

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION
CIVIL CASE NO. HBC 32 OF 2011
CONSOLIDATED WITH CIVIL CASE NO. HBC 22 OF 2012

<u>BETWEEN:</u>	1. TRUSTEE OF VANUALEVU MUSLIM LEAGUE 2. BASHIR KHAN	<u>PLAINTIFFS</u>
<u>AND:</u>	VCORP LIMITED	<u>1ST DEFENDANT</u>
<u>AND:</u>	LABASA TOWN COUNCIL	<u>2ND DEFENDANT</u>
<u>AND:</u>	I-TAUKEI LAND TRUST BOARD	<u>3RD DEFENDANT</u>
<u>AND:</u>	MINISTRY OF LANDS & MINERAL RESOURCES	<u>4TH DEFENDANT</u>
<u>AND:</u>	MINISTRY OF LOCAL GOVERNMENT, URBAN DEVELOPMENT	<u>5TH DEFENDANT</u>
<u>AND:</u>	ATTORNEY GENERAL OF FIJI	<u>6TH DEFENDANT</u>

Appearance: Plaintiffs - Mr. A. K. Singh
Defendants - Mr. A. Sen for 1st Defendant
Mr. Sharma S for 2nd Defendant
No Appearance for 3rd Defendant
Mr. J. Pickering for 4th, 5th and 6th Defendants

Date of Judgment : 15th March, 2018

JUDGMENT

Introduction

- [1] The Plaintiff filed summons seeking a stay of the judgment delivered on 11.05.2017. The decision was delivered after hearing where even the judge had visited the place, and had made some observations. The Plaintiff has appealed against the said judgment.

Analysis

- [2] The judge had made following orders

"a). The plaintiff's claim for declaratory and injunctive orders are dismissed in its entirety.

(b). The plaintiffs are jointly and severally liable to pay to VCORP exemplary damages in the sum of \$50,000.

(c). The plaintiffs are jointly and severally liable to pay VCORP damages for trespass to land in the sum of \$50,000.

(d). The plaintiffs must within 14 days remove any structure that is erected on VCORP's ITL No. 30080, failing which, VCORP is entitled to remove the said structure from its property to develop its land.

(e). The plaintiffs are immediately and permanently restrained from trespassing onto VCORP's ITL NO. 30080 and also from discharging waste or storm water onto the same.

(f). VCORP is at liberty to develop its land. The plaintiffs are restrained from interfering with VCORP's development of the land. VCORP must comply with condition 8 in paragraph 97 of the judgment. Until VCORP is able to comply with condition 8, the plaintiffs are to discharge its storm water only in the common drain provided by LTC.

(g). VCORP's counterclaim for special damages and claim for unlawful arrest, malicious prosecution and intimidation are dismissed.

(h). The plaintiffs are to pay costs to the defendants in the following manner:

(i) \$6,500 to the 1st defendant.

(ii) \$2,500 each to 2nd and 4th, 5th, and 6th defendants. The costs to the 4th, 5th, and 6th defendants to be paid collectively which means that only \$2,500 shall be paid to 4th, 5th and 6th defendants.

(iii) \$1,500 to 3rd defendant."

[3] This matter was instituted in 2011 and Plaintiff's main contention that he had an easement over the land leased to 1st Defendant was rejected in the said decision upon the evidence as well as observations of the judge at the scene.

[4] It should also be noted that judge upon visit had further observed as follows:

'I have also visited the property and on my visit it was evident that the plaintiff had dug the drain overnight when I had indicated to the parties that I would visit the property and see the drain. The soil that was dug was fresh and there was no indication that there was a drain before. The storm water from VML's building was being discharged on the land to the Labasa River and not only that the kitchen rubbish from VML's property was also being discharged on the land to Labasa River.

Before the drain was dug, I find that there was a natural water way that was created on the land and that was due to the buildings storm water and kitchen rubbish flowing through the path to the sea.

*When Mr. VD gave evidence he tendered 5 photographs of the drain. The photographs were tendered as **Exhibits 14 A – E**. The photographs were taken on 15 March 2016, being the time when the trial was in progress. It is clear from the photographs that there was no such drain behind the property. VML was using the land inappropriately and selfishly to discharge not only the storm water from the property but also kitchen waste to Labasa River. Exhibit 14 A clearly shows the soap scum behind the back of the property and the illegally constructed shed on the same.*

It is clear that the plaintiff's should not have at any time discharged the kitchen rubbish into Labasa River. That causes immense pollution and is a hazard to sea creatures and the human beings as well.

I have found that the drain contained soap scum and food particles which indicate why the plaintiff does not wish to use the common drain to discharge the rain water. If the common drain was used and food particles and soap scum was found in it, the residents would have complained and LTC would have taken action against the plaintiff's. To avoid that, VML and Mr. BK found an easy way to discharge rubbish through the back of the land. The kitchen rubbish should properly be directed to the sewer lines.'

At the closing submissions stage only, the plaintiff's counsel agreed that the plaintiff's do not have a drainage easement. This is only after the plaintiff's could not establish that there was an easement as falsely claimed all along' (emphasis added)

[5] So the judgment contained some first-hand observations from the judge which will be the best independent finding of facts and even in an appeal such findings are rarely interfered.

[6] Court of Appeal , in **Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd** [2005] FJCA 13; ABU0011.2004S (18 March 2005) held ,

'Principles on a stay application

[7] The principles to be applied on an application for stay pending appeal are conveniently summarised in the New Zealand text, McGechan on Procedure (2005):

"On a stay application the Court's task is "carefully to weigh all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful": Duncan v Osborne Building Ltd (1992) 6 PRNZ 85 (CA), at p 87.

*The following **non-comprehensive list of factors conventionally taken into account by a Court in considering a stay** emerge from Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd (1999) 13*

PRNZ 48, at p 50 and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission (1993) 7 PRNZ 200:

(a) Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory (this is not determinative). See 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."

- [7] The above principles were applied by Fiji Supreme Court in ***In Native Land Trust Board – v- Shanti Lal and Others*** (unreported CBV 9 of 2011; 20 January 2012), the Supreme Court (Gates CJ)

Whether, if no stay is granted, the applicant's right of appeal will be rendered nugatory

- [8] As stated in the judgment this is not determinative factor. The final order (a) is refusal to grant declaratory order and there cannot be stay of that. Orders (b), (c) and (h) are for payment of money and considering the circumstances of the case and the commercial nature of the businesses there is no evidence that if stay is not granted that appeal will be rendered nugatory.
- [9] At the same time considering the pertinent observations by the judge at the scene if a stay is granted for orders (e) and or (f) it would allow the irreparable loss not only to the Defendants but also allowing unlawful dumping in to a natural waterway.
- [10] As regard to order (d) again there is no evidence that removal of any structure on the said land already leased to 1st Defendant would make the appeal rendered nugatory.

Whether the successful party will be injuriously affected by the stay

- [11] Successful party will be injuriously affected if a stay is granted. They have waited for a long time since the lease was granted in 2012 to start a commercial venture and it should not be further delayed, by a stay of the judgment.

The effect on third parties and the public interest in the proceeding

- [12] There is an effect on third parties if the stay is granted due to the pollution of a natural waterway which was observed by the judge. There is a public interest in the nature of the pollution and also nature of the prospective business venture in the centre of the town which lacks such facility.

The overall balance of convenience and the status quo

- [13] The overall balance of convenience will also favour the refusal of the stay. According to the judgment the status quo is not very satisfactory and if a stay is granted it will affect the successful party more than the Plaintiff. The 1st Defendant's business venture is already delayed for more than 5 years and this also opens space for rival or competitors to cash in. If a stay is granted the lost opportunity during such time can never be gained, and there is relatively more damage to the successful party.
- [14] Though I do not have any doubt about the bona fides of the applicant regarding the appeal, considering the merits of the appeal and also grounds of appeal contained in the annexed affidavit to the summons for stay, the discretion of the court should be to refuse the stay.

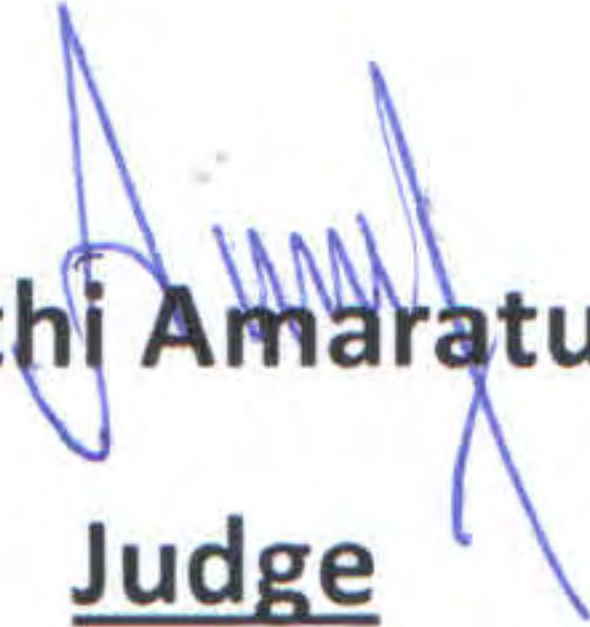
Conclusion

- [15] Considering the nature of the final orders and its effect on the parties, the discretion of the court is exercised to refuse the stay of judgment. The cost of this application is summarily assessed at \$1,500.

Final Orders

- [20] a. Summons for stay of judgment and orders, is struck off.
b. Cost of this application is summarily assessed at \$1,500




Deepthi Amaratunga
Judge