

IN THE SUPREME COURT OF FIJI
AT SUVA

CIVIL APPEAL NO: CBV0010 OF 2016

[On Appeal from the Court of Appeal No. ABU0064 of 2014]

BETWEEN : AMRIT SEN

Petitioner

AND : CHIEF REGISTRAR

Respondent

Coram :
Hon. Justice Saleem Marsoof
Judge of the Supreme Court
Hon. Justice Sathya Hettige
Judge of the Supreme Court
Hon. Justice Suresh Chandra
Judge of the Supreme Court

Counsel :
Mr. G. O'Driscoll for the Petitioner
Mr. A. Chand for the Respondent

Date of Hearing : 16 October 2017

Date of Judgment : 27 October 2017

J U D G M E N T

Marsoof J

- [1] I have read the judgment of Chandra J with which I agree unreservedly. However, I would like to add that disciplinary proceedings such as the one before the Independent Legal Services Commission should not be unduly delayed by applications for stay of proceedings, as the time is of the essence in these matters.

Hettige J

- [2] I agree with the reasoning and conclusion in the draft judgment of Chandra J.

Chandra J

- [3] The Petitioner is seeking special leave to appeal against the judgment of the Court of Appeal delivered on 29th November 2016 by which his appeal from the Ruling of the Independent Legal Services Commission was dismissed.

- [4] The Petitioner was charged by the Chief Registrar with the following counts of professional misconduct in contravention of section 82[1](a) of the Legal Practitioners Act 2009:

Count 1: Amrit Sen a legal practitioner, being the principal of Maqbool & Company, having known or ought to have known that he had unlawful custody of the original Crown Lease document No. 12426, failed to return the said Title, which conduct was an act of professional misconduct pursuant to section 82(1)(a) of the Legal Practitioners' Decree 2009.

Count 2: Amrit Sen a legal practitioner, being the principal of Maqbool & Company while in the practice of law demanded \$2,000.00 in exchange for the original title of Crown Lease No. 12426, having known or ought to have known that he had unlawful custody of the original Crown Lease Title No. 12426 and that Original Crown Lease Title No. 12426 should be in the custody of the Registrar of Titles at all times, which conduct was an act of professional misconduct pursuant to section 82(a)(a) of the Legal Practitioners' Decree 2009.

Count 3 : Amrit Sen a legal practitioner, being the principal of Maqbool & Company while in the practice of law improperly received payment of \$2,000.00 in exchange for the original title of Crown Lease No. 12426 without issuing a receipt, which conduct was an act of professional misconduct pursuant to section 82 (1)(a) of the Legal Practitioners' Decree 2009.

- [5] The Petitioner made an application for the charges to be permanently stayed/or summarily dismissed to the Independent Legal Services Commission (hereinafter referred to as “the Commission”).
- [6] The Commission heard the application of the Petitioner and by its Ruling delivered on 8th August 2014 refused the application for permanent stay or dismissal.

Appeal before the Court of Appeal

- [7] The Petitioner appealed to the Court of Appeal to have the ruling of the learned Commissioner set aside and for an order to stay the proceedings on the following grounds:

- “i. That the learned Commissioner has erred in law by misdirecting himself on the law pertaining to stays by holding that there has to have been an inordinate delay within the Legal Services Commission for a stay to be granted when the proper test was whether the lapse of time since the events which are alleged against the practitioner is such that the practitioner is seriously prejudiced in the conduct of his defence that in all of the circumstances it would be unconscionable for the matter to proceed.
- ii. That the learned Commissioner has erred in law in holding that the paucity of evidence was a matter for the eventual hearing when in fact detailed prejudice was deposed in the affidavit of the appellant detailing the relevant documents which were contained in the appellants file but could not be retrieved by reasons of disposal of the file and not contradicted by the respondent.
- iii. That the learned Commissioner has erred in law and in fact in holding that the proceedings against the appellant was not an abuse of process when the chain of events and facts as presented by the respondent conclusively showed that the offence was incapable of being committed on the chain of events and on the summary of facts as presented by the respondent.
- iv. That the learned Commissioner has erred in law in failing to hold that the proceedings were an abuse of process when the purported Crown Lease No. 12426 was not produced

before the commission and to the appellant notwithstanding an application by the appellant for discovery of the same which was imperative to allow the appellant to defend the charges.

- v. That the learned Commissioner has erred in law and in fact in taking into consideration irrelevant matters and failing to take into consideration relevant matters in particular the detailed affidavit of the appellant who had conclusively set out the chain of events and the fact that the Crown Lease No. 12426 given to him from the original lessee and handed over to Ami Kohli was in fact the lessee's copy.
- vi. That the learned Commissioner has erred in law and in fact in holding that the appellant's file records were irrelevant, contrary to the appellant's detailed affidavit unchallenged by the respondent wherein he had unequivocally maintained that the relevant searches from the Titles Office at the material time of receiving the relevant lease in the years between 1994 and 1996 would have conclusively proved that he was in possession of the lessee's copy.
- vii. That the learned Commissioner has erred in law and in fact in failing to hold that it was impossible for the Registrar of Titles to deal with the Registrar's copy of the lease as the lessee's copy and enter memorials when such procedure was neither available under the Land Transfer Act Cap 131 not permitted by any law, thereby rendering the entire set of charges a nullity on the facts.
- viii. That the learned Commissioner has erred in law in holding that Section 14 of the Constitution was not applicable on the basis that the appellant had to produce evidence to show that the allegations appearing in the counts was not misconduct in 1995 when they were alleged to have been committed.
- ix. That the learned Commissioner has erred in law by shifting the burden on the appellant to prove through evidence before the Commission that possession of the original Registrar's copy of the lease was not a misconduct in 1995 contrary to the interpretation of Section 14 of the Constitution of Fiji 2013 that unequivocally prohibited a person to be tried on any act or omission that was not an offence either under a domestic law or international law at the time it was committed or omitted.

- x. That the learned Commissioner has erred in law in failing to hold that the Constitution of Fiji was a Supreme Law that superseded Section 101(2) of the Legal Practitioners Decree and further erred in holding that section 101 (2) of the Legal Practitioners Decree permitted charges filed against the appellant for purported acts or omissions prior to 2009 contrary to a correct interpretation of the said section.
- xi. That the learned Commissioner has erred in law in failing to hold that the charges against the appellant were prejudicial and an abuse of process on the totality of the disclosure provided and in the absence of the appellant having his relevant file and documents to argue his defence.
- xii. That the entire decision of the learned Commissioner is unconstitutional.
- xiii. And such further and other grounds as the Appellant may be advised in due course and upon receipt of a copy of the record of the proceedings.”

[8] The Court of Appeal by judgment delivered on 26th November 2016 dismissed the appeal with costs in a sum of \$3,500.00 for the reasons set out in the judgment and stated further that the grounds raised by the Petitioner were not substantial to stay the proceedings.

The present application

[9] The Petitioner in his application to this Court seeking special leave to appeal has based his application on the following grounds:

- a. That the Court of Appeal erred in law and in fact in failing to consider detailed prejudice to the Petitioner in particular, him not having the actual file which was 18 years old and containing the relevant documents pertaining to search of the titles, payment receipts and other documents to defend the charges and further erred in failing to hold that the charges were prejudicial and an abuse of process of court.
- b. That the Court of Appeal erred in law and in fact in misdirecting themselves to law pertaining to stay.

- c. That the Court of Appeal erred in law and in fact in failing to hold that the appellant was entitled to full disclosures in particular, inspection of the original documents prior to hearing of the charges.
- d. That the Court of Appeal erred in law and in fact in holding that the appellant's file records were irrelevant, contrary to appellant's detailed affidavit unchallenged by the respondent wherein he had unequivocally maintained that the relevant searches from the Titles Office at the material time of receiving the relevant lease in the years between 1994 to 1996 would have conclusively proved that he was in possession of the lessee's copy.
- e. That the Court of Appeal erred in law in failing to hold that the Constitution of Fiji was a Supreme Law that superseded Section 101(2) of the Legal Practitioners Decree and further erred in holding that section 101(2) of the Legal Practitioners Decree permitted charges filed against the appellant for purported acts or omissions prior to 2009 contrary to correct interpretation of the said Section 14(1)(a) of the Constitution of Fiji and further erred in holding that the said section is only applicable to criminal cases prescribed in Criminal Procedure Decree.
- f. That the Court of Appeal erred in law in failing to adequately deal with all the grounds of appeal on the basis of the materials and disclosures before the court.

[10] The charges framed by the Registrar were based on Crown Lease 12426, which was alleged to be in his possession, that he had demanded and received payment of \$2000.00 for it to be handed over to a prospective purchaser.

[11] The Office of the Chief Registrar had commenced investigations when Krishna Sami Naidu had sent a complaint to the Independent Legal Services Commission against the Petitioner and two other Legal Practitioners on 3rd August 2011. In his complaint he had stated that the crown lease had been transferred to his father, Shiu Sami Naidu, on 6th February 1995 and that his father's lawyer was the Petitioner. He had narrated a series of

events that had taken place thereafter which led to making his statement to the Chief Registrar's Office.

[12] It may suffice for the purposes of the present application, in so far as it relates to the charges against the Petitioner, to state that according to the copy of the memorials of the Titles Register (at p.224 of the Record) that one Shiu Sami Naidu was named as the transferee of CL 12426 in memorial No.372539 registered on 6th February 1995. Memorial no.392238 registered on 28th February 1996 indicates that the said Crown Lease had been transferred to Ram Karan. According to the investigations made by the Chief Registrar's Office, the Petitioner had been the lawyer for Shiu Sami Naidu, while Ami Kohli had been the lawyer for Ram Karan. During the investigations into the complaint made by Krishna Sami Naidu, Ami Kohli had stated that the Original Lease had been given to him by the Petitioner on payment of a sum of \$2000.00 as being fees that were said to be due from Shiu Sami Naidu to the Petitioner.

[13] It was the submission on behalf of the Petitioner that the original Crown lease 12426 was not being made available to the petitioner, for him to prepare his defence nor that a copy of the supposed to be constructed document of the said lease being made available to him before the commencement of the inquiry by the Commissioner. That as a result grave prejudice was caused to the Petitioner specially as the office file relating to the transactions of Krishna Sami Naidu had not been traceable since the transactions had taken place during 1994 – 96.

[14] The Court of Appeal has dealt with the submission of delay causing prejudice to the Petitioner and it has been opined by the Court of Appeal that witnesses would explain further with regard to delay in bringing these charges before the Commission.

[15] As regards the complaint about non-disclosure, the Court of Appeal stated:

“[14] the learned counsel complains that the original crown lease has not been disclosed. The learned counsel for

the Respondent explained the reason for not producing the original Crown lease, as it has been kept with the police. The learned counsel for the respondent undertook to produce the original if the Commission so directs.

[15] However a reconstructed copy of this Crown Lease has been produced and appears at pages 224 & 225 of the RHC. The appellant in a caution interview on 13 April 2010 (pgs.282 to 284) has admitted that he was in possession of the Crown Lease. The Appellant had given the following answers to questions by the police:

‘Q.14. Now look at this Crown Lease number 12426 with stamp duty number 94962 (shown to Amrit Sen). What you have to say on this Title?

A. According to my statement given to the police on 8/12/2005 Maqbool and Co. had his Crown Lease that was given to this office by Shiu Sami Naidu and my office had acted in accordance with his instruction.

Q.15 What was his instructions?

A. I can't recall because I do not have the file now.

Q.16 When did Shiu Sami give this Title to you?

A. I cannot recall the exact date.

... ..

Q.21

A. I only wish to state that I had given a statement to the police earlier and the police had brought me Crown Lease No. 12426 and shown it to me. They asked me to give a statement and I gave a statement and the details of the lease provided to me by the police. ...’

[16] In a statement made to the police on 11 March 2011 (pg. 293) the appellant had stated as follows:- ‘Further to my statement which I gave to the police on 8 December 2005 at no time I denied possession of Crown Lease # 1246.’ On the same day in a caution interview the appellant was questioned over this Crown Lease as follows:-

‘Q.2 Do you remember that you were interviewed by D/IP. Munsami on 13/4/2010?

A. Yes.

Q3. As per your answer to Question 16 you cannot recall the exact date but can you tell me if this title was in your possession?

A. Yes.'

[17] The above statements and the interviews were made while the police were investigating into his having in his possession the Crown Lease No. 12426. The interview notes along with the annexures had been submitted to the appellant at the inquiry before the Commission. How could the appellant now state that there is no such Crown Lease? A reconstructed copy of the lease has been produced, and the Original Lease, the respondent had undertaken to produce through the police."

[16] It is apparent therefore that the Petitioner was aware of the matter pertaining to the said Crown Lease when he had made a statement to the Police on 8 December 2005. According to the Court of Appeal Judgment, the Respondent had in fact undertaken to produce the original of the lease if the Commission so directed, regarding which the Petitioner would have to take the necessary steps before the Commissioner. The inquiry before the Commission was at its initial stages when he made the application for a permanent stay and or dismissal.

[17] It is to be observed that in relation to registration of Crown Leases, the practice is to have the original of the lease which is registered with the Registrar of Titles and what is given to the transferee is a copy of the original. As to what was referred to as the "Crown Lease", whether it was the Original which should be with the Registrar of Titles or whether it was the copy given to a Lessee, is what would transpire at the inquiry proper before the Commission.

[18] This Court agrees with the observations made by the Court of Appeal citing Tevita Nalawa v. State (unreported CAV 002/09 (3 August 2010) regarding delay and the grant of permanent stay and would reiterate the principles formulated by the Supreme Court to the effect that:

(i) Even where delay is unjustifiable a permanent stay is the exception and not the rule.

(ii) Where there is no fault on the prosecution very rarely will a stay be granted.

(iii) No stay should be granted in the absence of any serious prejudice to the defence so that no fair trial can be held.

(iv) On the issue of prejudice, the trial court has processes' which can deal with admissibility of evidence if it can be shown there is prejudice to an accused as a result of delay."

- [19] The Court of Appeal went on to state as regards the submission in respect of the delay that has caused prejudice, that witnesses would explain further with regard to delay in bringing these charges before the Commission. As observed earlier, the matter before the Commission was at its initial stages, and the Petitioner would be able to make necessary applications before the Commission before the hearing would commence in order to defend himself.

Consideration of the Grounds of Appeal

- [20] The Petitioner in his written submissions has set out many matters which would be appropriate to be taken up before the Commission. The present appeal is against the judgment of the Court of Appeal, and this Court is not in a position to consider matters which have to be dealt with in the original forum.
- [21] The Petitioner has to meet the threshold for obtaining special leave from the Supreme Court on the basis of the grounds of appeal he has urged.
- [22] As regards ground 1, the main thrust of the ground is that the Court of Appeal had failed to consider the Petitioner's claim of detailed prejudice on the basis that he did not have the actual file which was 18 years old which contained the relevant documents for the Petitioner to prepare his defence. The Court of Appeal dealt with this position in its judgment and cited the decision in Tevita Nalawa v. State (supra) on the basis that what was necessary to consider was whether the delay complained of by the Petitioner denied him a fair trial.

- [23] The Petitioner in his written submissions (paragraph 62) concedes the fact that the Court of Appeal has considered the decision in Nalawa v. State (supra) and at the same time has stated that the actual test is on the issue of prejudice and that the trial court has processes which can deal with admissibility of evidence if it can be shown there is prejudice to an accused as a result of delay. This position clearly shows that prejudice caused to him is a matter that had to be dealt by him before the Commission, and that he had to invoke the processes of the Commission to establish the prejudice caused to him. The Petitioner had without invoking the processes before the Commissioner which would have been necessary to defend his case, made his application to the Commission to permanently stay the proceedings, and therefore it would be unfair to complain about prejudice in those circumstances. Therefore there is no merit on this ground and the position taken up by the Court of Appeal cannot be faulted.
- [24] In ground 2, the Petitioner complains that the Court of Appeal had misdirected itself on the law pertaining to stay. The Court of Appeal had dealt with this position at paragraphs 28 to 31 and cited the decisions in Tevita Nalawa v. State (supra), Attorney General's Reference (No.1 of 1990) (1992 Cr App R 296, Mohammed Sharif Shaim v. State (unreported Misc. Action No.17 of 2007) and Anand Kumar Singh v. Chief Registrar (2013 FJCA 141).
- [25] In Attorney-General's Reference (supra) the Court of Appeal in England held that there should never be a stay unless the defendant showed on a balance of probabilities that due to delay he would suffer serious prejudice to the extent that no fair trial could be held. In the present case, the Petitioner before exploring the avenues available to him before the Commission so that he could have a fair trial sought the permanent stay. Therefore it cannot be stated that the Court of Appeal had misdirected itself on the law relating to stay.
- [26] The third ground of appeal is on the basis that the Court of Appeal had failed to hold that the Petitioner was entitled to full disclosures, in particular, inspection of the original

- documents prior to hearing of the charges. The judgment of the Court of Appeal at paragraph [14] has adverted to this fact and has stated that the Respondent had undertaken to produce the original if the Commission so directs. Therefore this ground lacks any merit.
- [27] The fourth ground of appeal relates to the fact of his not having the original office file and that the court of Appeal had stated that the petitioner's file records were irrelevant. The Court of Appeal has not made such a pronouncement and therefore it is not fair for the Petitioner to allege that the Court of Appeal held so.
- [28] The fifth ground of appeal is on the basis that the provisions of S.14(1)(a) of the Constitution supersedes section 101(2) of the Legal Practitioners Decree (now Act) of 2009, and further erred in holding that the said section 101(2) permitted charges filed against the Petitioner for purported acts or omissions prior to 2009 contrary to section 14(1)(a) of the Constitution of Fiji.
- [29] The Petitioner cited the decision in Queen v. Liyanage (P.C.) 1 AC 1967 regarding retrospective legislation seeking to equate the position of the Legal Practitioners Decree of 2009 as having made acts which were not acts of misconduct prior to its promulgation as acts of misconduct. This was premised on the basis that the act complained of against the Petitioner was during 1994 to 1996 and that he was being charged under the Legal Practitioners Act of 2009 for those acts which were not offences previously.
- [30] The Court of Appeal dealt with these arguments before it at paragraphs [33] to [36] and arrived at the conclusion that the charges against the Petitioner did not fall within the ambit of Section 14(1)(a) of the Constitution. This Court does not see any flaw in the conclusion reached on this point by the Court of Appeal and therefore this ground fails.
- [31] For the Petitioner to obtain Special leave from the Supreme Court, he has to meet the threshold set out in S. 7(3) of the Supreme Court Act, 1998:

“7(3) In relation to a civil matter (including a matter involving a constitution 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.”

[32] The Petitioner has failed in satisfying this Court on the grounds of appeal urged by him in seeking leave. In the absence of any merit in the grounds of appeal, the petitioner has failed to meet the threshold in s.7(3) cited above. The application of the Petitioner seeking special leave to appeal is refused and dismissed.

Orders of Court:

- (a) The application for Special Leave to appeal is refused.
- (b) The judgment of the Court of Appeal dated 26th November 2016 is affirmed.
- (c) The Petitioner to pay \$4000.00 as costs of this appeal.



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Hon. Justice Saleem Marsoof
JUDGE OF THE SUPREME COURT

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Hon. Justice Sathya Hettige
JUDGE OF THE SUPREME COURT

A handwritten signature in blue ink, appearing to be 'Suresh Chandra', written over a horizontal line.

Hon. Justice Suresh Chandra
JUDGE OF THE SUPREME COURT