

**IN THE HIGH COURT OF FIJI**  
**AT SUVA**  
**CIVIL JURISDICTION**

**JUDICIAL REVIEW NO. HBJ 8 OF 2012**

**IN THE MATTER** of an application by  
RAMESH CHAND for the Judicial Review  
under Order 53 of the HIGH Court Rules of  
Fiji

**AND**

**IN THE MATTER** of the decision made by the  
Permanent Secretary for Finance dated 26  
April, 2012 to uphold the surcharge action  
against the application for the sum of  
\$87 530.69

**THE STATE** : Permanent Secretary for Finance

**RESPONDENT**

**EX-PARTE** : Ramesh Chand

**APPLICANT**

**COUNSEL** : Mr. H Nagin for the Applicant  
Ms Levaci with Mr D Nair for the Respondent

**Date of Judgment** : 9 August 2013

**JUDGMENT**

1. This is an application for leave to apply for Judicial Review against a decision dated 26.04.2012 upholding the surcharge decision of \$87,530.69 against the applicant. The grounds upon the reliefs sought are:

- 1) *That the Respondent failed to comply with procedural fairness in imposing the surcharge action as the Respondent decided to impose the surcharge also heard the appeal.*
- 2) *That Respondent exceed his jurisdiction and abused his powers is not properly constituting an independent and impartial appeals authority as required under section 69 of the Finance Management Act 2004.*
- 3) *That the Respondent exceeded or did not properly exercise his jurisdiction is not properly construing and complying with the High Court decision in the matter Civil Action 99 of 2002 wherein compensation in the sum of \$87,530.69 was ordered against the three Defendants namely Co-operative Department (Northern) and the Attorney General of Fiji.*
- 4) *That the Respondent made error of law and acted unreasonably by upholding the surcharge action for compensation which is contrary to the provisions of the surcharge policy as contained in section 74 and 75 of the Financial Management Act, 2004.*
- 5) *That the Respondent made error of law in not providing proper reasons for upholding the surcharge whilst disregarding the applicant's specific grounds of appeal.*
- 6) *That the Respondent made errors of law and exceeded his jurisdiction by upholding the surcharge in view of the lapse of more than eleven years since the Order of the High Court was delivered, which is contrary to the Limitations Act (35).*
- 7) *That the Respondent made errors of law by disregarding relevant considerations which included the decisions of the Magistrate's Court in Labasa in the matter Traffic Case No. 1933 of 2001, wherein the applicant*

*was not found guilty of the charges in relation to the accident that caused compensation against the three defendants.*

8) *That the Applicant reserves the right to add further ground upon inspection of document pursuant to a discovery order in terms of Order 53 Rule 4 and Order 24 Rule 8.*

### **The Cause of the Applicant**

2. The Permanent Secretary for Finance acting under section 67 & 68 of the financial Management Act 2004 served a letter on 22.03.2011 on the applicant. By the said letter an explanation had been sought pertaining to a sum of \$87,530.69 payable as compensation to one Abdul Gani in respect of injuries caused by an accident involving the government vehicle bearing the registration no. GM 332.
3. The applicant had submitted his explanation explaining as to why he should not be held responsible for the said payment.
4. However on 9 June 2011 the Permanent Secretary for Finance had decided to surcharge the applicant, but had given a right to appeal against the said decision.
5. The applicant had submitted an appeal on 30 June 2011 which was marked as RC-04 by the letter dated 26 April 2012, as R-5. The Respondent had upheld the decision to surcharge the applicant.
6. The applicant states that the appeal submitted should have been heard by an independent and impartial forum but instead the same person who took the decision to surcharge also had reviewed the appeal, thus denying the applicant the due process of procedural and fairness and natural justice.
  - i) *It is further urged by the applicant that the decision to surcharge was inconsistent with the surcharge policy.*

- ii) *Section 74 & 75 of the Finance Instruction 2004 specifies its grounds for surcharge and does not include third party compensation.*
- iii) *The surcharge charge action had emanated from a decision of the Labasa High Court in Civil Action 88/2002 in which the order was made against three defendants and included the Co-operative Department (Northern) and the Attorney General (RC -06) accordingly imposing the order only against the applicant who was also a party is unlawful, inconsistent and unjustified.*
- iv) *Respondents have exceeded the jurisdiction under section 74 & 75 of the Finance Instruction Act 2004.*
- v) *The decision of the said High Court case was delivered on 25.10.2005 and the decision to surcharge was made on 26.04.2012 and the delay in imposing the same is unreasonable and contrary to the Limitation Act (Cap 35).*

### **Respondent's Opposition**

7. The Respondent after filing the notice of opposition had filed the answering affidavit on 19.07.2012 stated:
- i) *Section 69(2)(a) of Finance Management Act 2004 empowered the Permanent Secretary to decide on appeal against the decision of the Deputy Secretary.*
  - ii) *The original decision to surcharge had been taken by the Deputy Secretary independently and impartially from the appropriate body which deliberated the appeal and the appeal was heard by the Permanent Secretary of Finance and the respondent had also explained the signatures and the signatories position on this letter.*

- iii) *The section 30 of the Motor Vehicles (Third Party Insurance) Act precludes government vehicles from being insured under the Third Party Insurance Policy.*
- iv) *Finance Instruction Act 2004 has been repealed by this section 63(c ) of Finance Instructions (2010) Act and has specified when a surcharge may be imposed.*
- v) *As per the High Court ruling the defendant was vicariously liable.*
- vi) *Respondent further stated that the Government was required to compensate for damages and the decision to surcharge was a disciplinary measure for the losses incurred under the Finance Instruction Act and has empowered the Deputy Secretary on behalf of the Respondent to surcharge.*

### **Determination**

- 8. *In an application for Judicial Review the grounds that the court should consider are reflected in Order 53 Rule 3(5), Order 53 Rule 4.*
- 9. At this stage the court has to decide three primary issues namely:
  - i) Whether the applicant has a sufficient interest to bring this proceeding.
  - ii) Is there an arguable case.
  - iii) Whether there is a delay as per Order 53 Rule 4 of the High Court Rules.
- 10. Leave should not be granted if the applicant does not have sufficient interest to bring the proceedings. In this matter the impugned decision is to surcharge the applicant and thereby the applicant is directly affected by the said decision.

Accordingly in my view the Applicant has the sufficient interest to bring this action.

11. Now I will analyse whether the applicant has an arguable case to bring in these proceedings. In an application for Judicial Review the grounds that the court should consider are set out in Order 53 3(5) and Order 53 Rule (4).
12. Considering the argument of the applicant that he had been given right to appeal but the appeal had been considered by the same person who had taken the decision to surcharge. It appears in the Financial Instruction Act 2010 section 62. The power has been given to the Deputy Secretary of the Ministry of Finance.
13. Perusing the document submitted to court, Mr Kolutagane had signed the letter in his capacity as the Deputy Secretary for the Ministry of Finance. It is quite evident that he was not the secretary when he took the decision to surcharge as he had signed the letter dated 9.6.11 for the "Permanent Secretary for Finance."
14. The appeal had been directed to the Permanent Secretary of the Ministry of Finance as the Chief Executive Officer on a careful consideration of the letter dated 26 April 2012. It is not evident that the decision pertaining to the appeal had been taken by the Permanent Secretary for Finance, the 2<sup>nd</sup> paragraph of the letter states (RC 5) 26 April 2012 *"After carefully considering the submission leading to the surcharge and the grounds of appeal against it, the Permanent Secretary for Finance has decided that the surcharge should be upheld."* This letter however has been executed by David Kolutagane on behalf of the Permanent Secretary.
15. The respondent has drawn the attention of the court to Finance Instruction 2010. However Court observes that the letter marked as RC 03 has been issued in accordance with section 68 (1)(a) of the Finance Management Act 2004 and the determinations in RC 05 appears to have been taken according to

the same act. This inference is drawn by referring to the 1<sup>st</sup> paragraph of the said document which starts by saying “*I refer to your appeal dated 4/7/2011.*” However no party has submitted an appeal dated 4/7/11 in fact the appeal submitted to court is marked as RC 04 is dated 30/6/2011.

16. On a plain reading of the letters marked RC – 01, RC – 03 and RC – 05, it appears to court that all these documents have been sent from the office of the Permanent Secretary for Finance and all these documents have been signed by one David Kolitagane for Permanent Secretary. In view of the above it appears to me that the allegation of the applicant that decision to surcharge and the appeal was heard by the same person and the Respondent’s position that it was done by two persons has to be further looked into to ascertain whether there was any breach of natural justice and/or procedural impropriety.
17. At this stage the court has to only decide whether there is an arguable case for the applicant and as stated in **State v O’Connor ex parte Sayed Mukhta Shah (2008)** FJHC 64, “*At leave stage the threshold is low*”. Thus stage the court does not have to go into the substantive matter as the threshold of satisfying whether the arguable cause is low.
18. The role of the Judge at this stage is only to see whether the applicants application is frivolous, vexation or hopeless. If the Judge sees it as a case suitable for further consideration then leave should be granted to proceed to a substantive hearing of the court. The judge has a discretion whether to grant leave and the manner in which that discretion is to be exercised was discussed by Lord Diplock in **Inland Revenue Commissioner v National Federation of Self Employed and Small Business Ltd (1981)** 2All ER 93 at page 106:

*“The whole purpose of requiring that leave should first be obtained to make the application for judicial review would be defeated if the court were to go into the matter in any depth at the stage. If, on a quick perusal of the material then available, the court thinks that it discloses what might on further consideration turn out to be an arguable case in favour of*

*granting to the applicant the relief claimed, it ought, in the exercise of a judicial discretion, to give him leave to apply for that relief. The discretion that the court is exercising at this stage is not the same as that which it is called on to exercise when all the evidence is in and the matter has been fully argued at the hearing of the application.”*

19. As per the said judgment, court does not need to go into the entire Judicial Review of the matter at this stage also as decided in **National union v Sugar Industry Tribunal & Others (FCA No. 8/1990)** whereby the court has held; *“At the leave stage of an application for Judicial Review the court is not required to do more than decide whether the applicant has shown a prima facie arguable case on the merits of each ground of relief.”*
20. Accordingly, in answering the question whether the applicant has an arguable case on the documents submitted to court and the affidavits tendered, I am of the view that the question whether there was a breach of natural justice, procedural impropriety needs to be tried in relevance to come into a determination.
21. The third limb the Court has to analyse at this stage is whether there is a delay. As per the documents submitted to court, leave to appeal for Judicial Review has been filed on 25 May 2012 against the decision dated 26 April 2012 and thus holds that there is no delay in filling the application.



22. For the above stated reasons, leave to apply for Judicial Review is granted.
23. The Applicant is to proceed by way of motion in accordance with order 53.
24. A cost of the leave application is to be costs in the substantive application.

Susantha N Balapatabendi

**JUDGE**