

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 313 of 2018

IN THE MATTER of an application by the
ATTORNEY-GENERAL OF FIJI for leave
to apply for an Order of Committal.

AND:

IN THE MATTER of RAJENDRA
CHAUDHRY Lawyer, New Zealand.

BEFORE: Hon. Justice Kamal Kumar

COUNSELS: Ms P. Prasad, Ms O. Solimailagi and Ms M. Ali for
Applicant

Mr A. K. Singh for Respondent

DATE OF HEARING: 14 February 2019

DATE OF JUDGMENT: 4 April 2019

JUDGMENT

Introduction

1. Pursuant to leave granted on 18 October 2018, Applicant on 19 October 2018, filed Notice of Motion dated 19 October 2018, pursuant to Order 52, Rule 3 of High Court Rules 1988 (“HCR”) seeking following Orders:-

- “1. An Order of Committal against Rajendra Chaudhry for Contempt of Court and that the said Rajendra Chaudhry be committed to prison;**
- 2. That the said Rajendra Chaudhry be also ordered to pay a fine;**
- 3. That the said Rajendra Chaudhry do pay costs of and occasion by these proceedings on an indemnity basis; and**
- 4. Such other Order(s) as this Honourable Court may deem just.”**

(“the Motion”)

2. On 2 November 2018, Applicant filed Affidavit of Service in respect to Service of Statement, Affidavits of Aiyaz Sayed-Khaiyum sworn and filed on 16 October 2018, Affidavit of Izek Ashwin Lal sworn and filed on 16 October 2018, Orders sealed on 22 October 2018, (Leave Application), Orders sealed on 22 October 2018 (Service Application) and the Motion.

3. On 20 November 2018, Respondent filed Conditional Acknowledgement of Service.

4. On 22 November 2018, Respondent’s Counsel informed Court that Respondent intends to file Application to Strike Out proceedings when Court informed the parties that all issues including any Striking Out Application and substantive matter will be heard together and gave following directions:-

- (i) Respondent do file and serve Affidavit in Opposition by 4 December 2018;
- (ii) Applicant do file and serve Affidavit in Reply by 14 December 2018;
- (iii) Both parties do file and serve Submissions by 28 December 2018;

- (iv) Any Reply to Submissions to be filed and served by 11 January 2019;
 - (v) The Motion and any Striking Out Application to be filed by Respondent were adjourned to 14 February 2019, at 10.00am for hearing.
5. On 21 December 2018, Applicant filed Submissions.
 6. On 5 February 2019, Respondent filed Application to Strike out the proceedings by Inter-Parte Summons (**Strike Out Application**).
 7. Applicant relied on following Affidavits:-
 - (i) Affidavit Verifying Statement of Aiyaz Sayed Khaiyum sworn and filed on 16 October 2018 (**ASK's Affidavit**);
 - (ii) Affidavit of Izek Ashwin Lal sworn and filed on 16 October 2018 (**LAL's Affidavit**);
 - (iii) Supplementary Affidavit of Aiyaz Sayed Khaiyum sworn on 6 November 2018 and filed on 8 November 2018 (**ASK's Supplementary Affidavit**);
 - (iv) Supplementary Affidavit of Izek Ashwin Lal sworn on 6 November 2018, and filed on 8 November 2018 (**LAL's Supplementary Affidavit**).
 8. Respondent chose not to file Affidavit in Opposition in respect to the Motion or Affidavit in Support of the Strike Out Application.
 9. On 14 February 2019, Strike Out Application and the Motion was heard and prior to parties making Submission, Court informed parties that if Court determines it does not have jurisdiction then this proceedings will end there.

Preliminary Objection

10. Applicant through his Counsel referred to second sentence in paragraph 20 of Respondent's Submission dated 14 February 2019, which reads as follows:-

“20. In his rush to issue proceedings on the eve of the 2018 elections, the applicant oversaw on basic and critical fact - perhaps deliberately - that the respondent was a New Zealand resident and governed by the laws of that country and not Fiji”.

11. Counsel for Applicant submitted that such assertion is incorrect and should be expunged on the ground that the proceedings were issued on 16 October 2018, and election was held on 14 November 2018.
12. It is common knowledge that 2018 Election was held on 14 and 17 November 2018, which is four (4) weeks after this proceeding was commenced.
13. Therefore, this Court will not give any regard to what is stated in second sentence of paragraph 20 of Respondent’s Submission dated 14 February 2019.

Strike Out Application

14. Respondent’s main contention is that this Court did not have jurisdiction over the Respondent when Court granted Leave to issue Contempt proceedings on the ground that when the proceedings was issued Respondent resided in New Zealand, and that this Court does not have jurisdiction to hear the Motion.
15. Even though the Respondent did not file any Affidavit to say that on date of commencement of this proceedings he was a resident of New Zealand and not Fiji, this Court accepts that Respondent was residing in New Zealand when this action was commenced on the basis that the Respondent’s address in the Leave Application is shown as New Zealand.
16. Respondent by his Counsel relied on s100(3)(4) of the Fiji Constitution in support of his Submission that this Court does not have jurisdiction over the Respondent.

17. In response, Ms Solimailagi, Co-Counsel for Applicant submitted that this Court has jurisdiction and relied on following case authorities in support of her Submission:-
- (i) **Nicholas v. The Attorney-General of Fiji** (2013) C.A. No. 364 of 2011 [8 February 2013];
 - (ii) **Finau & Ors. v Civil Aviation Authority of Fiji & Ors.** (2018) C. A. No. 117 of 2017 [12 June 2018];
 - (iii) **Dow Jones & Company Inc. v. Gutnick** (2002) 210 CLR. 575
18. In addition, Senior Counsel for Applicant, Ms Prasad handed following case authorities:-
- (i) **H. D. Rajah v. CH. Witherington and Anor.** AIR 1934, Mad 423;
 - (ii) **Emperor v. Benjamin Horniman** AIR 1945 All 1.
19. Ms Solimailagi submitted that in **Nicholas** and **Finau Mara** case the contemnors were non-residents when contempt proceedings (including Leave application) was filed in Court and the High Court exercised jurisdiction in dealing with the Contempt Application.
20. Counsel for Applicant submitted that this Court take into consideration as what was said at paragraph 113 in **Dow Jones** case which was in following terms:-
- “113. First, the Internet is global. As such, it knows no geographic boundaries. Its basic lack of locality suggests the need for a formulation of new legal rules to address the absence of congruence between cyberspace and the boundaries and laws of any given jurisdiction (2009).”*
21. The facts of **Dow Jones** case as highlighted by the Co-Counsel for Applicant were:-

- (i) Gutnick (Respondent/Plaintiff) was a businessman who resided in Victoria, Australia and conducted business in Australia and elsewhere including United States of America (USA) with his business headquarters in Victoria;
- (ii) Dow Jones (Appellant/Defendant) was a USA company which published Wall Street Journal and Barron's magazine;
- (iii) Dow Jones operated site called WSJ.com on world wide web and from that site subscribers of Wall Street Journal or Barron's Magazine could download what was printed in the magazine;
- (iv) In an edition of Barron's online and Barron's Magazine an article appeared titled "Unholy Gains" in which several references were made to Mr Gutnick which he claimed defamed him;
- (v) Gutnick also established that Dow Jones had subscribers for Dow Jones website, in Victoria who had access to the article;
- (vi) Gutnick instituted defamation proceedings in Supreme Court of Victoria and Writ was served on Dow Jones in USA;
- (vii) Dow Jones entered a conditional appearance and applied to have the service of the Writ and Statement of Claim set aside or proceedings permanently stayed on the ground that article was published in New Jersey, USA and as such Supreme Court of Victoria is not an appropriate forum;
- (viii) His Honour the primary judge dismissed Dow Jones Application on the ground that "Victoria was not a clearly inappropriate forum for trial of proceeding and dismissed Dow Jones's application." (page 596)
- (ix) Dow Jones appeal to Court of Appeal was dismissed and from there it appealed to High Court of Australia.

22. Counsel for Respondent also submitted that the Facebook posts subject to this proceedings does not fall under Order 52 Rule 1 of High Court Rules

(“HCR”) in that the Facebook posts were not in relation to any proceedings in the Court and this Court did not have jurisdiction to Order substituted service of the documents on the Respondent which were to be served on Respondent personally pursuant to Order 52 Rule 3(3) of HCR.

23. Applicant’s Counsel in respect to the Order 52 Rule 1(2) and Rule 3(3) submitted that:-

- (i) Facebook posts subject to this proceedings is caught by Order 52 Rule 2(b) of HCR which deals with contempt of Court “**committed otherwise than in connection with any proceedings**”;
- (ii) In **Nicholas** and **Finau** case, Court in exercise of its discretion ordered substituted service of the documents on the contemnors out of jurisdiction;
- (iii) Pursuant to Order 52 Rule 3(4) of HCR, this Court could dispense with service of the notice of motion.

24. Applicant by his Counsel submitted that Facebook posts subject to this proceedings:-

- (i) was open for public viewing, was accessible to any user of Facebook worldwide and to users in Fiji;
- (ii) Applicant had access to the posts;
- (iii) Facebook posts were directed at the Judiciary and Judicial Officers.

25. Respondent’s Counsel in Reply to Applicant’s Submission in Response submitted that:-

- (i) Order 52 Rule 3(4) of HCR does not specify or empower Court to make Order for service out of jurisdiction;
- (ii) In the absence of express jurisdiction this Court could not order substituted service and acted ultra vires;

- (iii) Order 52 Rule 3(4) of HCR deals with Respondent who is within **Court** jurisdiction and does not cover when Respondent who is not within jurisdiction;
- (iv) Before Court holds a person liable and subject to jurisdiction there has to be clear provision dealing with jurisdiction over a person in sovereign State;
- (v) With uttermost respect begged to differ with what was stated in Dow Jones case;
- (vi) In each part of Order 52 Rule 1 of HCR question arises as to whether it is connected with Court proceedings;
- (vii) No case has been made by Applicant that Respondent can be made accountable to Fiji Jurisdiction;
- (viii) Any sentence Court may pass, if Respondent is found guilty of contempt will be difficult to enforce because of Respondent not being in Court's jurisdiction.

26. In **H. D. Rajah** (Supra) the High Court of Madras in respect to the Advocate-General's submission on behalf of Respondent that Madras High Court did not have jurisdiction over the Respondents who happened to be residing in Calcutta stated as follows:-

*“There can be no doubt that this Court as a Court of Record has jurisdiction in all matters of contempt of Court arising in the Madras Presidency. So much is conceded; but the learned Advocate-General argues that because the offenders happen to reside in Calcutta, the hands of the Court are tied. **A party can malign prisoners and insult Courts to the top of his bent, so long as he is careful to be beyond the territorial jurisdiction of the Court when notice issues. We find no warrant for this view of the law.** Contempt of Court is not an offence within the ambit of the Penal Code, but nevertheless it conforms to the ordinary rule that the **jurisdiction of the Court is determined***

by the place where the offence is committed, and not by the place where the offender may happen to reside. (cf. Section 177, Criminal Procedure Code). *If an offender has removed himself beyond the territorial jurisdiction of the Court, there may be difficulty both in securing his appearance and in executing his sentence, but that is not to deprive the Court of jurisdiction.”* **(emphasis added)**

27. In **H. D. Rajah** (Supra), Magistrate found that H. D. Rajah was instilling revolutionary ideas in the minds of young persons and ordered him to find security failing which committed him to jail. H. D. Rajah appealed the decision to Madras High Court and to not to prison him, he provided the security and was granted bail pending appeal.

Respondent in one of its review, published article to the effect that a terrorist who was in jail in connection with a scheme in Madras to send poisoned handkerchiefs to officials as Christmas presents had been released on bail presumably to enable him to proceed with his plan of preparing poisoned handkerchiefs.

No evidence was produced to prove that H. D. Rajah was planning to send poisoned handkerchief.

Court found that the suggestion that Court granted him bail to proceed with his plan to be at **“the highest degree offensive”**. Even though Respondents were residing in Calcutta, Madras High Court found them in contempt of Madras High Court and fined them.”

28. **H. D. Rajah** principle was subsequently followed by Allahabad High Court in **Emperor’s Case** (Supra).

29. At paragraph 48 of **Dow Jones** case (Supra) their Honours Gleeson CJ, McHugh, Gummow and Hayne JJ stated as follows:

“The place of commission of the tort for which Mr Gutnick sues is then readily located as Victoria. That is where the damage to his reputation of which he complains in this action is alleged to have occurred, for it is there that the

publications of which he complains were comprehensible by readers. It is his reputation in that State, and only that State, which he seeks to vindicate. It follows, of course, that substantive issues arising in the action would fall to be determined according to the law of Victoria. But it also follows that Mr Gutnick's claim was thereafter a claim for damages for a tort committed outside the jurisdiction. There is no reason to conclude that the primary judge erred in the exercise of his discretion to refuse to stay the proceeding."

30. His Honour Justice Kirby at paragraph 113 of Dow Jones case stated as follows:-

"First, the Internet is global. As such it knows no geographic boundaries. Its basic lack of locality suggests the need for a formulation of new legal rules to address the absence of congruence between cyberspace and the boundaries and laws of any given jurisdiction (209)."

31. His Honour further went on to state that:-

*"Intuition suggests that the remarkable features of the Internet which is still changing and expanding makes it more than simply another medium of human communication. It is indeed a revolutionary leap in the distribution of information, including about the reputation of individuals. It is a medium that overwhelmingly benefits humanity, advancing as it does the human right of access to information and to free expression. **But the human right to protection by law for the reputation and honour of individuals must also be defended to the extent that the law provides.**" (para 164 page 642)*

32. In **Nicholas** case and **Finau** case the contemnors were not residing in Fiji when contempt proceedings were instituted against them.

Court in both cases exercised jurisdiction against persons (contemnors) who were not residing in Fiji when proceedings were commenced.

33. Contemnors and their Counsel in both cases did not challenge Court's jurisdiction and submitted to Courts jurisdiction.

34. Respondent at paragraph 30 of his submission dated 14 February 2019, submits as follows:-

“30. The **Viliame Finau** cases (1st and 2nd authorities in the applicant’s list of authorities) and concerned alleged sub judice comments by J D Singh in relation to (Fijian) Court proceedings concerning the appointment and removal of Air Terminal Services directors. Mr Singh was alleged to have made a recording which was uploaded onto Facebook and published whilst the matter was still before the Court.”

35. In view of what is stated at paragraph 30 of Respondent’s Submission dated 14 February 2019, it appears Respondent somewhat accepts that if Respondent made a comment regarding any Court proceedings then this Court would have jurisdiction over the Respondent even though he did not reside in Fiji when proceedings was instituted.

36. In reference to **Fiji Times v. Attorney-General of Fiji** [2017] FJHC 13 Respondent at paragraphs 38 and 39 of his Submissions dated 14 February 2019, submitted as follows:-

“38. At paragraph 6 of its judgment, the Supreme Court made the following relevant as it relates to the law of contempt:

[6] There is no Statute Law in Fiji dealing with contempt and it is the Common Law principles that have been applied in the cases that have been dealt with the subject of contempt. There have been three instances in Fiji, where contempt was considered, namely *Vijaya Paramanandam v. Attorney-General* (1972) 18 FLR 90 (23 June 1972), *Chaudhry v Attorney-General* [1999] FJHC 28; [1999] 45 FLR 87 (4 May 1999) and *In Re Application by the Attorney-General of Fiji* [2009] Civil Action No. 124 of 2008 (22 January 2009).

39. As can be clearly evinced from the above paragraph, there is no law dealing with contempt and the cases of where contempt (scandalizing the Court) and that **common law principles were applied in the relevant**

instance on cases which had a strong connection to Fiji as the conduct complained of had occurred in Fiji and the respondents were all Fiji residents.”

37. The Respondent seems to accept that for Court to have jurisdiction over the Respondent there has to be strong connection between the conduct complained of and Fiji.

38. Facebook Posts posted by Respondent and reproduced at paragraphs 2.2(i) to (xiv) of Applicant’s Submission from Affidavits filed on behalf of Applicant is as follows:-

“2.2 The statements made by the Respondent contained the following relevant statements (**Facebook Comments**):

(i) on 3 September 2018 at 2.14 pm, the Respondent posted a statement containing the following words:

***“Biggest obstacle to freedom in Fiji
Is the corrupt and pliant judiciary full of Sri Lankan
monkeys and locals who need a job!
Headed by a crook – yes a double dipping crook called
Anthony Gates!”***

(ii) on 4 September 2018 at 1.39 pm, the Respondent posted a statement containing the following words:

*“The Judiciary will be an election issue
Questions and comments for the corrupt and thoroughly
incompetent Fiji CJ Anthony Gates!...
**Since the abrogation of the 1997 Constitution, our
judiciary has been compromised...”***

on 5 September 2018 at 5.26 pm, the Respondent posted a statement containing the following words:

*“Judiciary will be a major election issue!
Why aren’t local judicial officers sent for overseas
training? Come on corrupt CJ Gates we want answers
and now!*

From a friend:

Fiji bench members sent for criminal judicial training to the UK, overseas judges only, poor locals jhinga Maro in Fiji.”

- (iii) on 11 September 2018 at 6.13 am, the Respondent posted statements containing the following words:

*“Another reason why the **corrupt Fiji judiciary** will be an election issue!*

***Corrupt judicial appointments** exposed by a conscientious Sri Lankan....*

It should be noted that no Judge who has gone to Fiji from the AG’s chamber has even been appointed as a District Court Judge in Sri Lanka far less a High Court, Appeals Court or Supreme Court Judge and that gives an indication of their relative lack of seniority in the AG’s department when we send them to Fiji”

- Further, on 11 September 2018 at 6.43 am, the Respondent posted statements containing the following words:

***“Fiji’s corrupt Anthony Gates** exposed!”*

- (iv) on 11 September 2018 at 5.35 pm, the Respondent posted a statement containing the following words:

***“More on the corrupt Fiji judiciary** run by Sri Lankan regime lackeys! ...*

*The Sri Lankan **Court of Appeal** now in Suva, **dispensing supreme injustice in Fiji.**”*

- (v) on 12 September 2018 at 6.30 pm, the Respondent posted a statement containing the following words:

“More on the corrupt Fiji judiciary

Colossal loss of money and a junket as I see it!...

Meanwhile, President of the Fiji Court of Appeal, Bill Calanchini is being trained at Cambridge while resident justice Sri Lankan Suresh Chandra is heading to Brazil to be trained at the ripe old age of 70.

*Why train them at the end of their judicial careers unless **they're so unqualified and inexperienced?***

Is it another junket or rort?"

on 13 September 2018 at 6.07 pm, the Respondent posted a statement containing the following words:

"More on the corrupt judiciary

This time it concerns CR aka Yohan Liyanage aka Monkey Face! Gross waste of taxpayer monies investing in this bum!"

(vi) on 14 September 2018 at 8.20 am, the Respondent posted a statement containing the following words:

*"Remember the **corrupt Fiji Judiciary which is the number one threat to democracy today!***

The practices and removal of the corrupt Judiciary will be a key election issue."

(vii) on 16 September 2018 at 9.02 am, the Respondent posted a statement containing the following words:

"More on the corrupt Fiji judiciary

*Fiji tax dollars to train an **incompetent pathetic Sri Lankan monkey!**"*

(viii) on 18 September 2018 at 5.32 am, the Respondent posted a statement containing the following words:

"Yo corrupt thieving lying CJ Gates"

(ix) on 20 October 2018 at 10.24 am, the Respondent posted a statement containing the following words:

"Meet Anthony Gates

Fiji's illegal lying thieving CJ. Any wonder the people have no faith in the Judiciary! More to come."

Further, at 10.26 am, the Respondent posted a statement containing the following words:

“The Fiji Judiciary

Is corrupt and that’s a fact! I dare anyone to prove me wrong.”

Also, at 8.29 pm, the Respondent posted a statement containing the following words:

“I say

Bring it on!

I stand by my posts on the corrupt Fiji judiciary! The regime is rattled as I have made the corrupt Fiji judiciary an election issue!

Post regime change there will be a major change overhaul of the judiciary and boy aren’t some of them going to be answering some serious questions and that include Anthony Corrupt Thieving Lying Gates!

*And let’s see how the **corrupt Fiji judiciary** can explain being a judge in its own cause! This and matters of jurisdiction will make this a case where the **corrupt and pliant judiciary will see that picking a fight with me will come with devastating consequences!***

Let’s get ready to rumble folks!”

on 29 October at 8.19 pm, the Respondent posted statements containing the following words:

“More on the corrupt CJ Gates!

From a friend:

“Ratu Naiqama case on constitutional redress was heard 14052016 by Gates, no judgement delivered yet he has time for the Rabuka appeal by FICAC.””

(x) on 30 October 2018 at 7.02 pm, the Respondent posted a statement containing the following words:

“Clear case of double standards by a corrupt judiciary

Why is Rabuka appeal rushed through and FFP Minister Mahend Kanwa Reddy’s appeal still somewhere in the court

system despite his case being much older (15 May 2018 when appeal appealed filed by FICAC) than SLR's case.

Why did the corrupt CJ Anthony Gates not abide by the statutory service 3 clear days service prior to the matter being listed for first call re FICAC appeal against Rabuka acquittal?

Section 18A of the PPRD only applies only to a charge and not an appeal and that is what the corrupt judiciary is doing with the Reddy case so why rush the SLR appeal?

"Court to finalise decisions

18A. A court must promptly make a decision with respect to a charge filed for an election related offence under this Act, the Electoral (Registration of Voters) Act 2012 and the Political Parties (Registration, Conduct, Funding and Disclosures) Act2013."

Why the rush to proceed against Rabuka and not against Mahendra Kanwa Reddy – whose acquittal for a supposed election related offence – was also appealed by FICAC?

Why the double standards by the judiciary?

SLR must file for recusal of this corrupt judge."

(xi) on 31 October 2018 at 6.20 am, the Respondent posted a statement containing the following words:

"Coming up

How the Court of Appeal and Supreme Court judges disbelieved the corrupt CJ Anthony Gates in the Qaranivalu appeal.

Gates being discredited by his peers who still unashamedly sits as the CJ.

Gates is a disgrace by any standard.

A thief also who was caught double dipping by the Auditor General.

He is corrupt and heads a judiciary which is devoid of any credibility."

39. This Court without any reservation accepts Applicant's Submission at paragraph 3.13 to 3.16 of his Submission dated 21 December 2018, which reads as follows:-

“3.13 These comments conveyed, and no doubt were intended to convey that the Chief Justice, and indeed the entire Fijian judiciary is corrupt, pliant, biased towards the Fijian Government, a threat to democracy in Fiji and that people have no faith in the Fijian judiciary.

3.14 Further, by the Respondent’s comments on an appeal filed by the Fiji Independent Commission against Corruption in **Fiji Independent Commission against Corruption [FICAC] v Sitiveni Ligamamada Rabuka** Criminal Appeal No. HAA 57 of 2018 (12 November 2018) while the matter was sub judice that there was a “**clear case of double standards by a corrupt judiciary**” any reasonable audience would take the view that the court was acting in favour of the Appellants.

3.15 The use of the words “**regime lackeys**” by the Respondent implies that the Fijian judiciary is not independent and favours the Government.

3.16 All of the Respondents comments when viewed collectively paint a picture of corruption, bias and partiality by the Chief Justice and the entire Fijian judiciary and clearly show that there was indeed a real risk that the Facebook Comments undermined the public confidence in the administration of justice in Fiji.

40. This Court after analysing the Affidavit evidence and submissions made by Counsel for the parties holds **this Court is not an inappropriate forum** to hear and determine this proceeding. This Court has jurisdiction in this matter. The reason for such finding is that:-

- (i) Facebook Posts subject to this proceedings were all directed at the Honourable Chief Justice, Chief Registrar and the Fiji Judiciary as a whole;
- (ii) Facebook Posts were easily accessible to any member of public including people in Fiji who has Facebook account (Dow Jones) as

appears at paragraph 3 and 4 of ASK's Affidavit and at paragraphs 3 and 4 of Lal's Affidavit when they stated as follows:-

Paragraphs 3 and 4 - Khaiyum's Affidavit

- “3. On 18 September 2018, the Executive Manager Support at the Office of the Attorney-General namely Izek Ashwin Lal, brought to my attention that Rajendra Chaudhry (‘the Respondent’) had posted on the online networking site Facebook several statements concerning the Judiciary and members of the Judiciary in Fiji. The statements which were posted on the Respondent’s Facebook page is publicly accessible and contained inter-alia scandalous and derogatory comments about the Judiciary and members of the Judiciary.
4. The statements against the Judiciary and members of the Judiciary that were posted on Facebook by the Respondent and which I had subsequently viewed are as follows:
.....”

Paragraph 3 and 4 of Lal's Affidavit:-

- “3. On 18 September 2018, I accessed the online social networking website Facebook page of Rajendra Chaudhry which is open for public viewing.
4. Upon perusing the said Facebook page, I sighted the following posts with photographs uploaded by the said Rajendra Chaudhry:
.....”

Paragraphs 5 and 6 of ASK's Supplementary Affidavit:-

- “5. Thereafter, on 31 October 2018, the Executive Manager Support at the Office of the Attorney-General namely Izek AshwinLal, brought to my attention that the Respondent had posted on the online networking site Facebook further statements concerning the Judiciary and members of the Judiciary in Fiji. The further

statements which were posted on the Respondent's Facebook page are publicly accessible and contained inter-alia scandalous and derogatory comments about the Judiciary and members of the Judiciary.

6. *The statements against the Judiciary and members of the Judiciary that were posted on Facebook by the Respondent and which I had subsequently viewed are as follows:*

.....”

Paragraphs 3 and 4 of Lal's Supplementary Affidavit:

“3. *On 31 October 2018, I accessed the online social networking website Facebook page of Rajendra Chaudhry which is open for public viewing.*

4. *Upon perusing the said Facebook page, I sighted the following posts with photographs uploaded by the said Rajendra Chaudhry ('the Respondent'):*

.....”

Izek Lal also took screenshots of some of the Facebook Posts subject to this proceedings:

- (iii) Respondent's intentional conduct was directed at Fijian Judiciary, Chief Justice of Fiji and Chief Registrar and the Facebook Post would cause harm to Fijian Judiciary;
- (iv) Facebook Posts was intended to bring disrepute to the Chief Justice, Chief Registrar and the Judiciary as a whole;
- (v) Facebook Posts subject to this proceedings undermined the public confidence in Fijian Judiciary, its Chief Justice and intended to weaken Fijian democracy;

- (vi) Damage that was suffered by the Facebook Posts was damage to the reputation, integrity and dignity of Chief Justice of Fiji, Chief Registrar of Fiji, Fijian Judiciary and Fijian democracy as a whole (Dow Jones);
 - (vii) Facebook Posts were very damaging and calculated to tarnish the reputation, integrity and dignity of the Fijian Judicial system and was **“the highest degree offensive” (H.D. Rajah)**;
 - (viii) Facebook Post of 30 October 2018 at 7.02pm in relation to **FICAC v. Sitiveni Rabuka** case which was sub-judice as the Appeal was still pending;
 - (ix) There is strong connection between the Facebook comments **“subject to this proceedings and Fiji”**.
 - (x) Respondent aimed and specifically directed his Facebook Post subject to this proceedings to Fijian Judiciary.
41. During her Submission, Ms Solimailagi posed the question: that since the Facebook Post subject to this proceeding is directed to Fiji judiciary then if not Fijian Jurisdiction then which jurisdiction?
42. In view of what has been said at paragraph 40 of this Judgment the answer is obviously Fijian Jurisdiction.
43. Having held that this Court has jurisdiction to hear proceedings this Court now looks at the issue raised by Respondent’s Counsel in respect to Order granting Leave for substituted service of documents on Respondent.
44. Respondent by his Counsel submitted that Order 52 Rule 3(3) of HCR requires personal service and as such this Court does not have jurisdiction to make Order for substituted service.
45. Order 52 Rule 3(3) of HCR provides as follows:-
- “Subject to paragraph (4), the notice of motion, accompanied by a copy of the statement and affidavit in support of the application for leave***

under rule 2, must be served personally on the person sought to be committed.”

46. It appears that Learned Counsel for Respondent did not give any attention to Order 65 Rule 4 of High Court Rules which provides as follows:-

“4.-(1) If, in the case of **any document which by virtue of any provision of these Rules is required to be served personally** or a document to which Order 10, rule 1, applies, **it appears to the Court that it is impracticable for any reason to serve that document in the manner prescribed on that person, the Court may make an order for substituted service of that document.**

(2) An application for an order for substituted service maybe made by an affidavit stating the facts on which the application is founded.

(3) Substituted service of a document, in relation to which an order is made under this rule, is effected by **taking such steps as the Court may direct to bring the document to the notice of the person to be served.”** *(emphasis added)*

47. At paragraphs 4 to 6 of Ajay Singh’s Affidavit sworn on 16 October 2018, in Support of Application for Substituted Service it is stated as follows:-

“4. *I am advised by the Applicant’s Counsel and verily believe that the Applicant is required to personally serve on the Respondent the Notice of Motion for an Order of Committal, Statement, Affidavit Verifying Statement and all other documents of or relevant documents filed in these proceedings.*

5. *I verily believe that the respondent no longer resides in Fiji and currently resides in New Zealand, however, the current residential address and/or location in New Zealand is not known to the Applicant.*

6. *I also verily believe that the Respondent is engaged in his own legal practice known as ‘Chaudhry Legal’ which is located at 17/16 Lambie Drive, Manukau, Auckland 2104, New Zealand.”*
48. This Court after due consideration to the Affidavit evidence granted Order for substituted service as it would have been impractical to serve the Respondent personally.
49. This Court holds that it had jurisdiction to grant Order for substituted service of the documents on the Respondent under Order 65 Rule 4 of HCR, in respect to any proceedings that is before the Court.

Application to Strike Out

50. Having held that this Court has jurisdiction to deal with this proceeding and to Order substituted service, the Court will now look at other grounds relied by Respondent to strike out the proceedings.
51. Respondent submits that the proceeding be struck out pursuant to Order 18 Rule 18(1) of HCR and inherent jurisdiction of this Court.
52. Order 18 Rule 18(1) provides as follows:-

“18.-(1) The Court may at any stage of the proceedings order to be struck out or amended any pleading or the indorsement of any writ in the action, or anything in any pleading or in the indorsement, on the ground that-

- (a) it discloses no reasonable cause of action or defence, as the case may be; or*
- (b) it is scandalous, frivolous or vexatious; or*
- (c) it may prejudice, embarrass or delay the fair trial of the action;*
or
- (d) it is otherwise an abuse of the process of the court;*

and may order the action to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

53. It is well established that jurisdiction to strike out proceeding should be used very sparingly and only in exceptional case **Timber Resource Management Limited v. Minister for Information and Others** [2001] FJHC 219; HBC 212/2000 (25 July 2001).
54. In **National MBF Finance (Fiji) Ltd v. Buli** Civil Appeal No. 57 of 1998 (6 July 2000) the Court stated as follows:-

“The Law with regard to striking out pleadings is not in dispute. Apart from truly exceptional cases the approach to such applications is to assume that the factual basis on which the allegations contained in the pleadings are raised will be proved. If a legal issue can be raised on the facts as pleaded then the Courts will not strike out a pleading and will certainly not do so on a contention that the facts cannot be proved unless the situation is so strong that judicial notice can be taken of the falsity of a factual contention. it follows that an application of this kind must be determined on the pleadings as they appear before the Court...”

No Reasonable Cause of Action

55. In **Razak v. Fiji Sugar Corporation Ltd** [2005] FJHC 720; HBC 208. 1998L (23 February 2005) his Lordship Justice Gates (current Chief Justice) stated as follows:-

*“A reasonable cause of action means a cause of action with “some chance of success” per Lord Pearson in **Drummond-Jackson v. British Medical Association** [1970] 1 All ER 1094 at p.1101f. The power to strike out is a summary power “which should be exercised only in plain and obvious cases”, where the cause of action was “plainly unsustainable”; Drummond-Jackson at p.110b; **A-G of the Duchy of Lancaster v. London and NW Railway Company** [1892] 3 Ch. 274 at p.277.*

56. Order 52 Rule 1 and 2 provides as follows:-

“1.-(1) The power of the High Court to punish for contempt of court may be exercised by an order of committal.

(2) This Order applies to contempt of court-

(a) committed in connection with-

(i) any proceedings before the Court, or

(ii) proceedings in an inferior Court;

(b) committed otherwise than in connection with any proceedings.

(3) An order of committal may be made by a single judge.

(4) Where by virtue of any enactment the High Court has power to punish or take steps for the punishment of any person charged with having done any thing in relation to a court, tribunal or person which would, if it had been done in relation to the High Court, have been a contempt of that Court, an order of committal may be made by a single judge.”

57. The Facebook Posts subject to this proceedings and subject to ASK’s Affidavit and Lal’s Affidavit sworn on 16 October 2018, is not in relation to any court proceedings but fall under Order 52 Rule 1(2)(b).

58. Also after this Court granted Leave to issue contempt proceedings Respondent continued to make comments on Facebook as appears at paragraph 38 on pages 14, 15 and 16 of this Judgment and one of the posts relates to matter that was pending before High Court.

59. That fact that Respondent posted on his Facebook pages about matter that was pending in Court, he is caught by Order 52 Rule 1(2)(a)(b) of HCR.

60. Respondent’s Counsel did acknowledge and concede that if this Court finds jurisdiction then the Facebook Posts posted by Respondent and comments made therein is more serious than scandalising comments made by contemnors in **Parmanandan v. Attorney-General** (1972) 18 FLR 90 and **Mahendra Chaudhry v Attorney-General of Fiji** (1999) 44 FLR 39.

61. This Court holds that Plaintiff/Applicant do have reasonable cause of action against the Respondent and this proceedings is not plainly unsustainable.

Frivolous or Vexatious

62. At paragraph 18/19/15 of Supreme Court Practice 1993, Vol 1 (White Book) it is stated:-

*“By these words are meant cases which are obviously frivolous or vexatious or obviously unsustainable per Lindley LJ in **Attorney General of Duchy of Lancaster v. L. & N.W.Ry** [1892] 3 Ch. 274;.... The Pleading must be “so clearly frivolous that to put it forward would be an abuse of the Court” (per **Juene P. in Young v. Halloway** [1895] P 87, p.90;”*

63. The Oxford Advanced Learners Dictionary of Current English 7th Edition defines “frivolous” and “vexatious” as:-

frivolous: “having no useful or serious purpose”

vexatious: “upsetting” or “annoying”

64. No evidence has been produced by the Respondent to establish that this proceeding has no useful or serious purpose and is just to upset or annoy the Respondent.

Abuse of Process

65. It is well settled that this Court has inherent jurisdiction to strike out the claim or pleadings for abuse of Court process as well as under Order 18 Rule 18(1)(d) of High Court Rules (paragraph 18/19/18 of Supreme Court Practice 1993 Vol. 1).

66. At paragraphs 18/19/17 and 18/19/18 of Supreme Court Practice 1993 (White Book) Vol. 1 it is stated as follows:-

*“Abuse of Process of the Court” - Para. (1)(d) confers upon the Court in express terms powers which the Court has hitherto exercised under inherent jurisdiction where there appeared to be “an abuse of the process of the Court.” This term connotes that the process of the Court must be used bona fide and properly and must not be abused. The Court will prevent the improper use of its machinery, and will, in a proper case, summarily prevent its machinery from being used as a means of vexation and oppression in the process of litigation (see **Castro v. Murray** (1875) 10 P.59, per Bowen L.J. p.63). See also “Inherent jurisdiction”, para.18/19/18.”*

*“Inherent Jurisdiction - Apart from all rules and Orders and notwithstanding the addition of para.(1)(d) the Court has an inherent jurisdiction to stay all proceedings before it which are obviously frivolous or vexatious or an abuse of its process (see **Reichel v. Magrath** (1889) 14 App.Cas.665) (para 18/19/18).”*

67. Except for challenging jurisdiction of this Court, the Respondent has failed to provide any evidence to show as to why this proceeding is an abuse of court process.
68. I hold that the Applicant has reasonable cause of action, this proceeding is not frivolous or vexatious and not an abuse of court process as against the Respondent.
69. Accordingly, Respondent’s Application to strike out the proceeding by Summons filed on 5 February 2019, should be dismissed with costs which will be assessed at later stage of this Judgment.

Contempt of Court

70. As stated hereinbefore Counsel for the Respondent conceded that Facebook Posts published by Respondent is more serious than those published or spoken in **Parmanandan v. Attorney-General** (1972) 18 FLR 90 and **Chaudhry v Attorney-General of Fiji** (1999) 44 FLR 39.

71. This Court will briefly consider Ms Prasad's submission on law applicable to contempt proceedings and law to be applied.

72. In **Nicholas** case, the Court at paragraph 19 of the Judgment stated as follows:-

"[19] In summary, as a result of the decisions in Parmanandan v. The Attorney-General (supra) and Attorney-General v. Times Newspaper Ltd (supra), the position in Fiji is that contempt of court whether civil or criminal contempt committed in connection with any civil proceedings or contempt committed otherwise than in connection with proceedings is dealt with under Order 52 of the High Court Rules. Only contempt committed in connection with criminal proceedings falls outside the scope of Order 52 and is dealt with by the trial judge according to criminal law practice and procedure for contempt of court."

73. In this instance, the Facebook Post subject to this proceedings was contempt committed by the Respondent otherwise than in connection with any proceedings as provided for in Order 52 Rule 1(2)(b) of HCR.

74. This Court accepts Applicant's Submission that common law principles apply in respect to contempt proceedings as was stated by Lautoka High Court in **Finau & Ors v. Civil Aviation Authority of Fiji** C.A. No. 117 of 2017 (Lautoka) (12 June 2017; and **Fiji Times Ltd & Ors v. The Attorney-General of Fiji** (2017) FJSC: CBV 0005 of 2015 (21 April 2017).

75. In **Finau's** case his Lordship Justice Ajmeer at paragraph 41 stated as follows:-

"Unlike the UK, there is no substantive law governing any contempt of court in Fiji, except for HCR, O52, which explains the procedure to be adopted in dealing with an application for an order of committal for contempt of court. In the absence of any substantive law, we need to look at the common law and the principles applied in common law countries such as the UK and Australia in dealing with an application of committal of the contemnor."

76. This Court also accepts Applicant's Submission that the test applied to determine whether the Respondent has committed the contempt is **real risk test**.

77. The facts of **Fiji Times Ltd. v. Attorney-General of Fiji** are succinctly stated by Supreme Court as follows:-

"4. *The factual matrix in brief relating to this appeal is set out as follows:-*

On Monday 7 November 2011, an article entitled "FIFA Probes Doc" was published on page 30 of the Fiji Times. The impugned article contained the words and statement:

"You should be aware that with no judiciary there, his case has been reviewed by one Australian Judge. It is not a court per se."

These words were part of a statement made by one Tai Nicholas who was described as the General Secretary of the Oceania Football Confederation. The reference to "his case" in the article was to a lawyer's (Dr Muhammed S.D. Sahu Khan) case heard and determined by a Commissioner appointed under Section 85 of the Legal Practitioners Decree (LPD) No. 16 of 2009. The lawyer had been found guilty of professional misconduct and struck off from the Roll of Barristers and Solicitors in Fiji. The lawyer was holding the post of President of the Fiji Football Association at the time. He also held an official position with the Oceania Football Confederation (OFC).

On 10 November 2011, the Respondent sought leave ex parte to apply for an order of committal against the Fiji Times Ltd, Brian O'Flaherty and Fred Wesley (the Appellants) in terms of Order 52 Rule 2 of the High Court Rules.

The Respondent alleged that the words and the statement published in the Fiji Times scandalized the Court and the Judiciary in that they were a scurrilous attack on the judiciary and the members of the judiciary, thereby lowering the authority of the judiciary and the Court."

78. The Supreme Court adopted with approval the following statement of the Trial Judge which was quoted at paragraph 20 of the Judgment:-

*“It is my judgment that the words published in the Fiji Times and thus **understood by a fair minded and reasonable reader do represent a real risk to the administration of justice in Fiji by undermining the authority, integrity and impartiality of the Court and the judiciary.** I am satisfied that publication of the **words represents a real risk of undermining the confidence of the people in the judiciary and in the judgments of the Courts** since they have the effect of lowering the authority of the Court and its judiciary. **The words generate misgiving as to integrity, ability and impartiality which are qualities fundamental to the judicial office and rule of laws.** See *R v. Dunabin; ex parte Williams* (1935) 53 CLR 434. I am satisfied that the offence of contempt scandalizing the court has been established against the First Respondent, Fiji Times Limited.” **(emphasis added)***

79. The Supreme Court in **Fiji Times Limited** case also made it clear that mens rea (intention) is not an element of the offence of contempt of Court. At paragraph 47 of the judgment his Lordship Justice Chandra stated as follows (quoted at paragraph 3.20 of Applicants Submission:-

*“[47] I dealt with this matter in the above manner as there was much argument on the effect of **Dooharika** as having changed the position in **Ahnee**. However, since **Dhooharika** is a case from Mauritius which went up to the Privy Council and was decided in 2014 there is no binding effect of that decision in Fiji and I would rest my decision on the law that was applicable in Fiji prior to the High Court decision in this case, which was that the intention of the contemnor was not a requirement to establish liability for contempt and what was necessary was whether there was a real risk of undermining the judiciary or the administration of justice by publishing such statements. In any event, it is well established that under the*

common law, mens rea is not an element of the offence of contempt of Court and that is the position in Fiji.” **(Emphasis added)**

80. This Court has no doubt at all that Facebook Posts subject to this proceedings will represent to any fair minded and reasonable person that in Fiji there is a **real risk** to the administration of justice, integrity, dignity of the Chief Justice, Chief Registrar and judiciary as a whole which weakens the concept of democracy in Fiji.
81. Facebook Posts subject to the proceedings would also undermine confidence of the public in Fiji judiciary and judgments of Court and the Posts as stated earlier affects the integrity, dignity and impartiality of the Courts and judicial officers which is considered to be paramount to the judicial office and rule of law (**Fiji Times Ltd v. Attorney-General of Fiji**).
82. Further, Fiji being a small jurisdiction in terms of geographical size and population, public confidence in Courts, the judicial officers and court administrators is paramount given that the judicial officers and administrators may be known to majority of the population by name and face.
83. Since, judicial officers and administrators are known by their name and face in a small jurisdiction like Fiji and as such their ability to carry out their duties and judicial function should not be tarnished by comments like those posted by Respondent on his Facebook page.
84. What has been said in preceding paragraphs is in conformity with what was said by Supreme Court in **Fiji Times Ltd v. Attorney-General of Fiji** (supra) at paragraph 64 which is in following terms:-

“[64] I would echo the views expressed in Singapore as being relevant to Fiji being a small country like Singapore. In Attorney-General v Dhee Soon Juan [2006] 2 SLR 650 (at paragraph 25) the Supreme Court states that:

‘Conditions unique to Singapore necessitate that we deal more firmly with attacks on the integrity and impartiality of our courts. To begin

with, the geographical size of Singapore renders its courts more susceptible to unjustified attacks.” (Emphasis added)

It is noted that seventeen Facebook Posts subject to this proceeding have Honourable Chief Justice’s picture while three Posts have Chief Registrar’s picture.

85. This Court is of the view that the judicial officers and judiciary as a guarantor of justice must enjoy public confidence and be protected from baseless attacks and from being tyrannized by anyone.
86. The Courts should not hesitate to safeguard its integrity and dignity from such scrupulous attacks whether made by residents or non-residents.
87. In view of what has been stated by this Court at paragraph 70 to 86 of this Judgment, this Court has no hesitation in finding that the Respondent is guilty of contempt of court.

Costs

86. This Court takes into consideration that the Applicant filed four Affidavits, filed Submissions and made Oral Submission whereas the Respondent did file any Affidavits but apart from filing Application to Strike Out proceeding, filed Submission and made Oral Submissions mainly on jurisdiction issue.

Orders

88. This Court makes following Orders:-
 - (i) Application to Strike Out Proceedings vide Summons filed on 5 February 2019, is dismissed and struck out;
 - (ii) Rajendra Chaudhry, Lawyer of New Zealand, the Respondent is found guilty of contempt of Court;

- (iii) The Respondent do pay cost of the Application to strike out and this proceedings assessed in the sum of \$10,000.00 to the Applicant within thirty (30) days from date of this Judgment.




Kamal Kumar
JUDGE

At Suva
4 April 2019

OFFICE OF THE ATTORNEY-GENERAL for the Applicant
SINGH AND SINGH LAWYERS for the Respondent