

**RENUKA SHANKAR v CHANDAR GOPALAN NAIDU**

SUPREME COURT — CIVIL JURISDICTION

5 FATIAKI P, FRENCH and HANDLEY JJ

17, 24 October 2003

[2003] FJSC 6

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**Practice and procedure — time limit extensions — petition for special leave — High Court Rules 1998 O 18 r 14(1) — Supreme Court Act 1998 s 7(2).**

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**Damages — assessment — motor vehicle accident — loss of earnings — right to equality — Fiji Constitution ss 38(1), 38(2), 122(2)(a), 122(2)(b). — United Nations Convention on the Elimination of all forms of Discrimination against Women.**

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Applicant sought an application, in a personal injuries action arising out of a motor vehicle accident, to extend time to bring a petition for special leave to appeal against a Court of Appeal decision. She alleged insufficiency of assessment of her loss of earnings awarded to her by gender-biased assumptions contrary to the provisions of s 38 of the Constitution guaranteeing equality before the law.

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**Held** — (1) Having regard to the relatively short period of the delay, the circumstances in which the delay occurred and the want of any practical prejudice to the Respondent, time should be extended to enable the court to hear and determine the special leave petition.

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(2) The right to equality before the law conferred upon “every person” by s 38(1) of the Constitution and the prohibition against unfair discrimination in s 38(2) raise matters of general importance in Fijian society. The trial judge’s assessment was based upon Ms Shankar’s pre-accident intentions and behaviour and his factual assessment in part upon them.

Special leave dismissed.

**No case cited.***V. M. Mishra* for the Petitioner.

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*V. Kapadia* for the Respondent.**Fatiaki P, French and Handley JJ.****Introduction**

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This is an application to extend time to bring a petition for special leave to appeal against a decision of the Court of Appeal. The application is brought by the successful plaintiff in a personal injuries action arising out of a motor vehicle accident. She contends that the quantum of damages she was awarded was insufficient in various respects. In particular, she contends that the case involves a constitutional point namely that the assessment of her loss of earnings was informed by gender-biased assumptions contrary to the provisions of s 38 of the Constitution guaranteeing equality before the law.

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***Factual history***

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Renuka Shankar was born on 30 August 1955. In 1979 she received a Diploma in Education at the University of the South Pacific. She also received a Certificate of Basic Programming from the Nadi Commercial School.

In 1994 Ms Shankar was working as a school teacher and had been working as such for about 15 years. She was living in a de facto marriage with a Mr Gopal, whom she had met in December 1993. They had started living together in January 1994. Although Ms Shankar continued to work as a school teacher after they met she and Mr Gopal set up a small business in Nadi. They planned to marry at the end of 1994. They intended to have a child or children.

On 15 October 1994 Ms Shankar was driving in a motor vehicle towards Suva. She was taking several students from her school to attend an award ceremony. Her car was involved in a head on collision with a motor vehicle driven by Chandar Gopalan Naidu. Ms Shankar suffered injuries in the accident including bruising and lacerations to her face, multiple bruises to her body and a deep laceration over her right elbow. Her dog, which was travelling in the car, was killed in the accident.

In proceedings which she subsequently brought in the High Court the learned trial judge, (Scott J) found that she had also suffered from “severe emotional harm” and “quite a severe level of psychosocial distress and disability”. In a judgment delivered on 15 December 2000, his Lordship awarded Ms Shankar damages of \$103,850 calculated as follows:

20	1. Pain and suffering and loss of amenities	\$ 60,000
	2. Loss of salary 5 x \$7,600	\$ 38,000
	3. Special Damages	\$ 5,850
		Total \$103,850

25 There was no award for interest as none had been claimed.

The loss of salary component of the award is reflected in the following passage in his Lordship’s reasons:

30 On the important matter of her teaching career the evidence was somewhat less firm than I would have liked but in my opinion had the accident not happened she would in all probability have married Gopal, and carried on teaching until the children arrived. I think then she would have left teaching and joined her husband in the running of the business whenever she had time to spare. I do not think it likely that she would have married, had children and taken a degree at University (something she did not get around to doing for 15 years, choosing instead to travel extensively overseas) and gone on to become a head of department. I think she has certainly lost wages as a result of this accident but I put that loss at 5 years and no more.

### **The grounds of appeal to the Court of Appeal**

Ms Shankar appealed to the Court of Appeal against the quantum of the award. In respect of the loss of earnings component of the award the two grounds of appeal were expressed thus:

1. The Learned Judge erred in fact and/or in law in only allowing a multiplier of 5 for the Appellant’s loss of salary as a school teacher despite finding that:
  - 45 (a) He accepted that the Plaintiff suffers from severe emotional harm and a severe level of psychosocial distress and disability.
  - (b) The appellant would never again become her old self.
  - (c) He accepted that she had lost her teaching career and income therefrom.
- 50 2. The Learned Judge erred in fact and/or in law and applied wrong principles that the Appellant would only have taught until she had married and had children and then would have left teaching.

She also challenged the trial judge's award for pain and suffering (ground 3) and contended that he had erred in not awarding any sum for her permanent facial and elbow scarring (ground 4). The fifth and final ground of appeal asserted that the trial judge erred in refusing to allow interest on her damages award.

5 In the written submissions put on behalf of Ms Shankar to the Court of Appeal in relation to the loss of earnings component of the award, reference was made to s 38 of the Fiji Constitution. That section guarantees equality before the law and prohibits unfair discrimination, direct or indirect, on a number of grounds including gender. It was said in support of this contention that, having taught for  
10 fifteen years in a profession that she enjoyed and was good at and being a person of her own mind, the appellant was "... entitled to an inference that she would have worked until retirement as would a male in her position". It was submitted that teaching was a central part of her existence and enjoyment of life and that the multiplier of 5 for a person of 39 years of age (as she was at the time of the  
15 accident) was manifestly inadequate. The submissions did not develop the constitutional point further.

The Court of Appeal dismissed the appeal.

### **The judgment of the Court of Appeal**

20 In relation to the loss of earnings question, the court did not in terms address the discrimination point taken in the written submissions. The court acknowledged that the assessment of both past and future loss of earnings gave rise to difficulty. There was no real problem in determining the income which Ms Shankar would have received had she continued to work as a school teacher.  
25 The difficulty arose because it was contended that in her circumstances she would not necessarily have continued to work indefinitely as a school teacher.

The court referred to the contention, put on behalf of Mr Naidu, that Ms Shankar, having intended to have a child or children, inevitably would have given up her work in order to "perform her duties as a wife and mother". She  
30 would have been more likely to work in the family business in conjunction with the discharge of her maternal obligations than to have continued teaching. The court acknowledged the argument advanced for Ms Shankar "... that it was no longer appropriate to reflect gender differences in the assessment of damages and that it should not be assumed that a woman would work for a shorter period in  
35 a career than would a man". It referred also to the submission that Ms Shankar was likely to have continued working as a school teacher and to have made arrangements for child care if necessary so that she could continue with that career.

The court adverted to the trial judge's factual conclusion that had the accident  
40 not happened Ms Shankar would in all probability have married Mr Gopal and carried on teaching until the children arrived. It referred to his finding that she would then have left teaching and joined her husband in the running of the business in her spare time. The court referred to the judge's choice of a multiplier of 5, which it said was "... no doubt on the assumption that at the time the  
45 accident occurred her teaching career bearing in mind the considerations to which reference had already been made would have extended for only a comparatively limited number of years beyond the time at which the accident occurred". When the case came on for hearing before the trial judge, Ms Shankar had already been unable to work as a teacher for 4 years. Although the court  
50 accepted that an immediate reaction was that she must have been entitled to some additional sum for future loss of earnings, her actual loss was assessed by the trial

judge on a multiplier of 5 "... given his conclusion on the limited length of time she would have been expected to continue with her career if the accident had not intervened".

5 The Court of Appeal observed that the evidence on this aspect of the matter was sparse and said:

10 We appreciate the difficulties which the judge faced. In the circumstances we do not see that there is any breach of principle in the approach which he followed or that there is any evidence which is so convincing that we ought to substitute our views for those which led him to the conclusion embodied in his judgment. Accordingly we arrive at the conclusion that the appeal must fail in respect of the loss of earnings both past and prospective.

15 The court went on to reject the claim for interest on the basis that no claim had been included in the pleadings and that it was the established practice of the court, reflected in authorities which were cited, that interest would not be awarded where it had not been claimed.

### **The application for leave to appeal**

20 The judgment of the Court of Appeal was delivered on 18 October 2001. On 12 December 2001 Ms Shankar filed in the Court of Appeal a motion for leave to extend time to file an application in the Court of Appeal for leave to appeal to the Supreme Court. The motion was about two months out of time, the time limit for an application for leave to appeal being 28 days. The reasons for the delay related to Ms Shankar's physical and psychological disability and an assault which she had suffered on 20 October 2000.

25 When the court asked for identification of the matters of "significant public importance" which would warrant it granting leave under s 122(2)(a) of the Constitution, two matters were raised. The first related to the disallowance of the claim for interest. The second related to the assessment of loss of earnings on the basis that Ms Shankar would only have carried on teaching until she married and had children. On this matter reference was made by her counsel to s 38 of the Constitution of Fiji and the prohibition against discrimination on the grounds of gender. Reference was also made to the United Nations Convention on the Elimination of all forms of Discrimination against Women.

30 The Court of Appeal rejected the contention that the interest question raised a matter of significant public importance. Although it allowed that it might be a matter of "substantial general interest to the administration of civil justice" if special leave were being sought in the Supreme Court under s 7(2) of the Supreme Court Act 1998. On the gender discrimination issue, the court held that the issue which counsel for Ms Shankar sought to debate was fundamentally one of fact which turned upon the particular facts of the case rather than a point of principle suitable for determination by the Supreme Court.

### **The application to extend time to petition for special leave**

45 The application for extension of time having been dismissed, Ms Shankar then filed an application in this court seeking an extension of time within which to bring a petition for special leave to appeal under s 122(2)(b) of the Constitution. That application by way of petition was filed on 18 March 2002. When the matter came on for hearing the court heard argument both on the question of extension of time and the special leave points.

50 The court is of the view that, having regard to the relatively short period of the delay, the circumstances in which the delay occurred and the want of any practical prejudice to the Respondent, time should be extended to enable it to

hear and determine the special leave petition. In so saying, the court does not accept the proposition advanced by counsel for Mr Naidu that a party who has failed, in the Court of Appeal, to obtain leave to appeal to the Supreme Court, is thereby precluded from pursuing a petition for special leave in the Supreme Court. Section 122(2) provides for both kinds of application. Their criteria differ, albeit the criteria for the grant of special leave to appeal are statutory, being found in s 7 of the Supreme Court Act. No issue of abuse of process arises from the mere fact that a Petitioner for special leave has previously applied for and been refused leave to appeal by the Court of Appeal.

10 There is no special leave point arising out of the award for general damages for pain and suffering and the alleged failure of the trial judge to take account of scarring.

15 On the question of interest, the established practice of the High Court requiring that interest be claimed, which was referred to in the judgment of the Court of Appeal, is supported by O 18 r 14(1) of the High Court Rules 1998 which provides:

14(1) A statement of claim must state specifically the relief or remedy which the plaintiff claims: but costs need not be specifically claimed.

20 There is no special leave point arising out of this well-established requirement which was not followed in this case.

25 The final point is whether the assessment of loss of earnings, based upon a finding that Ms Shankar would probably have ceased full-time work as a teacher to have children after her marriage to Mr Gopal, involved unfair discrimination against her on the basis of her gender alone contrary to s 38(2) of the Constitution.

30 This is not the occasion for an extended discussion of the constitutional guarantee of equality before the law in relation to gender. That constitutional guarantee was not raised at trial. Nor was it raised expressly or even by necessary implication in the grounds of appeal before the Court of Appeal. It was raised in passing and without any significant elaboration in written submissions put to the Court of Appeal.

35 Where, as in this case, a constitutional issue might have involved questions of fact, it would be a rare occasion in which the issue could properly be raised for the first time on an appeal. In the ordinary course the point should be raised at the earliest opportunity and if possible in the pleadings. The High Court has an express grant of original jurisdiction in any matter arising under the constitution or involving its interpretation (s 120(1)).

40 Undoubtedly, the right to equality before the law conferred upon “every person” by s 38(1) of the Constitution and the prohibition against unfair discrimination in s 38(2) raise matters of general importance in Fijian society. This case however, as presented in the Court of Appeal and to this court, does not raise any issue of principle arising under that provision. The trial judge’s assessment was based upon the particular facts found by him in the case. He had reference to Ms Shankar’s pre-accident intentions and behaviour and based his factual assessment in part upon them. Had the constitutional point been taken at trial no doubt evidence could have been presented by both sides to ensure a solid factual foundation for any application of the constitutional principle. As the Court of Appeal noted, the evidence on the question of loss of earnings generally was “sparse”.

Even taking the point for the first time in the Court of Appeal there was nothing in the grounds of appeal to give notice of the argument which only emerged out of the written submissions filed by counsel for Ms Shankar.

This case, turning as it does upon a limited evidentiary base and a particular procedural history, does not provide an appropriate vehicle for dealing with the important constitutional issues which may fall for decision in due course in connection with the application of s 38 of the Constitution.

The court is therefore of the opinion that although the time limited for bringing the petition should be extended, the petition itself should be dismissed with costs.

#### 10 **Conclusion**

For the preceding reasons the court orders that:

- 15 (1) The time limited for filing the petition for special leave to appeal to the Supreme Court be extended to 18 March 2002.
- (2) The petition for special leave be dismissed.
- (3) The Petitioner is to pay the Respondent's costs of the petition.

*Special leave dismissed.*

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