IN THE SUPREME COURT OF FIJI
APPELLATE JURISDICTION

CIVIL APPEAL No. CBV 0018 of 2020
[Court of Appeal No. ABU 40 of 2020]

BETWEEN : **TEMPLETEC FIJI LTD AND SHANGHAI URBAN CONSTRUCTION (GROUP) CORPORATIONS**

Petitioners

AND : **ATTORNEY-GENERAL OF FIJI**

Respondent

Counsel : **Ms M. Rakai for the Petitioners**
Ms O. Solimailagi and Mr Y. Naidu for the Respondent

Date of Hearing : **13th of October, 2022**
Date of Ruling : **28th of October, 2022**

RULING

Priyasath Dep J.

[1] The Petitioner filed a Petition dated 20th November 2020 praying for Special Leave to Appeal to the Supreme Court from the Judgment of Justice Kamal Kumar in the High Court at Suva on 22nd November 2019 where renewed leave to appeal was refused by the Court of Appeal.

[2] On 24th December 2020 a motion was filed along with the affidavit of Zhang Bei Yan by the Petitioner to support the motion for enlargement of time and leave to appeal before a single judge of the Supreme Court in chambers on 3rd February 2021.

[3] This Petition came up before His Lordship the Chief Justice and his Lordship had given time to the Respondent to file an Affidavit opposing the petition on 24/02/21 and the Petitioner to (if necessary) file affidavit in reply on 10/03/ 21. Both parties to file written submissions before 31/3/21. And reply to written submissions by 04/4/21 and hearing on 03/05/21.

[4] The Petitioner filed the submissions on 20th April 2021 and the Respondents submissions were filed on 31 March 2021. In response to the affidavit in support of the Petitioner, Ms. Kamni Naidu on behalf of Respondent filed an affidavit on 1/3/2021. In reply to the affidavit of the Respondent, the Petitioner filed an affidavit sworn by its director Zhang Bei Yan dated 17/03/2021.

[5] This case was listed for hearing on several dates, but the case was not taken as court sittings were not regularly held due to the covid pandemic. The case was last mentioned on 17/08/2022 for directions before His Lordship Justice Gates and it was listed for hearing on 13 October 2022.

[6] There are two Applications pending before this Court, which is one regarding the enlargement of time and the other Petition for special leave to appeal. In the first instance the Petitioner has to satisfy this Courts that there are grounds to grant enlargement of time.

[7] When this matter was taken up for hearing on 13 October 2022, the Counsel for the Petitioner made submissions for enlargement of time while conceding that there was a 48-day delay in filing the petition and also gave reasons for the delay.

[8] As regards to the enlargement of time in the case of **Kumar vs State FJSC 17, CAV 1 of 2009** (21 August 2012) his Lordship the Chief Justice Gates referred to the grounds that should be considered in such applications. He stated that

'Appellate courts examine five factors by way of a principled approach to such applications. Those factors are:

(i) The reason for the failure to file within time.

(ii) The length of the delay.

(iii) Whether there is a ground of merit justifying the appellate court's consideration.

(iv) Where there has been substantial delay, nonetheless is there a ground of appeal that will probably succeed?

(v) If time is enlarged, will the Respondent be unfairly prejudiced?

[9] If the Petitioner succeed in obtaining enlargement of time to proceed with Petition for leave to appeal, the Petitioner has to satisfy the requirements in section 7(3) of the Supreme Court Act 1998.

Section 7(C) states:

(3) In relation to a civil matter (including a matter involving a constitutional question), the Supreme Court must not grant special leave to appeal unless the case 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.

[10] However, the Respondents had taken up the position that in the first instance, the Petitioner has to satisfy the requirements of s.98 (3) of the Fiji Constitution.

The article 98(3) of the Constitution of the Republic of Fiji **provides** for the jurisdiction of the Supreme Court as follows:

The Supreme Court-

(a) is the final appellate court.

(b) has exclusive jurisdiction, subject to such requirements as prescribed by written law, to hear and determine ***appeals from all final judgments of the Court of Appeal****; and*

(c) has original jurisdiction to hear and determine constitutional questions referred under section 91(5).

[11] The Respondent's objections are twofold.

1. The Petitioner is seeking leave in respect of an interlocutory order and not from a final judgment of the High Court and Court of Appeal. If the Judgment is not a final Judgment this Court has no jurisdiction to hear this case.

2. That there is no proper application before the court. The Petitioner in its petition is seeking leave from the judgment of the High Court.

[12] In view of this objection the Petitioner has to satisfy this Court that special leave to appeal application is from a final judgment.

[13] The Court granted one week to the parties to file written submission. Accordingly written submissions were filed.

[14] Therefore, this court has to consider this objection having regard to the orders made by the High Court and by the Court of Appeal.

The case in the High Court

[15] The Petitioners and Ministry of Works, Transport and Public Utilities entered into an agreement in September 2009 for the construction of the Yasawa-i-Rara jetty. The dispute arose when the Ministry of Works, Transport and Public Utilities terminated the agreement.

[16] The Appellants filed originating summons alleging that the said termination was unlawful and *inter alia* sought an order that the dispute be resolved by adjudication

under Clause 15 of the agreement and alternatively for an order that the defendant pay the plaintiff unpaid balance on the Agreement and damages for the alleged breach of contract.

[17] Thereafter the parties agreed to settle the dispute by adjudication and Robert J. Pole was appointed the adjudicator. Due to the death of Robert J. Pole parties agreed to appoint an architect Abhinesh Chand as adjudicator.

[18] A question arose whether Mr. Chand acted as an adjudicator or a mediator. Correspondence between the parties revealed that parties at times referred to him as mediator. He held only one meeting at the solicitors' office of the Petitioner and directed parties to file written submissions. There was no hearing.

[19] The Adjudicator delivered his decision on 5 March 2015 ordering the Respondent to pay a sum of $651,304.41 to the Plaintiff (Petitioner).

[20] When the case was called in the High Court, the counsel for the Respondent expressed his dissatisfaction at the manner in which Mr. Chand had conducted the proceedings. Subsequently Respondent filed a notice of dissatisfaction which the petitioner claimed filed outside the stipulated time.

[21] On 3 June 2015 Petitioner filed a notice of motion to enter Judgment based on Mr. Chand's decision seeking an order that the Defendant do pay the sum of F$651,304.41 to the Plaintiff in terms of the adjudication decision dated 2 March 2015. The Court permitted the parties to file submissions and proceeded to hear the application.

[22] The High Court in its ruling dated 22 November 2019 held that:

1. The process adopted by the parties to resolve their dispute outside court was mediation.
2. Abhinesh Chand failed to follow the mediation process and as such his decision is not binding on the Respondent.

3. Even if this Court would have found that the process adopted is adjudication. Abhinesh Chand's decision would still not be binding on the Respondent.
4. The Plaintiffs application to enter judgment by notice of motion dated 3 June 2015 is dismissed and struct out.

A direction was given to the Registry to refer the matter to another Judicial Officer to give directions and/or assign a hearing date for the substantive matter.

In the Court of Appeal

[23] The Petitioner applied for leave to appeal from the High Court which was refused on 26 May 2020. The Petitioners then applied for leave to appeal from the Fiji Court of Appeal and Leave was refused by Justice Guneratne on 25th September 2020.

[24] The Petitioners then applied for leave to appeal to the full Court of Appeal on 19th October 2020 and the case was not taken up as there are no provisions to appeal to the full Court of Appeal against the Ruling of the single Judge .There after Petitioner filed an Application for enlargement of time and the Petition of appeal through out of time by 48days.

In the Supreme Court

[25] In this Petition, this Court has to decide whether the Ruling of the High Court dated 22 November 2019 and the Ruling of the Court of Appeal dated 25 September 2020 are final judgments or not.

[26] When deciding whether the order or judgment is a final judgment or an interlocutory order, the common law countries were throughout influenced by the judgments of the English Courts. The Courts in England adopted two different approaches from time to time known as order approach and application approach in deciding what is a judgment and what is an order. However, these distinctions are not relevant to the determination of this Court.

[27] In ***Salaman vs. Warner***, *(1891) 1 Q.B.734, 735, 736, 737* (C.A.) a question arose as to whether the order in question a final order or an interlocutory one, Lord Esher M.R. laid down the test for determining the question as follows:

> *"The question must depend on what would be the result of the decision of the Divisional Court, assuming it to be given in favour of either of the parties. If their decision whichever way it is given, will if it stands finally dispose of the matter in dispute, I think that for the purpose of these Rules it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then I think it is not final, but interlocutory".*

[28] In ***Bozson v. Altrincham Urban District Council,*** *(1903) 1 KB 547,548,549 (C.A.)* a similar question arose as to whether the order was a final or interlocutory order, for the purpose of appeal.

Lord Alverstone, C.J. then proceeded to lay down the proper test according to him in the following words;

> *"It seems to me that the real test for determining this question ought to be this: Does the judgement or order as made, finally dispose of the rights of the parties? If it does, then I think it ought to be treated as a final order, but if it does not, it is then, in my opinion an interlocutory order" the Earl of Halsbury also took the view that the order appealed from was a final order.*

[29] The Supreme Court in Sri Lanka has considered these judgments in determining whether a judgment is a final Judgment or not. In ***Rajendra Chettiar vs. Narayanan Chettiar*** [2011] BALR 25 and [2011] 2 SLR 70 (decision of a bench consist of five judges) and in ***Dona Padma Priyantha Senevirathne vs H. G Chaminda Jayantha*** SC Appeal 41/2015 and SC (CHC) 37/2008 (a bench consist of seven judges) decided on 04.07.2017, considered the above judgments and several other judgments including the judgment of Lord Denning in ***Salter Rex & Co v Gosh,*** *(1971)2 All ER 865.*

[30] Therefore, I find that the Ruling of the High Court refusing to enforce the decision of the adjudicator is not a final judgment as it did not finally determine the rights

of the parties. It kept the action live and the Plaintiff could establish his claim in the High Court. Same could be said about the Ruling of the Court of Appeal. Therefore, I hold that the petition of appeal was filed from a judgment which is not final. In view of section 98(3) (b) of the Constitution, this Court has no power to hear and determine this application.

[31] The Respondent's second objection is that there is no proper application before this court as the Petitioner in its petition is seeking leave to appeal from the judgment of the High Court. Paragraph 1 of the Petition dated 20 November 2020 states:

> *'That the Petitioner prays for Special Leave to Appeal to the Supreme Court of Fiji from the Judgment of Justice Kamal Kumar in the High Court at Suva on 22nd November 2019 where renewed leave to appeal was refused by the Court of Appeal....'*

[32] In the prayer it is stated:

> *'YOUR PETITIONER THEREFORE HUMBLY PRAYS that the Supreme Court of Fiji may graciously be pleased to grant special leave to appeal the Judgment of the High Court dated 22nd November 2019 and that the Respondent pay the Petitioners costs on an indemnity basis and or such further relief in the premises as to the Supreme Court may seem fit.'*

Further, I find that the grounds of appeal are also based on the Judgment of the High Court.

[33] For the reasons stated above, I uphold the preliminary objections taken up by the Respondent that there is no proper application before this Court. Therefore, the Petitioner's application for enlargement of time and the petition for leave to appeal dismissed at the threshold (in limine).

Orders of Court:

1. The Petitioners Application for enlargement of time and the petition for special leave to appeal rejected.

2. The Petitioner is ordered to pay cost in a sum of $3000 to the Respondent within two weeks from the date of this judgment.

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Hon. Mr. Justice Priyasath Dep
Judge of the Supreme Court