

injury to his left eye and medical evidence was that it would aggravate in future.

FACTS AND ANALYSIS

2. Plaintiff was injured while working as a tiller of Pine Wood from the machine used to till Pine Wood at Defendant's premises.
3. Plaintiff was allowed to work with a Hazardous Device without proper protection and or supervision by Defendant.
4. Plaintiff in his evidence said that he had repeatedly asked for safety equipment and not provided and there were no supervision of the inherently hazardous machine operated at the premises of Defendant.
5. Defendant was a supplier of wooden posts and it was using inherently hazardous machine at its premises and no way in a position to shift his prime obligation to safety from a hazardous machine without adequate safety and supervision.
6. Defendant in paragraph 11 of the affidavit in support states that it has 'substantial property' hence in a position to pay the Plaintiff 'any damage'.
7. It was ordered to pay only \$124,537 which cannot be considered as a decisive amount for its survival considering that it can pay 'any damage'. So the contention that this payment will affect Defendant, adversely to its business cannot be accepted on their own evidence.
8. Affidavit in support does not state that Plaintiff will be unable to pay the damages if the appeal is allowed.
9. Court of Appeal in *Attorney General of Fiji v Dre* [2011] FJCA 11; Misc.13.2010 (17 February 2011) Marshall JA held,

“What probably always has been relevant to these stay applications but is now expressly so in view of the Hong Kong cases cited from the Hong Kong White Book 2007 at paragraph 24 above, is the negative chances of success of the appellant. The policy behind, "not denying the Plaintiff the fruits of his judgment" is the experience of the law that many litigants, will appeal any judgment until finality on any grounds in order to postpone the day of paying out. **Too often delay is the name of the game.** So it has probably always been correct to say that there will be no special reasons based on the Plaintiff's lack of means to repay or otherwise where on examination of the Defendants' chances of success on appeal the decision maker concludes that they are low to non-existent. The Defendant should not be appealing because he does not have strong grounds; the fact that he has low to non-existent chance of success in his appeal must determine his application for a stay against him.” (emphasis added)

10. Court of Appeal had emphasized the issue of delay in payment by business entities for their commercial benefit, which is further prolonging mitigating the permanent injury happened from working in Defendant's, hazardous machine.
11. Fiji Court of Appeal in Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd held;

“The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005): “On a stay application the Court’s task is carefully to weight 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 [5] and Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission [6];

- i. **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).

There is no such evidence that if stay is not granted the appeal will be rendered nugatory.

Plaintiff had suffered a permanent loss of one eye and this injury can also get aggravated with time and he needs to be compensated quickly.

- ii. **Whether the successful party will be injuriously affected by the stay.**

Plaintiff had lost sight of one eye completely and medical evidence was that it will get aggravated if let attended. If the stay is granted it will injuriously affect Plaintiff. So the delay is causing greater damage to the condition of the Plaintiff who had already lost sight of one eye.

- iii. **The bona fides of the applicants as to the prosecution of the appeal.**

The delay in payment of compensation by a business is a factor to be taken consideration as stated in Court of Appeal (Per Marshall JA) in Attorney General of Fiji v Dre [2011] FJCA 11 (decided on 17.2. 2011).

Defendants have timely appealed against the judgment exercising their right of appeal. But this does not necessarily mean the bona fides of the application favours Defendant. It is part of due process and they also know that there is no stay of execution unless court grants such a stay. Defendants may bona fide believe success of their appeal, and may proceed with due diligence. It may also appeal to delay payment.

iv. **The effect on third parties.**

There are no effect on third parties.

v. **The novelty and importance of questions involved.**

There are no novel issues as duty of care from hazardous material or machinery is trite law.

There are no novel issues to be determined in Court of Appeal or effects of judgment on third parties as only Defendants are liable to pay damages or public interest on the matter. It was a personal injury that led to loss of sight of one eye. He had waited for a long time to obtain the judgment.

vi. **The Public interests in the proceeding.**

There is no public interest in this personal injury action.

vii. **The overall balance of convenience and the status quo.**

The overall balance of convenience lied with Plaintiff considering the injury and aggravation of the injury with time according to medical evidence. As admitted in the affidavit in support, Defendant is in a position to pay any amount of damage hence the sum ordered by the court has no effect to the financial status of the Defendant.

If a stay is granted injury to Plaintiff is more as the time value for money decrease with time and this would make Defendant at an advantage. So, there is clear injury to Plaintiff due to decreasing value of money.

This is aggravated due to permanent injury to vital organ such an eye, which deprive Plaintiff his fruits of the judgment.

12. In England and Whales Court of Appeal (Civil) decision R (on the application of *BMW AG*) v *Revenue and Customs Comrs.* [2008] EWHC 712 (Admin); [2008] STC 3090; [2008] EWHC 689; [2008] All ER (D) 114 (May) lifting a stay order of court below in the exercise of discretion held,

“That starting point is, however, by no means also the finishing point, because it is also equally well-established that the court has an unfettered discretion to order a stay of the order under appeal if the justice of the case demands it. In a case in which the question of the ordering of a stay arises, the role of the court is to make the order that best accords with the interests of justice. **Where there is a risk of harm to one party or the other, whichever order is made, the court has to balance the alternatives and make a decision as to the course which is likely to occasion the least injustice.** (emphasis added)

13. So the consideration of the court is ‘least injustice’ taking all the factors into consideration.

14. Defendants had appealed against the said judgment on following grounds and they are discussed in brief along with the appeal grounds which are contained in (a)-(I) and the consideration of them individually found below the grounds for convenience.

- a) That the Learned Judge erred in law and in fact when he failed to consider that the Appellant was not in breach of negligence as he had provided the Plaintiff with safety equipment, such as and it was the Plaintiff that lost the equipment and did not report that he had no safety goggles to the Appellant.

Defendant was negligent in allowing its main activity, which was the tilling machine to operate without adequate supervision and for safety measures. The fact that such a machine was allowed to be operated without any supervision and or danger sign and allowing it to be accessed freely is a gross negligent act.

- b) That the Learned Judge erred in law and in fact when he misdirected himself in that the Appellant had breached his duty of care towards the Plaintiff.

There was no misdirection on the point of law as duty of care of the Defendant from a hazardous equipment that was allowed to be used in negligent manner without proper supervision and also danger signs. Defendant's duty of care expands even to trespasser when dealing with dangerous material or machines. This is a trite law.

- c) That the Learned Judge erred in law and in fact when he misdirected himself in law when he failed to consider that the Plaintiff was a hired person of an independent contractor and not a directly employed by the Appellant himself.

The issue of hiring a labour was not an issue as the primary obligation of the occupational safety applied to all the workers irrespective of nature of engagement. The injury happened from the main equipment used in Defendant's business by Plaintiff. It cannot be absolved from the liability as the workplace was hazardous environment and special measures needs to be taken to safeguard all users to the premises.

- d) That the Learned Judge erred in law and in fact when he misdirected himself in law by failing to consider that the Plaintiff could not submit in court an Employment Contract stating to the Court that he was directly employed by the Appellant at any material time.

Employment contract is not determinative to duty of care from hazardous machine.

- e) That the Learned Judge erred in law and in fact when he misdirected himself in law by failing to consider that the Plaintiff was working for his brother who was an Independent Contractor of the Appellant, thus making the Appellant not liable for the injuries sustained by the Plaintiff.

Plaintiff was working in Defendant's premises using its machine and got

injured from it due to lack of supervision and safety measures to secure injury from it.

- f) That the Learned Judge erred in law when he failed to consider that the Plaintiff worked on the instructions of the Independent Contractor who was his brother and not that of the Appellant.

The issue of independent contractor or not is not the determinant issue before the court. Defendant provided the machine to till the wood and Plaintiff used it. The mode of payment and other arrangements cannot release the primary occupational safety from hazardous machine that eject wood parts while it being used. There were no safety areas marked or enclosures and or signs of danger exhibited for any person while it was operational.

- g) That the Learned Judge erred in law and in fact when he misdirected himself in law by failing to consider that when the Plaintiff was previously employed by the Appellant as a casual worker and there was no termination from the side of the Appellant but rather that Plaintiff stopped reporting to work completely.

If the Plaintiff was employed without a specific time period employer should be able to provide termination of such employment, but again this is not determinant regarding the duty of care from hazardous machine.

- h) That the Learned Judge erred in law and in fact when he misdirected himself in law by failing to take into consideration at all that the Plaintiff did not report the matter to the Appellant as soon as the incident occurred and rather chose to use herbal medications which further deteriorated the injury to his left eye and after the eye worsened, then the Plaintiff chose to get the matter reported to the Appellant.

Plaintiff got injured from the hazardous machine while it being in operational status. Plaintiff was authorized to use it but without any supervision. This had caused the incident not be reported as there was no one to report or proper procedure laid down.

- i) The Learned Judge erred in law and in fact when he misdirected himself in law by failing to consider that the Appellant was unaware of the injury sustained by the Plaintiff, and only came aware weeks after the injury and right after becoming aware took the Plaintiff for medical examination.

Defendant's lack of knowledge was due to its own lack of procedure to deal with injured and or supervision and cannot be held against Plaintiff.

- j) The Learned Judge erred in law and in fact when he failed to consider that Plaintiff's left eye could have been properly examined if he got medical attention on the day he got injured.

This is a conjecture that was not proved on balance of probability on the evidence. Medical evidence was contrary to this. The loss of sight was

due to detachment of retina due to weight of wood speck.

- k) The Learned Judge erred in law and in fact when he failed to consider that the delay by the Plaintiff caused his left eye to worsen up to that level.

The injury was caused by Defendant's premises while engaged in the work. Hence the delay in treatment was also due to lack of procedure or supervision on the part of Defendant. It lacked any procedure for injured person to follow.

- l) The Learned Judge erred in law and in fact when he held that Appellant's witness namely Tania was bias as she was still employed by the Appellant.

Analysis of evidence needs to be done with proper evaluation and interested person's evidence needs to be considered accordingly. if such evidence was not substantiated by other evidence.

15. UK Supreme Court Practice (White Book) 1988 59/13/1 p 893 states;

Stay of execution of proceedings pending appeal

The Court does not "make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled, "pending an appeal (The Annot Lyle [1886] UKLawRpPro 31; (1886) 11 P.D. 114, p 116. CA; *Monk v Brtram* [1891] UKLawRpKQB 15; [1891] 1 Q.B. 346; and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from for example, inquiriesBut it has also been said that "when a party is appealing exercising his undoubted right of appeal this Court ought to see that the appeal is successful is not nugatory.... It is in the discretion of the Court to grant or refuse a stay and the court will grant it where the special circumstances of the case so require. As a general rule the only ground for a stay of execution is an affidavit showing that if damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds...."

16. There is no material in the affidavit in reply to substantiate the allegation that Plaintiff was not a person who may return the judgment ordered. This allegation was not made in the affidavit in support, depriving Plaintiff to refute said allegation. In my mind such an allegation without any basis, cannot be considered as meritorious ground to deprive Plaintiff's right to fruits of the judgment.
17. Supreme Court of Fiji in *Ward v Chandra* [2011] FJSC 8; CBV0010 (20 April 2011) cited a previous decision of Supreme Court with authority.(Per Justice Gates President of Supreme Court)

*[21] In *Iftakhar Iqbal Khan v Michael Fenech* CBV0002.05S (4 May 2005) Ward JA in this court said (at p.4) in relation to stay:

"Execution in this case is payment of a sum of money. Only in the rarest of cases is that sufficient to justify a stay as subsequent success in the appeal will be implemented by repayment to the appellant. This is not a case of

performance or restraint of some action or destruction of property which will irreversibly change the status quo and render a successful appeal nugatory. The description in the petitioner's affidavit of the consequence of having to pay before the application for special leave is heard is insufficient to meet that test."

18. This action awarded a sum of money as compensation to Plaintiff who lost his sight in left eye in 2016 and awaits the payment. Defendant owed duty of care not only for the workers but also even to other users, of its premises from the danger from hazardous machine had failed to do so. The gross negligent manner the premises and the machine was operated evident from their own evidence.

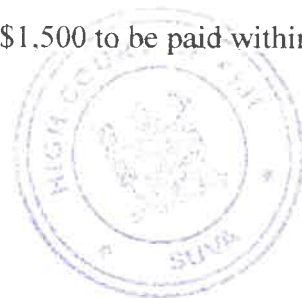
CONCLUSION

19. If stay is not granted the appeal will not be a nugatory. There was no evidence in any of the affidavits that show Plaintiff will not be in a position to pay said sum if the appeal is successful. In any event this should not be the deciding factor when the Defendant had a hazardous machine and allowed it to operate without adequate supervision and safety measures. Plaintiff's left eye lost its sight completely and this happened from usage of Defendant's premises while working as wood tiller. Wood tilling machine is hazardous but Defendant had not taken adequate supervision while it was in operation. Defendant had duty of care for all the users of its premises. Plaintiff was engaged in the main activity of the Defendant's premises and got injured. There is no prospect of success for the Defendant due to gross negligence. Application for stay struck off. Cost of this application is summarily assessed at \$1,500 to be paid within 21 days by Defendant.

FINAL ORDER

- a. Summons for stay struck off.
- b. Cost of this application is summarily assessed at \$1,500 to be paid within 21 days.

Dated at Suva this 22nd day of August, 2023.



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Amruthi
Justice Deepthi Amaratunga
High Court, Suva