# IN THE HIGH COURT OF FIJI AT SUVA

## CIVIL JURISDICTION

**Civil Action No. 287 of 2018**

**ROSY REDDY** of Auckland, New Zealand, Process Worker as the Administratrix of **THE ESTATE OF NARAYAN REDDY,** late of Suva, Fiji.

**PLAINTIFF**

AND

**YANKTESH PERMAL REDDY** of Waterfront Hotel, Marine Drive Lautoka, Company Director.

**FIRST DEFENDANT**

AND

**YANKTESH PERMAL REDDY** of Waterfront Hotel, Marine Drive Lautoka, Company Director, **ROHIT REDDY** of Level 2 Spartik House 6-8 Edward Wayte Place, Auckland New Zealand, Company Director, **KALPANA REDDY** of Level 2 Spartik House 6-8 Edward Wayte Place, Auckland New Zealand, **GIYANANAND NAIDU** of 15 Kadau Street, Lautoka, Finance Manager and Director.

**SECOND DEFENDANTS**

AND

**REDDY CONSTRUCTION COMPANY LIMITED** a company incorporated in Fiji and having its registered office at 35 Ravouvou Street, Lautoka.

**THIRD DEFENDANT**

AND

**REDDY ENTERPRISES LIMITED** a company duly incorporated in Fuji and having its registered office at 35 Ravouvou Street, Lautoka.

**FOURTH DEFENDANT**

AND

**CLYDE EQUIPMENT (PACIFIC) LIMITED** a company incorporated in Fiji and having its registered office at 35 Ravouvou Street, Lautoka.

**FIFTH DEFENDANT**

AND

**REDDY HOLDINGS LIMITED** a company incorporated in Fiji and having its registered office at 35 Ravouvou Street, Lautoka.

**SIXTH DEFENDANT**

AND

**FINEGRAND LIMITED** a company duly incorporated in Hong Kong and having its registered office at 1st Floor, Tung Hip, Commercial Building, 224 Des Vouex Rd, Hong Kong.

**SEVENTH DEFENDANT**

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| **Counsel** | : | Ms. Fa. F. for the Plaintiff<br>Mr. Singh. R. for the Defendants |
| **Date of hearing** | : | 12th August 2020 |
| **Date of Ruling** | : | 31st August 2020 |

# RULING

**(On the Application for leave to Appeal)**

[1] This is an application by the plaintiff seeking leave to appeal the order of this court made on 26th June 2019 declaring that the plaintiff was not entitled to demand the attendance of the defendants for cross examination at the hearing of the committal proceedings, on the following grounds:

1. The Learned Judge erred in fact and in law in holding that the Appellant/Plaintiff is not entitled to demand the attendance of the Respondents in court for cross-examination at the Hearing on the Committal proceedings when in fact O.38 r.2 (3) of the High Court Rules 1988 permits the Court to order the attendance of the 1st -2nd Respondents, namely Yanktesh Permal Reddy, Rohit Reddy, Kalpana Reddy and Giyananand Naidu to be cross-examined on their Affidavits deposed to on the 6th of May 2019 on an application by the Plaintiff.
2. The Learned Judge erred in fact and in law in holding that the Appellant/Plaintiff is not entitled to demand the attendance of the Respondents in court for cross-examination at the Hearing on the Committal proceedings without any legal authority to support its position.
3. The Learned Judge erred in fact in law in holding that the Appellant/Plaintiff is not entitled to demand the attendance of the Respondents in court for cross-examination at the Hearing on the Committal proceedings when in fact O.38 r.2 (3) of the High Court Rules 1988 permits the C to order the attendance of the 1st -2nd Respondents, namely Yanktesh Permal Reddy, Rohit Reddy, Kalpana Reddy and Giyananand Naidu to be cross-examined on their Affidavits deposed to on the

6th of May 2019 when at all material times, the 1st- 2nd Respondents, namely Yanktesh Permal Reddy, Rohit Reddy, Kalpana Reddy and Giyananand Naidu had no objected to attending Court for the purposes of being cross-examined on their respectful Affidavits.

[2] The law relating to granting leave to appeal interlocutory orders have been discussed at length in the following decisions:

In **Niemann v. Electronic Industries Ltd.** [1978] V.R. 431 at page 441 where Supreme Court of Victoria (Full Court) held as follows:

> ".....leave should only be granted to appeal from an interlocutory judgment or order, in cases where substantial injustice is done by the judgment or order itself. If the order was correct then it follows that substantial injustice could not follow. If the order is seen to be clearly wrong, this is not alone sufficient. It must be shown, in addition, to affect a substantial injustice by its operation.
>
> It appears to me that greater emphasis is therefore must be on the issue of substantial injustice directly consequent on the order. Accordingly if the effect of the order is to change substantive rights, or finally to put an end to the action, so as to effect a substantial injustice if the order was wrong, it may be more easily seen that leave to appeal should be given.

In the case of **Khan v Suva City Council** [2011] FJHC 272; HBC406.2008 (13th May 2011) the following observations were made in regard to applications for leave to appeal;

> It is trite law that leave will not generally be granted from an interlocutory order unless the Court sees that substantial injustice will be done to the applicant.
>
> Further in an application for leave to appeal, it is incumbent on the applicant to show that the intended appeal will have some realistic prospect of succeeding.

In **Kelton Investment Ltd & Tapoo Ltd v Civil Aviation Authority of Fiji and Motibhai & Company Limited** Civil Appeal No. ABU 0034 of 1995 the Court of Appeal observed as follows;

> The Courts have thrown their weight against appeals from interlocutory orders or decisions for very good reasons and hence leave to appeal are not readily given. Having read the affidavits filed and considered the submissions made I am not persuaded that this application should be treated as an exception. In my view the

intended appeal would have minimal or no prospect of success if leave were granted. I am also of the view that the Applicants will not suffer an irreparable harm if stay is not granted.

In the case of **Ex parte Bucknell** (56 CLR 221 at page 224) it was held:

> At the same time it must be remembered that the prima facie presumption is against appeals from interlocutory orders, and, therefore, an application for leave to appeal under section 35(1)(a) should not be granted as of course without consideration of the nature and circumstances of the particular case. It would be unwise to attempt an exhaustive statement of the considerations which should be regarded as a justification for granting leave to appeal in the case of an interlocutory order, but it is desirable that, without doing this, an indication should be given of the matters which the court regards as relevant upon an application for leave to appeal from an interlocutory judgment.

In **Dunstan v Simmie & Co Pty Ltd** 1978 VR 649 at 670 it was held:

> "....although the discretion to grant leave cannot be fettered, leave is only likely to be given in a case where the determination of the primary issue puts an end to the action or at least to a clearly defined issue or where, to use the language of the Full Court in Darrel Lea (Vic.) Pty Ltd v Union Assurance Society of Australia Ltd., (1969) V.R. 401, substantial injustice would result from allowing the order, which it is sought to impugn, to stand."

In **Rajendra Prasad Brothers Ltd v FAI Insurances (Fiji) Ltd** [2002] FJHC 220; HBC0205r.2001s (9 August 2002) the High Court Held:

> This application as I see it is not only on interlocutory order but also one of Apractice and procedure. Here there was an exercise of discretion by the Court on a point of >practice and procedure=. I find that the following passage from the judgment of the High Court of Australia in **Adam P Brown Male Fashions Pty Ltd v Philip Morris Inc. & Anor,** [1981] HCA 39; [1918] 148 CLR 170 at 177 wherein is repeated with approval the oft-cited statement of **Sir Frederick Jordan** in **Re Will of F.B. Gilbert** (deceased) [1946] 46 SR (NSW) 318 at 323 pertinent:
>
> > A...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 inference with the order 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. (Emphasis mine)

[3] From the decisions cited above it appears that the court are discouraged to a very great extent in granting leave to appeal interlocutory orders.

[4] The grounds of appeal relied on by the by the plaintiff are mainly based on the provisions of Order 38 rule 2(3) of the High Court Rules 1988 which provides:

> In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.

[5] The above provision of the High Court rules does not confer a right on a party to compel a person to attend for cross-examination. It only confers a discretion on the court to make such orders. As I said in my ruling a party who is charged for contempt has the right to testify at the hearing or to refrain from giving evidence which will be to his own detriment. The burden of proving that the defendant has acted in contempt of court is fairly and squarely on the plaintiff and she cannot compel the defendants to testify to prove her case.

[6] Order 38 rule 2(3) also provides that after making the order if the person does not attend the court, his affidavit shall not be used as evidence without the leave of the court. Therefore, even if the court makes an order requiring the defendants to testify at the contempt hearing they are still not bound to testify. The consequences for not attending court to testify is clearly stated in Order 38 rule 2(3) of the High Court Rules.

[7] In the affidavit of Giyananand Naidu who is now deceased it is averred that the defendants have had, but have not now, in their possession, custody or power the documents enumerated in Schedule 1 herein.

[8] The learned counsel for the plaintiff submitted that the plaintiffs need to know whether the defendants still have in their possession or not but the issue here is whether the defendants or any of them have acted contrary to the order of the court or failed to comply with the order of the court. The plaintiff cannot use the contempt proceedings for discovery of documents.

[9] Giyananand Naidu passed away after the court made the order sought to be appealed. Therefore, his death cannot be a ground to refuse leave. However, the plaintiff seeks to cross-examine the defendant on the averments contained in his affidavit. The position of the learned counsel for the plaintiff is, his death will not affect the plaintiff's right to cross examine the defendants since the other defendant have affirmed the position of Gayananand Naidu in their respective affidavits. Affidavit is sworn evidence and averments contained therein are based on facts within the personal knowledge of the affirmant. Although the other defendants have confirmed the averments in the affidavit of Gayananand Naidu they cannot as of a right cross-examine the other defendants on the averments contained in his affidavit.

[10] For the above reasons the court is of the view that the intended appeal would have minimal or no prospects of success.

## ORDERS

1. The application for leave to appeal is refused.
2. Costs shall be in the cause.


Lyone Seneviratne

**JUDGE**

31st August 2020