

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

CIVIL APPEAL NO. ABU0005 OF 2003S
 (High Court Civil Action No. HBC0157 of 1999L)

BETWEEN:

DEOJI AND SONS LIMITED

Applicant

AND:

GURDEV SINGH
MALKIT SINGH

Respondents

In Chambers:

Hon. Justice Sheppard, Justice of Appeal

Hearing:

Monday, 4th August 2003, Suva

Counsel:

Mr K. Vuataki for the Applicant
 Mr R. Gordon for the Respondent

Date of Judgment: Thursday, 14th August, 2003

JUDGMENT ON APPLICATION FOR LEAVE TO APPEAL AGAINST
 SUMMARY JUDGMENT AND FOR STAY OF PROCEEDINGS

By its notice of motion of 27 March 2003 filed in this matter the applicant, who was the defendant in the proceedings below, seeks leave to appeal out of time against a summary judgment recovered by the respondents, the original plaintiffs in the action. Hereafter I shall refer to the applicant as "Deoji" and to the respondents as "the Singhs." Counsel for Deoji recognised that there is a question whether an order directing the entry of judgment in an application for summary judgment is final or interlocutory. For that reason the application made by the notice of motion for leave to appeal out of time is made in the alternative, one alternative being to appeal against a final order if the order is final, and the other to appeal against an interlocutory order, if indeed the order is interlocutory. The parties have lodged written submissions and the submissions contain an analysis of the authorities on the question. Having considered these and also a judgment of Paṅhik J. sitting as a judge of the Court of Appeal, I have reached the conclusion, although not without some hesitation, that the judgment recovered should be treated as interlocutory and not final.

The case dealt with by Pathik J. was *The New India Assurance Company Limited v. Footwear Manufacturers Limited* (Civil Appeal ABU0062 of 1998S,4/6/99). Pathik J. considered many of the authorities which are discussed in the parties' submissions and reached the conclusion that the judgment in the case before him which was also a summary judgment was interlocutory. He adopted the approach which has been adopted in England of deciding whether one determines the question whether the judgment is interlocutory or final by what is called the "application approach" or the "order approach." For the reasons given in English practice books and in a number of cases which I do not feel it necessary to discuss, the better view seems to be that judgments recovered as a consequence of an application for summary judgment are interlocutory notwithstanding that they are final in effect.

The only authority in Fiji on the matter is the decision of Pathik J. in the case to which I have referred. I can understand that a court of three judges might eventually take a different view but I am not convinced that Pathik J's decision is wrong and I think it is in accordance with the English Practice. For that reason I propose to apply it here and to treat the judgment in this case as interlocutory, notwithstanding that it is final in effect.

Nothing turns on this because whether the judgment is final or interlocutory, the question that has to be decided is whether Deoji should be given leave to appeal. If Deoji is successful, it seeks as well a stay of proceedings until the matter is determined by the Court of Appeal.

The judgment recovered by the Singhs was ordered to be entered by Prakash J. who at the time the judgment was given, 14th May 2001, was an acting judge of the High Court. As the judge said, the application was made pursuant to Order 14 of the High Court Rules. Both parties filed affidavits which were considered by the learned judge. After discussing the facts of the matter and some authorities, the judge ordered that the Singhs' application for summary judgment be granted in terms of its summons of 18th May 1999. The amount of the judgment was \$31,295.00.

On 11th June 2001 Deoji filed a further summons in which it sought leave to appeal the order made by the court on 14th May 2001. A stay of execution was also sought. The summons came also before Prakash J. who made a ruling on 28th November 2002. The application was dismissed.

It is to be observed that there was significant delay between the filing of the application for leave to appeal and for a stay on 12th June 2001 and the date of the ruling refusing leave to appeal, 28th November 2002.

In Deoji's written submissions there is a chronology of the steps that were taken in the High Court between the filing of the application on 12th June 2001 and the date of the ruling on 28th November 2002. On the face of the chronology it is not possible to attribute blame for such a long period of delay to the conduct of either party nor is there enough material on the file that I have to show whether the delay was occasioned by the congestion of the list.

On the basis that it is correct to say, as I think it is, that the judgment entered in favour of the Singhs was interlocutory and not final, the High Court had jurisdiction to hear the application for the stay and leave to appeal pursuant to the provisions of s.12(2)(f) of the Court of Appeal Act Cap. 12. It provides that no appeal shall lie without the leave of the judge (that is of the High Court) or of the Court of Appeal from an interlocutory order or interlocutory judgment made or given by the judge of the High Court except in some cases to which it is unnecessary to refer. It is convenient to say here that if the judgment were a final judgment (which I am persuaded it was not), the matter would be governed by the Court of Appeal (Amendment Act) 1998. That Act substituted a new section 20 which, so far as relevant, provides that a judge of the Court of Appeal may exercise a number of powers including the power to give leave to appeal. But the section would not have authorised a judge of the High Court to give such leave as does s.12(2)(f) of the Court of Appeal Act Cap. 12 in the case of an interlocutory judgment. In the view I take of the matter, s.20 of the Court of Appeal Act as amended by the 1998 amending Act is not relevant to be considered. That is because I have decided to treat the summary judgment which was entered as interlocutory rather than final.

The order giving effect to the ruling which was made on 14th May 2001 directing the entry of the judgment was not entered until 5th June 2001. Although the application for a stay and for leave to appeal was filed in the High Court and not the Court of Appeal it would seem to me that the times limited for bringing the application for leave to appeal are those provided for in s.16 of the rules of the Court of Appeal. It provides that in the case of an interlocutory order that period is 21 days from the date on which the judgment or order of the court sought to be appealed from was signed, entered or otherwise perfected. The application for leave to appeal and for the stay which led to the ruling dated 28th November 2002 was made by summons filed on 11th June 2001 only 6 days after the order sought to be appealed from had been entered. On that basis the application for leave to appeal made to the High Court was within time. For completeness reference should be made to rule 27 of the Court of Appeal Rules which provides that, without prejudice to the power of the Court of Appeal to enlarge the time prescribed by any provisions of the rule, the period for filing and serving notice of appeal under rule 16 may be extended by the court below upon application made before the expiration of that period. That rule is not in point here because the application was in time. It is therefore not necessary to consider it further.

As mentioned, the application made by summons on 11th June 2001 was not ruled upon until 28th November 2002 but, on the material which is before me, as I have earlier said, it is impossible to suggest that one party or the other was responsible for the very great delay which occurred between the filing of the summons and the making of the ruling. In passing I should mention that a search of the High Court file by the Registry in Lautoka suggests that no order has been taken out in consequence of the ruling of 28th November 2002. The entry of orders is not a formality. The order is the record of the court in relation to the order it has made. The fact that there may be reasons for judgment or reasons for a ruling does not mean that there is no need for orders to be entered. It is vitally important that they be entered. If any question of enforcement of an order arises, the court is unlikely to enforce its order unless the party seeking to enforce it has had the order entered. The order resulting from the ruling of 28th November 2002 should be taken out as soon as possible.

The order sought by Deoji in its notice of motion filed in the High Court on 27th February 2003 is that leave be given to Deoji to appeal out of time against the order of 14th May not the order of 28th November 2002. I have held it to be interlocutory so the application is that leave be given to the applicant to appeal out of time against the making of an interlocutory order. There is also an application for a stay but for the moment I wish to concentrate on Deoji's application for leave to appeal.

As mentioned, it is an application for leave to appeal against the earlier order of 14th May 2001. That order was made over 18 months before Deoji's application was filed. The delay is perhaps explained by the long delay between the filing of the application in the High Court on 12 June 2001 and the making of the Court's ruling on 28 November 2002. But there is no application for leave to appeal against the ruling of 28 November 2002. I do not pause to deal with whether it would have been likely that this court would have entertained such an application. It may have been seen to be purposeless.

Counsel for the Singhs has submitted that this court should not itself entertain an application for leave to appeal against the order of 14th May 2001. The matter is put both as a matter of jurisdiction and a matter of discretion. I am satisfied the Court has jurisdiction to deal with it notwithstanding Deoji's failure to obtain leave to appeal from the High Court. But the fact that that application was made and the prolonged delay that occurred before it was decided are very relevant matters to be considered in relation to any exercise of discretion.

The Singhs have had judgment against Deoji for \$31,295 since 14th May 2001. The application for leave to appeal to this court could have been made to it in 2001. Deoji chose to make the application to the High Court which was a course which was open to it. It is now 2 years and 3 months since the judgment was recovered. The Singhs have been deprived of the benefit of it for that period. I have reached the conclusion that this application made as it was on 27th March 2003 nearly 2 years after the judgment was recovered is simply too late. It is in the public interest that litigation should be concluded within a reasonable time. Deoji cannot shelter behind the delay in the High Court which, for whatever reason, took over 18 months to deliver judgment on the application made to

it for leave to appeal. It was Deoji's decision to apply to the High Court rather than the Court of Appeal. The application was carefully considered by Prakash J. and dismissed. It is not as if an application for leave to appeal has not been heard.

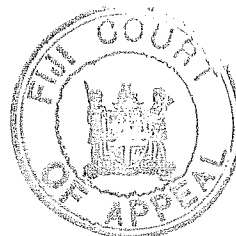
Justice must be done to both parties. The Singhs have been deprived of the benefit of their judgment for over 2 years. That is an important consideration to be weighed in the balance.

In all the circumstances I have decided that Deoji's notice of motion must be dismissed.

Before I conclude there are two matters I should mention. Firstly Deoji has brought a cross claim against the Singhs in these proceedings. It has also commenced a separate action claiming the same relief as it has in the cross claim. Neither the order that I have made nor the orders made by Prakash J. affect the cross claim which remains on foot. There is no application to me to make any order or express any opinion on the effect (if any) of the separate proceeding brought by Deoji. It is a matter to be dealt with by the High Court.

The other matter concerns an order made by the High Court in another matter not connected with this one. Again there is nothing that this court can do, there being no application before it.

In the result then Deoji's notice of motion is dismissed. Deoji is to pay the Singhs' costs of it which I fix at \$500.



J. J. Sheppard

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Sheppard, JA

Solicitors:

Messrs. Vijay Naidu and Associates, Lautoka, for the Applicant
Messrs. Gordon and Company, Lautoka for the Respondents