Nivis Motors and Machinery Company Ltd.
v
Attorney General

Fiji Supreme Court
9th, 13th March 2007
Gates, A/President

Civil Appeal
CBV0007.06

RULING

Petition for Special Leave; s.122(2)(b) Constitution; stay application before single judge ss.11, 14, Supreme Court Act; same power and authority as the Court of Appeal; order made by primary judge for compulsory acquisition, s.6(1), (2), and (3) State Acquisition of Lands Act Cap 135; s.40(1), 40(2)(b) Constitution; effect of 1998 amendment s.3(2) State Acquisition of Lands Act; principles for stay application; effect on third parties and the public; qualifications for the grant of special leave; more onerous for interlocutory relief; whether grounds raised novelty or far reaching question of law; or matter of great general or public importance.

Mr H. Nagin for the Petitioner
Mr S. Sharma with Mr L. Daunivalu for the Respondent

[1] On 22nd December 2006 the petitioner filed a petition for special leave before the Supreme Court, pursuant to section 122(2)(b) of the Constitution. Meanwhile the petitioner seeks a stay of execution of the High Court judgment following the dismissal of his appeal to the Court of Appeal.

[2] The Supreme Court has in relation to matters that come before it, all the power and authority of the Court of Appeal. Section 14 of the Supreme Court Act [No. 14 of 1998] provides that such power and authority may be exercised, with necessary modifications as the circumstances of the case demand.

[3] A single judge of the court may deal with interlocutory matters not involving the decision of an appeal or reference [section 11]. A stay is clearly within the power of a single judge to grant in an appropriate case: *Prem Singh v Krishna Prasad and Others* Civil App. CBV0001.02, 25th April 2002.

[4] This case concerns the Nabua Roundabout. It is, as the Court of Appeal had remarked, a point along the Suva-Nausori corridor notorious for traffic congestion. In order to alleviate the problem the authorities tried to persuade Mr Nirmal Singh and his company the petitioner to give up a portion of its land, so that road widening could be carried out. Negotiations came to nothing. The authorities therefore took action through the Minister for Lands to acquire compulsorily 455 sq metres of the petitioner's land. Notice of this intention was first gazetted on 5th September 1997 as required under the State Acquisition of Lands Act Cap 135.

[5] McPherson JA observed in his judgment "the appellant has challenged the acquisition in every way that the law allows." Eventually the matter came before the High Court for an order that the compulsory acquisition proceed and that compensation for the acquisition be determined. Compensation remains to be fixed, but on 4th July 2006 Singh J made the order for the State to acquire the 455 sq metres in question from the petitioner.

[6] The petitioner appealed to the Court of Appeal. The court decided by a 2-1 majority against the petitioner.

[7] The Constitution protects persons, including corporations, from having property taken from them by the State [section 40(1)]. Under that section, a person can only be deprived of property if it is carried out by the State "in accordance with a law". Lawful acquisition is only permissible for public purposes and subject to compensation calculated with reference to certain principles set out in the Constitution [section 40(2)(b)].

[8] All three judges of appeal agreed that prior to the making of an order for compulsory acquisition it was necessary for the trial judge to be satisfied on two further statutory requirements. These are provided for in the State Acquisition of Lands Act and in a 1998 amendment Act.

[9] Under section 6(1) of the original Act, the acquiring authority may not acquire any land unless it has applied to the court and obtained an order authorizing such acquisition. Subsection (3) of s.6 provides:

> "(3) The Court shall not grant an order referred to in [subsection (1)] unless it is satisfied that the ..... acquisition is necessary or expedient for public purposes."

[10] Where the court divided in its opinion was on the application of a new provision brought in after the passing of the 1997 Constitution. A new section 3(2) was substituted in the principal Act by the State Acquisition of Lands (Amendment) Act 1998. It read:

> "(2) An acquisition under this section must not proceed unless the necessity for the acquisition is such as to provide reasonable justification for the causing of any resultant hardship to a person having an interest in the lands."

[11] All three judges agreed the burden was on the State to prove "reasonable justification for the causing of any resultant hardship."

[12] Unfortunately neither side had brought this amendment to the trial judge's attention. McPherson JA in dissent said [para 17]:

> "I am far from suggesting that those arguments would or will succeed; but they must be considered in the light of s.3(2) of the Act before the order to proceed is made."

[13] His lordship considered that "a relevant and material requirement of the Act was therefore disregarded", for which error the appeal must be allowed and a re-trial ordered. The judges in the majority judgment (Scott and Wood JJA) said they were satisfied that the evidence before Singh J would have satisfied the requirements of s.3(2) and that no conclusion would have been reasonably open other than that an order for acquisition should have been made. The majority referred to the wording of Rule 22 of the Court of Appeal Rules which they considered to be words of wide import, sufficient to allow the

dismissal of the appeal upon the basis that remitting the proceedings back to the High Court would have no utility.

[14] The majority observed (at para 4):

> "it seems to us that the matters which were considered, and found upon the evidence, would have been conclusive in relation to the subsection being satisfied. If that is so then a reference back to the High Court would lack utility, and, in the exercise of the Court's discretion should not be made."

The stay application

[15] On 8th March 2007 the petitioner for special leave filed an ex parte Notice of Motion for stay pending appeal. The notice was accompanied by an affidavit in support, that of Mr Nirmal Singh the Managing Director of the petitioner. I ordered that the matter be brought on inter partes and heard the next day.

[16] Mr Singh said he had been trying to resolve the matter amicably and had had meetings and correspondence with the Respondent and other Government officials. He says he was led to believe that the matter would be resolved and that there was no need to apply for a stay.

[17] Alas in holding that view Mr Singh was incorrect. His solicitor should have obtained a written assurance from the Respondent that the State would hold off from enjoying the fruits of its success, from enforcing its judgment, pending negotiations. This was not done. As a result, when the successful litigant moved to enjoy its judgment, a rushed application had to be brought on by the petitioner seeking a stay.

[18] The stay motion had not sought interim relief either pending the outcome of the stay application. Such relief was asked for orally by Mr Nagin in the course of the chambers hearing. I declined to grant such relief since the stay application should have been made when the petition was filed or very soon thereafter. I did however indicate to the Respondent's counsel that it would be appropriate if the fence of the petitioner's

property was left untouched till I had given my decision. The hearing concluded at 4 pm on Friday 9th March and the ruling was fixed for Tuesday 13th March at 2.30 pm, a few days later.

[19] It was apparent from subsequent media reports that the fence had indeed been taken down after the hearing and prior to my decision. At this stage, without explanation, it is not clear what operational reasons may have compelled that course. There was no court order in place preventing continuance with the roadworks. There was no coercive order commanding restraint on exercising rights following lawful acquisition. However a greater delicacy towards the court process could have been shown by the Respondent, and the lack of it exhibited here, is to be regretted.

Principles governing a stay application

[20] The relevant principles were conveniently set out in the judgment of the Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* Civil Appeal ABU0011.04S, 18th March 2005. They were:

> "(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."

[21] I find, as the primary judge found when he granted a stay, there would be some disruption to the applicant's business and service lines. There would be a need for re-

surety, re-adjustment of rent, perhaps variation of mortgage. There would be diminution of display area of its premises, following the loss of 5% of total land area. However I also find the petitioner's right of appeal would not be rendered nugatory if stay were refused. Its land could be returned to the company and present works do not involve the erection of buildings, merely road works.

[22] If stay were granted, the successful party would be prevented from fixing the impediments existing at this important road junction, in particular the lack of traffic flow and lack of safety for road users. In that sense the stay would affect the Respondent injuriously.

[23] I have no reason to doubt the bona fides of the petitioner as to the prosecution of its appeal.

[24] The effect on third parties and the public interest coincide. The holding up of such important public works is a very serious matter. This problem has been going on for many years and weighs strongly against the grant of a stay. The extent of the problem was summed up in the majority judgment in these words [at para 8]:

> "the inability of the highway authority to construct a second lane until these proceedings were finally resolved, has been an occasion of very great delay and annoyance to too many motorists for far too long, and it has been the occasion of very many accidents."

Petition for Special Leave

[25] I have put off consideration of the issues of novelty and importance of the questions raised in the petition till now. For in seeking special leave to appeal to the final court of appeal of the land the burden for the petitioner in obtaining interlocutory relief becomes more onerous. The petitioner must first obtain leave before its appeal is afoot. It is not enough to convince the Supreme Court that the decision of the Court of Appeal was incorrect. The petitioner must first qualify for special leave pursuant to section 7(3) of the Supreme Court Act by convincing the Supreme Court that the petition raises:

(a) a far-reaching question of law;

(b) a matter of great general or public importance;

(c) a matter that is otherwise of substantial general interest to the administration of civil justice.

[26] Section 7(3)(c) would appear to be inapplicable to this case. But does the petition raise "a far-reaching question of law" or "a matter of great general or public importance"? The roadworks of course may seem to many to be of great general or public importance. But does the ground for appeal fit into such a category? I approach the issue of special leave on a provisional basis without detailed argument. The appeal point is whether the majority judgment was correct in accepting that the judgment of the trial judge had traversed the consideration demanded by section 3(2), namely did the necessity for the acquisition provide reasonable justification for the causing of any resultant hardship? And were the majority correct to invoke Rule 22 to reach that conclusion on the judge's findings albeit without his specific reference to section 3(2)?

[27] At this stage I assess it to be unlikely that special leave would be granted for the appeal to proceed. The grounds as narrowed down lack novelty or importance, other than to the respective parties.

[28] I find there to be no special circumstances deposed to in Mr Singh's affidavit, and no evidence of his company facing ruin without the grant of a stay. On the facts of this case, the subject matter is capable of reversal on appeal, and sufficiently preserved: *Jennings Construction Ltd v Burgundy Investments Pty Ltd (No. 1)* [1968] 161 CLR 685, per Brennan J.

[29] The balance of convenience lies with the Respondent and the public interest. The loss to the petitioner will not produce an irreversible change or dire consequences. In

addition he can be compensated in damages if ultimately successful. In the result the application for stay is refused, with costs summarily assessed at $500.

A.H.C.T. GATES
ACTING PRESIDENT

Solicitors for the Petitioner : Messrs Sherani & Co., Suva
Solicitors for the Respondent : Office of the Attorney General's Chambers, Suva