

IN THE HIGH COURT OF FIJI
AT LAUTOKA
CIVIL JURISDICTION

Civil Action No. HBC 368/2007

BETWEEN: SHANAYA AND JAYESH HOLDINGS LIMITED a limited liability company having its registered office at Junction of Nadi Back Road, Meigunyah, Nadi in the Republic of Fiji.

PLAINTIFF-APPELLANT-APPLICANT

AND: BP SOUTH-WEST PACIFIC LIMITED a company having its registered office at 7th Floor, Vanua House, Victoria Parade, P O Box 118, Suva in Fiji.

DEFENDANT-RESPONDENT-RESPONDENT

Before:

Priyantha Nāwāna J.

Counsel:

Plaintiff-appellant-applicant : Mr V M Mishra

Defendant-respondent-respondent : Ms S Devan

Date of Hearing : 19 October 2012

Date of Order : 29 October 2012

O R D E R
[On Stay of Execution of Judgment]

1. The plaintiff-appellant-applicant (the plaintiff), by its writ of summons dated 05 December 2007, instituted action against the defendant-respondent-respondent (the defendant) seeking *inter alia* [special] damages in a sum of \$ 443,641.00, damages for breach of contract and general damages. The claims were founded upon the losses suffered by the plaintiff allegedly from faulty fuel pumps supplied by the defendant to build and operate a fuel station at Nadi Back Road, Nadi in consequence of a binding contract between the parties. The defendant was to supply fuel as well in terms of the contract.

2. The defendant, by its amended statement of defence dated 16 July 2008, denied the claims of the plaintiff and stated that the plaintiff unilaterally terminated the contract causing losses to the defendant. The defendant counter-claimed *inter-alia* a sum of \$ 202,065.46 being the cost of fuel it supplied to the plaintiff.
3. The parties pleaded and consequently it became common ground that the plaintiff was to engage in the retail sale of the fuel supplied by the defendant, which has earned a well-known trade name for the wholesale supply of fuel worldwide.
4. The case proceeded to trial before Honourable Justice Yohan Ian Fernando (as he then was). By a judgement dated 11 September 2012, Honourable Justice Y.I. Fernando dismissed the claims of the plaintiff and allowed the counter-claim on the cost of fuel supplied by the defendant. Judgment was, accordingly, entered in favour of the defendant for a sum of \$ 202,065.46 on that counter-claim together with interest at 10% per annum from 11 September 2007-11 September 2012 and costs in a sum of \$ 15,000.00.
5. The plaintiff, having been aggrieved by the judgment, filed its 'Notice and Grounds of Appeal' on 20 September 2012, and moved that the execution of the judgment be stayed on the basis of its summons dated 02 October 2012. The summons is supported by an affidavit dated 02 October 2012 from Mr Shiu Ram, Managing Director of the plaintiff-company, along with documents marked A-H.
6. The plaintiff, in its summons accompanied by the affidavit, urges that there are reasonable prospects of success in appeal as Honourable Justice Y. I. Fernando had erred in many respects in arriving at the judgment dated 11 September 2012. The plaintiff undertakes to furnish security to satisfy the judgment upon determination of the appeal.
7. The defendant, opposing the summons, has filed an affidavit dated 12 October 2012 by Mr Kalidas, the Financial Controller of the defendant-company. Mr Kalidas, while deposing on advice that the judgment was correctly entered, urges court to order that the plaintiff's Certificate of Title no 23865 be pledged to recover the judgment sum of \$ 318,098.19 after an independent valuation in the event of a stay being granted.
8. At the hearing into the summons, court had the benefit of receiving both oral and written submissions of learned counsel on 19 October 2012.
9. Grounds of appeal, as relied upon by Mr Mishra, principally revolve around the question - *who had owned the fuel pumps in order to attribute liability for the alleged losses suffered by the plaintiff?* The question is also closely linked to the issue of 'illegality' in relation to the provisions of the National and Trade Measurements Decree No 14 of 1989, which was

decided purely on application of the authority in *Latchman v Ajudhya Prasad* (FJLR Vol. 7 at 90) against the plaintiff.

10. It is not open for this court in these proceedings to delve into the issues raised on behalf of the plaintiff but for Their Lordships of the Court of Appeal. Instead, it would suffice to observe:

(i) Firstly, that Honourable Justice Y.I. Fernando, despite several admissions by parties to hold otherwise, has concluded that it was academic to rule on who the owner of the fuel pumps was (Paragraph 41 of the judgment); and,

(ii) Secondly, Honourable Justice Y.I. Fernando was fundamentally in error by misidentifying the parties when he held that *[t]he plaintiff [was] a wholesale supplier of branded product (BP fuel), while the Defendant was an aspiring retail dealer* (Paragraph 2 of the judgment) in spite of Honourable Justice

Y.I. Fernando's condescending remarks in paragraph 85.

11. Accurate identification of the parties is most basic for a trial judge to determine the issues before court; and, it is more so in this case given the facts and opposing claims by the two party-litigants. This court, in the exercise of its discretion under O 45 r 10 of the High Court Rules 1988 in regard to the stay of execution of a judgment, needs to be cognizant of such errors on the face of the judgment; because, such errors justifiably permit court to accommodate the judgment-debtor's position that the trial judge had erred on intricate issues when he is visibly in error on simple and non-contentious matters.

12. In the circumstances, I am satisfied that the plaintiff has established the first threshold as to the prospects of success of the appeal in seeking a stay of execution of the judgment dated 11 September 2012. I am, nevertheless, bound to consider the applicable principles in granting a stay under O 45 r 10 of the High Court Rules.

13. In *Reddy's Enterprises Limited v The Governor of the Reserve Bank of Fiji*, Fiji Court of Appeal Civil Appeal No. 67 of 1990, adopted the principle laid down in *Wilson v Church* (No 2) (1879) 12 Ch. D 454 CA, where it was stated:

Where an unsuccessful party is exercising an unrestricted right of appeal, it is the duty of the court in cases to make such orders for staying proceedings under a judgment appealed from as will prevent the appeal, if successful, from being nugatory. But the court will not interfere if the appeal appears not to be bona fide, or there are other sufficient exceptional circumstances.

14. His Lordship Gates C.J., in the case of *NLTB v Shanti Lal* (Civil Appeal No CBV 0009/11: 20 January 2012) at paragraph 14 approved the decision of the Court of Appeal in the *Natural Waters of Fiji v Crystal Clear Mineral Water* FJCA [2005] 13; 18 March 2005; Appeal No. ABU0011.04S as laying down the relevant criteria for stay of execution of a judgment. The relevant criteria include:

- (a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory. *Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd* [1977] 2 NZLR 41 (CA).
- (b) Whether the successful party will be injuriously affected by the stay.
- (c) The bona fides of the applicants as to the prosecution of the appeal.
- (d) The effect on third parties.
- (e) The novelty and importance of questions involved.
- (f) The public interest in the proceeding.
- (g) The overall balance of convenience and the *status quo*.

15. I am of the view that if no stay is granted, the appeal of the plaintiff will be rendered nugatory. There is no evidence, on the other hand, that the defendant will be injuriously affected, if at all by the delay, in the payment of the judgment-sum. Moreover, I find no material or evidence, as presented by parties, to be considered against the plaintiff under the remaining criteria.

16. In the circumstances, I allow the summons and order that the execution of the judgment dated 11 September 2012 of Honourable Justice Y. I. Fernando be stayed until final determination of the appeal. I order that the plaintiff shall furnish the Certificate of Title No 23865 as security to this court against the stay of the judgment after obtaining an independent valuation with the concurrence of the defendant. Costs shall be in the cause.

17. Orders, accordingly.

Priyantha Nāwāna
Judge
High Court
Lautoka
29 October 2012