

IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL APPEAL NO: CBV 5 of 2014
[Court of Appeal No: ABU 19 of 2012]

BETWEEN : MOHAMMED YAKUB KHAN
MOHAMMED NASIR KHAN
MOHAMMED SABIR KHAN
MOHAMMED IQBAL KHAN
MOHAMMED MUKTAR KHAN
MOHAMMED AZAD KHAN

Petitioners

AND : LAUTOKA CITY COUNCIL

1st Respondent

AMBARAM NARSEY

2nd Respondent

Coram : Hon. Justice S. Marsoof, Justice of the Supreme Court
Hon. Justice S. Chandra, Justice of the Supreme Court
Hon. Justice B. Mutunayagam, Justice of the Supreme Court

Counsel : Ms. N. Khan & Ms. A. Ali for the Petitioners
Mr. V. Mishra & Mr. R. Charan for the 1st Respondent
Mr. B. C. Patel & Mr. C. B. Young for the 2nd Respondent

Date of Hearing : 29 October 2014

Date of Judgment : 14 November 2014

J U D G M E N T

Justice Marsoof

1. I respectfully agree with the reasoning and conclusions of His Lordship Justice Chandra, and I have nothing to add.

Justice Chandra

2. The 2nd Respondent instituted action against the 1st Respondent and the Petitioners in the High Court at Lautoka claiming damages caused to its building as a result of building construction being carried on adjacent to their building by the Petitioners. The 2nd Respondent claimed such damages on the basis of the construction of the building works carried on by the Petitioner and against the 1st Respondent for approving the building plans and failing to supervise and for uplifting a stop order it had initially imposed on the building activities of the Petitioner.
3. The High Court held that the 1st Respondent and the Petitioners were liable for cracking, partial collapse and damage to the 2nd Respondent's building in the proportion of twenty percent (20%) of the liability to the 1st Respondent and 80% to the Petitioners.
4. The 1st Respondent appealed against the said judgment to the Court of Appeal and the Court of Appeal by its judgment dated 5th March 2014 dismissed the appeal but varied the High Court judgment by disallowing the 2nd Respondent the costs of experts reports and photocopies amounting to a sum of \$61,439.93.
5. The Petitioners by petition dated 15th April 2014 applied for Special leave on the following grounds:
 - (a) *The Court of Appeal was wrong to disallow the Petitioners from submitting and/or restricting the Petitioners from submitting on the real questions in controversy between the parties when there was evidence available for it to make its decision on the grounds that no appeal was filed by them.*
 - (b) *The Court of Appeal was wrong in not following its own previous judgment (Gir v. Devi [1989] 35 FLR 229 (CA) and applicable law and therefore disregarding the principles of stare decisis.*
 - (c) *The Court of Appeal was wrong in stopping the counsel of the Petitioners from making submissions on liability as found against them on the grounds that the matter had been laid to rest in an earlier ruling given by the President of Court of Appeal on 5th February, 2014, when the ruling of 5th February, 2014 only*

refused leave for the Petitioners to file and serve Respondent's Notice out of time and no more.

- (d) If the Petitioners were permitted to submit they would have argued that Justice Gates could not have placed any relevance on the business and investment nature of the Petitioners' development in apportioning liability between the Petitioner and 1st Respondent.*
- (e) The Petitioners would have further submitted that Justice Gates having awarded reinstatement cost for the 2nd Respondent's building could not then have awarded loss of rental.*
- (f) The Court of Appeal breached the principles of natural justice and rules 15(1), 22(3) and 22(4) of the Court of Appeal Rules by failing to give the Petitioners an opportunity to submit on the real issues in controversy between the parties.*

6. The Petitioners in their petition to the Supreme Court stated further that the Appeal raises a matter that is otherwise of substantial general interest to the administration of civil justice: Section 7(3)(c) of the Supreme Court Act 1998.
7. The High Court had delivered its judgment on 20th December 2007 and the 1st Respondent appealed against the said judgment to the Court of Appeal. The Court of Appeal heard the appeal and judgment was delivered dismissing the appeal subject to a variation in the damages awarded. It is against that judgment that the Petitioners are seeking special leave from this Court.
8. From the Record of the Supreme Court, which contains the Ruling of the Single Judge of the Court of Appeal (pp.194-199) it is revealed that by summons filed on 9 January 2014 the Petitioners had sought leave to file a Respondent's notice. The application had been supported by an affidavit sworn on 8 January 2014 by Mohammed Yakub Khan.
9. The said application was dismissed by the President of the Court of Appeal sitting as a Single Judge of the Court of Appeal by Ruling dated 5th February 2014.

10. The Petitioners appeared before the Court of Appeal when the appeal of the 1st Respondent was taken up for hearing and as stated by Mohammed Yakub Khan in his affidavit supporting the petition to this Court stated:

"4. That I was present at Court for the hearing of the appeal and our Legal Counsel was informed by the President of the Court of Appeal that she could not make submissions on issues that were not part of the Appellant's Notice of Appeal since we had failed to file our own Notice and Grounds of Appeal. Our Counsel was further informed that since the President of the Court of Appeal had in a previous ruling disallowed us leave to file and serve Respondent's Notice out of time, she could not then submit on any issues outside the Appellant's (1st Respondent) herein Notice of Appeal."

11. The Petitioners thereafter filed their Petition of Appeal in the Supreme Court on 15th April 2014 as stated above.
12. Section 12 provides for the filing of an appeal against a judgment of the High Court in civil cases and such an appeal has to be filed within 42 days.
13. In terms of Section 20 of the Act, a single Judge of the Court may exercise the powers of the Court to extend the time within which an appeal is to be filed.
14. Rule 19(4) of the Court of Appeal Rules requires a Respondent's notice to be served on the Appellant and any other party to the proceedings in the Court below who may be directly affected by the contentions of the Respondent within 21 days after service of the notice of appeal on the Respondent.
15. The Petitioners' application seeking to file a Respondent's notice was dismissed by the Ruling of the President of the Court of Appeal as stated above.
16. The Petitioners have not appealed against the said Ruling to the Full Court of the Court of Appeal.

17. The Petitioners are seeking to support their petition before this Court on the basis that there has been a breach of the provisions in Rules 15(1), 22(3) and 22(4) of the Act.
18. Section 15(1) relates to the power of the Court of Appeal on hearing an appeal and that it amounts to a rehearing. But to invoke that power of the Court of Appeal, the party seeking the rehearing must file a notice of appeal or a respondent's notice of appeal. The Petitioners did not file a notice of appeal and the belated application seeking extension of time to file a Respondent's notice was dismissed. The resulting position being that there was no appeal nor a Respondent's notice by the Petitioners against the judgment of the High Court. In such a situation the Court cannot be expected to give them an opportunity to urge matters which they had intended to, as would be given to a party to the action who had filed a valid appeal, just because the 1st Respondent had filed a notice of appeal. The rehearing of the appeal was in respect of the 1st Respondent's appeal only and not on what matters that the Petitioners wanted to urge before the Court of Appeal.
19. Rule 22(3) empowers the Court of Appeal to draw inferences of fact and give any judgment and make any order which ought to have been given or made, and to make such further or other order as the case may require. The Court of Appeal having considered the grounds of appeal and the arguments adduced by the parties affirmed the judgment of the High Court subject to a variation in the damages that were awarded. There was no necessity to make any other orders although according to Rule 15(1) the proceedings before the Court of Appeal is a rehearing. The Petitioner has failed to show in what manner the Court of Appeal had erred in relation to Rule 22(3).
20. Rule 22(4) empowers the Court of Appeal to deal with a situation where it is necessary to go outside the grounds in a notice of appeal to ensure that the determination had been made by the lower Court on the merits of the real question. This Rule does not assist the Petitioners as the Court of Appeal had considered the manner in which the merits of the real question between the parties had been dealt with by the High Court Judge and found no errors in the conclusion that the Respondents were liable for the damage caused.

21. The Petitioners had not canvassed the Ruling of the single Judge either and therefore their status before the Court of Appeal was that they were bound by the High Court Judgment.
22. In the foregoing circumstances the Petitioners' position that the Court of Appeal erred in law and in fact in stopping Counsel for the Petitioners from making submissions on liability as found against them on the ground that the matter had been laid to rest in the ruling of the President of the Court of Appeal on 5th February 2014 as the ruling only refused leave for the Petitioners to file and serve Respondent's notice out of time and no more, has no merit.
23. The Petitioners have sought to come to this Court, bypassing the Court of Appeal without filing an appeal against the High Court Judgment. Before the Court of Appeal they could only allude to matters arising from the 1st Respondent's appeal.
24. The Petitioners have cited the judgment of the Court of Appeal in *Gir v. Devi* [1089] 35 FLR 229(CA) case and stated that the Court of Appeal erred in law in not following the judgment in that case and had therefore disregarded the principles of stare decisis.
25. The decision in *Gir v. Devi* dealt with a situation relating to the registration of title under the Land Transfer Act. The Court of Appeal took into account the fact that the registration of the title had been effected after the trial. The Court had taken cognizance of the fact of the registration of title after trial, by referring to Rule 22(4) of the Court of Appeal which empowered the Court to make any order to ensure the determination on the merits of the real question in controversy between the parties, even though the point in issue has not been specified in the notice of appeal. The Court stated that since every appeal to the Court of Appeal is by way of rehearing, in appropriate circumstances the Court can take cognizance of facts which have occurred since the delivery of judgment in the Court below and make such order ruling or affirmation as the case may require.
26. The decision in *Gir v. Devi* has no relevance to the present case of the Petitioner and is clearly distinguishable on the facts.

27. The other grounds relate to what the Petitioners would have been able to urge before the Court of Appeal regarding the judgment of the High Court. As stated above, the Petitioners did not file an appeal nor a valid Respondent's notice.
28. The Petitioners in their submissions dealt with the position regarding the liability of the 1st Respondent which had been apportioned by the High Court at 20% and tried to make out the position that the 1st Respondent should have been made to bear the entire liability rather than apportioning same.
29. In the Court of Appeal when the 1st Respondent's appeal was heard, the 1st Respondent canvassed the position regarding their liability on the basis that they could not be made liable at all. The Court of Appeal dealt with that position at great length considering the authorities that were cited by the parties and concluded that the 1st Respondent could be made liable and that the High Court decision in making them liable for 20% was affirmed. It is to be noted that the 1st Respondent while opposing the petition of the Petitioners before this Court advanced the argument which they canvassed before the Court of Appeal that liability could not be imposed on the Council citing several authorities which had been considered exhaustively by the Court of Appeal in arriving at its conclusion.
30. Having considered the matters urged by the Petitioners before this Court, it has to be seen whether the matters urged by the Petitioners satisfy the threshold required for the granting of special leave.
31. The criteria set out in section 7(3) have been examined and applied in several decisions of the Supreme Court of Fiji such as *Bulu v. Housing Authority* [2005] FJSC 1 CBV0011.2004S (8 April 2005), *Ganesh Chand v. Fiji Times Ltd* CBV0005 of 2009 (8 April 2011), *Praveena's BP Service Station Ltd v. Fiji Gas Ltd* CBV0018 of 2008 (8 March 2011), *Suva City Council v. R. B. Patel Group Limited* CBV 0006 of 2012 (17 April 2004).

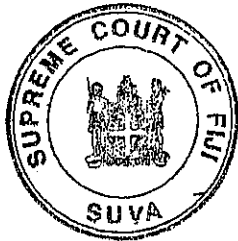
32. The matters urged by the Petitioner which have been discussed above, do not come within the threshold required for the granting of special leave and the application for special leave is refused and the petition of the Petitioners is dismissed.

Justice Mutunayagam

33. I also agree with the conclusions and reasons of His Lordship Justice Chandra.

Orders of Court:

1. The Petition of the Petitioner is dismissed.
2. The Petitioner shall pay costs in a sum of \$4000 to the 1st and 2nd Respondents to be shared equally.



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Hon. Justice S. Marsoof
Justice of Appeal

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Hon. Justice S. Chandra
Justice of Appeal

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Hon. Justice B. Mutunayagam
Justice of Appeal