be upheld by an appellate court unless his decision was plainly wrong since he was in a far better position to determine the most appropriate method of conducting the proceedings.'*

In the argument before me in this application Dr. Sahu Khan submits that Suresh Chandra's evidence on recall after discovery should be disposed first before any other witnesses are called by the defence. Although the learned counsel is not happy with this direction, '**a court should not be afraid to exercise its inherent power to control its own processes and refuse a ground for judicial review which has been refused at an earlier stage**'. (**Regina v Staffordshire County Council, Ex parte Ashworth**. The Times Law Reports 18.10.96 p.580, **Turner J.**).

On the principle involved in the granting of leave, '**a court was entitled to grant an application for leave to appeal even if it was not satisfied that the appeal had any realistic prospect of succeeding**'. (**Smith v Cosworth Casting Processes Ltd, The Times** 28.3.87 C.A.). However, on the facts and circumstances of this case, I do not consider that the appellants have any prospect of success on the issue raised by them. I do not see that there is any point of law which needs a determination by the Appeal Court at this interlocutory stage on the Judge's Ruling in the exercise of his discretion.

The order that the Judge has made in regard to the calling of witnesses is nothing new in the exercise of his discretion. Applications of this nature for amendment are made so often in Courts and Rulings are given thereon. I do not have to say, but all the counsel herein, who are all experienced, know that you do not rush to Court of Appeal after every decision with which one is dissatisfied and open the floodgates resulting in delay in reaching finality in the actions. For after all:

> "The purpose of the requirement of leave to appeal, to provide a filter to save unnecessary time and expense, was at risk where the grant of leave by the single lord justice was followed by an application to the full Court of Appeal for it to be set aside" (Sir Thomas Bingham M.R. in First Tokyo Index Trust Ltd v Morgan Stanley Trust Co. and Others, Ashurst Morris Crisp and Others, third parties, The Times Law Report 6.10.95 C.A.).

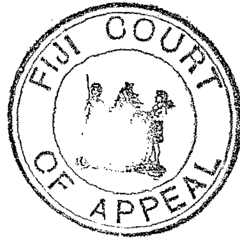
Conclusion

To sum up, for the reasons given hereabove, the trial Judge acted intra vires in making the orders regarding the manner in which the witness is to be recalled and the calling of other witnesses by the appellants which he has stated is in the order of their choice.

I see no merit in this application and the appeal in the circumstances of this case does not disclose upon studying the matter on paper an arguable case and is not likely to succeed not forgetting of course that "**no one should be turned away from the Court of Appeal if he has arguable case by way of appeal**" (**Lord Donaldson of Lymington M.R.** in **The Iran Nabuvat** [1990] 1 W.L.R. 1115 at 1117).

On the affidavit evidence before me, in the light of the very full argument on the issue based on authorities and the principles involved, I find that on looking at the facts and circumstances of this case in the round it is difficult to dislodge the trial Judge's decision which involved both law and fact and a lot of discretionary power in the consideration of the application for amendment before him and the power to make consequential orders thereon.

I would therefore dismiss this application by the appellants and refuses the orders sought with costs in the total sum of $1000.00 against them to be paid to the Respondents' counsel (1st Respondent $750.00, 2nd Respondent $250.00) to be paid within 14 days. The interim order for stay is also ordered to be dissolved..



D. Pathik

Justice of Appeal

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