

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

Civil Action No. HBC 230 of 2016

**BETWEEN:**     **SATENDRA KUMAR SHARMA** of 248 Fletcher Road, Vatuwaqa, Retired  
Civil Servant

**PLAINTIFF**

**AND:**            **ASHWANT BAHADUR SINGH** of 7 Kemindra Place, Vatuwaqa, Suva,  
Service Officer.

**1<sup>ST</sup> DEFENDANT**

**AND:**            **AJAY BAHADUR SINGH** of 7 Kemindra Place, Vatuwaqa, Suva,  
Businessman.

**2<sup>ND</sup> DEFENDANT**

**Counsel**                : **Plaintiff**     : **Mr Niubalavu. P**  
                                 : **Defendants:** **Mr Singh.S**

**Date of Judgment**   : **12.10.2021**

**JUDGMENT**

**INTRODUCTION**

1. This is summons seeking stay of execution in terms of Order 45 rule 10 of High Court Rules 1988. Plaintiff obtained judgment against Defendants for a claim based on defamation. Defendants had publicly defamed Plaintiff, when there was a large gathering for a religious festival. Plaintiff proved on balance of probability that Defendants had uttered words that were degrading to status of Plaintiff in community, in public during a religious festival and these are all aggravating factors to the claim and considering the circumstances a damage of \$50,000 was awarded. Defendants have appealed against the said judgment and there are eight appeal grounds. Most importantly Defendant had not established that if \$50,000 is paid

and the appeal succeeded, defendants will not be able to recover the sum paid from Plaintiff<sup>1</sup>. Summons seeking stay of the execution is refused.

## ANALYSIS

2. Order 45, rule 10 of the High Court Rules, 1988 states,

“10. Without prejudice to Order 47, rule 1, a party against whom a judgment has been given or an order made may apply to the Court for a stay of execution of the judgment or order or other relief on the ground of matters which have occurred since the date of the judgment or order, and the Court may by order grant such relief, and on such terms, as it thinks just.”
3. So there is a discretion of the court to grant or refuse stay of execution. This discretion is governed by judicial determinations.
4. Plaintiff had obtained the judgment in his favour and right of appeal to Court of Appeal is an option of the party against whom judgment was awarded. This right can be exercised in terms of the law. This is part of due process of law, but that does not deprive Plaintiff the fruits of the judgment specially when it related to an award on money.
5. It should be noted that a party who is ordered to pay damages is at an advantage if the payment is stayed due to decreasing time value for money. This will unduly favour Defendants.
6. Fiji Court of Appeal in *Natural Waters of Viti Ltd v Crystal Clear Mineral Water (Fiji) Ltd* held ;

“The principles to be applied on an application for stay pending appeal are conveniently summarized in the New Zealand text, McGechan on Procedure (2005): “On a stay application the Court’s task is carefully to weight all of the factors in the balance between the right of a successful litigant to have the fruits of a judgment and the need to preserve the position in case the appeal is successful.” *Duncan v Osborne Building Ltd* (1992) 6 PRNZ 85 (CA), at p.87.

The following non comprehensive list of factors conventionally taken into account by a Court in considering a stay emerge from *Dymocks Franchise Systems (NSW) Pty Ltd v Bilgola Enterprises Ltd* [5] and *Area One Consortium Ltd v Treaty of Waitangi Fisheries Commission* [6];

Whether, if no stay is granted, the applicant’s right of appeal will be rendered nugatory (this is not determinative). See *Philip Morris (NZ) Ltd v Liggett & Myers Tobacco Co (NZ) Ltd* 1977 2 NZLR 41 (CA).

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<sup>1</sup> *Atkins v. Great Western Ry Co.* (1886) 2 T.L.R. 400, following *Barker v. Lavery* (1885) 14 Q.B.D. 760, CA;

Whether the successful party will be injuriously affected by the stay.

The bona fides of the applicants as to the prosecution of the appeal.

The effect on third parties.

The novelty and importance of questions involved.

The Public interests in the proceeding.

The overall balance of convenience and the status quo.”

7. If a stay is granted injury to Plaintiff is more as the time value for money decrease with time and this would make Defendant at an advantage. So, there is clear injury to Plaintiff due to decreasing value of money.
8. Defendants have timely appealed against the judgment exercising their right of appeal. But this does not necessarily mean the bona fides of the application favours Defendant. It is part of due process and they also know that there is no stay of execution unless court grants such a stay. Defendants may bona fide believe success of their appeal, and may proceed with due diligence.
9. In England and Wales Court of Appeal (Civil) decision R (on the application of *BMW AG*) *v Revenue and Customs Comrs.* [2008] EWHC 712 (Admin); [2008] STC 3090; [2008] All ER (D) 114 (May) lifting a stay order of court below in the exercise of discretion held,

“That starting point is, however, by no means also the finishing point, because it is also equally well-established that the court has an unfettered discretion to order a stay of the order under appeal if the justice of the case demands it. In a case in which the question of the ordering of a stay arises, the role of the court is to make the order that best accords with the interests of justice. **Where there is a risk of harm to one party or the other, whichever order is made, the court has to balance the alternatives and make a decision as to the course which is likely to occasion the least injustice.** In *Leicester Circuits Ltd v Coates Brothers Plc* [2002] EWCA Civ 474, Potter LJ said, at paragraph 13:

"The proper approach is to make the order which best accords with the interests of justice. Where there is a risk of harm to one party or another, whichever order is made, the court has to balance the alternatives to decide which is less likely to cause injustice. The normal rule is for no stay, but where the justice of that approach is in doubt, the answer may well depend on the perceived strength of the appeal."(emphasis is mine)

10. Plaintiff filed action against Defendants for defamation and since the defamation happened during a religious festival in front of large gathering the fact of utterance of defamatory words were proved though eye witnesses and the facts were proved on balance of probability.
11. Plaintiff was awarded a damage of \$50,000 considering the circumstances of the case for the damage due to defamatory statements of the Defendants done in public. Plaintiff's position in religious body and community were relevant.
12. There are no novel issues to be determined in Court of Appeal or effects of judgment on third parties as only Defendants are liable to pay damages or public interest on the matter. It was a private defamation that affected Plaintiff's reputation in the community. He had waited for a long time seeking justice.
13. If stay is not granted the appeal will not be a nugatory. The amount ordered by the court was \$50,000 and Defendants should take entire responsibility of their actions. There was no evidence in any of the affidavits that show Plaintiff will not be in a position to pay said sum if the appeal is successful.
14. Defendants had appealed against the said judgment on following grounds
  - "a. The Learned Judge erred in law and in fact in holding that the Respondent had proved the libel alleged on a balance of probabilities without analysing the evidence of each of the witnesses and without providing any reasons and/or sufficient reasons for believing the Respondent's witnesses who were family members and/or friends of the Respondent.
  - b. The Learned Judge erred in law and in fact in holding that the Respondent had sufficiently pleaded the alleged slander and that the words alleged were capable of conferring the meaning the Respondent alleged. The Pleadings failed to plead the English translation and/or meaning of the alleged slander and failed to state how each of the words allegedly spoken by the Appellants alleged affected the Respondent's reputation.
  - c. The Learned Judge erred in law and in fact in holding that the words complained off were established by the Respondent's witnesses and that the inconsistencies in the version of the Respondent's witnesses' did not affect the Respondent's case in slander disregarding established law that actual words alleged to have been published must be proved; it is not sufficient for witnesses to state what they conceive to be the substance or effect of the words, or their impression of what was said.
  - d. The Learned Judge erred in law and in fact in holding that the Respondent was not required to prove special damages to have an actionable case for slander when the Respondent was not a public official, professional or had any business reputation at the time of the alleged slander.

- e. The Learned Judge erred in law and in fact in holding that the words complained of by the Respondent constituted slander when there was no evidence that the alleged words were spoken maliciously by the Appellants. The alleged exchange between the parties took place during a confrontation between the parties following the Respondent introducing new forms for the temple without the consent or approval of the members and there was no malice or falsehood alleged by the Respondent against the Appellants.
  - f. The Learned Judge erred in law and in fact in holding that the words complained off by the Respondent meant that the Respondent was a thief or a person who had stolen monies from the temple when there was no evidence led by the Respondent that the words complained off was capable of conferring such meaning.
  - g. If, which is denied that the words complained off constituted the alleged slander, the Learned Judge erred in law and in fact in applying the case of *Patel v Gosai* [2014] FJCA 37; ABU 0037.2012 (24 March 2014) to assets damages and incorrectly awarded an exorbitant amount of damages not established by the Respondent.
  - h. If, which is denied that the words complained off by the Respondent constituted actionable slander, then the Learned Trial Judge erred in awarding interest on damages when this was not pleaded by the Respondent in his Statement of Claim.”
15. There were several witnesses and the Defendant’s defamatory conduct was proved and the evidence of the parties were dealt in the judgment. Defendants had shouted defamatory words and one cannot give a twisted meaning to such inherently degrading words. Defendants in the statement of defence had denied degrading words. There is no issue of deficiency of facts relating to defamation in pleading. There was no need to prove special damages for an award of damages and this was dealt in the judgment. There was nothing wrong in the application of Court of Appeal decision relating to a person who value his reputation in the assessment. Plaintiff who had an unblemished character value it, as he was holding an important position in the religious body and that was an honorary position. So I cannot see merits in the said grounds.
  16. UK Supreme Court Practice (White Book) 1988 59/13/1 p 893 states:  
 Stay of execution of proceedings pending appeal  
 The Court does not “make a practice of depriving a successful litigant of the fruits of his litigation, and locking up funds to which prima facie he is entitled, “pending an appeal (The Annot Lyle (1886) 11 P.D. 114, p 116, CA; *Monk v Brtram* [1891] 1 Q.B. 346; and this applies not merely to execution but to the prosecution of proceedings under the judgment or order appealed from for example, inquiries .....But it has also been said that “when a party is appealing exercising his undoubted right of appeal this Court ought to see that the appeal is successful is not nugatory.... It is in the discretion of the Court to grant or refuse a stay

and the court will grant it where the special circumstances of the case so require. As a general rule the only ground for a stay of execution is an affidavit showing that if damages and costs were paid there is no reasonable probability of getting them back if the appeal succeeds....”

17. There is no material in the affidavit in reply to substantiate the allegation that Plaintiff was not a person who may return the judgment ordered. This allegation was not made in the affidavit in support, depriving Plaintiff to refute said allegation. In my mind such an allegation without any basis, cannot be considered as meritorious ground to deprive Plaintiff's right to fruits of the judgment.
18. Supreme Court of Fiji in Ward v Chandra [2011] FJSC 8; CBV0010 (20 April 2011) cited a previous decision of Supreme Court with authority, (Per Justice Gates President of Supreme Court)
- ‘[21] In Iftakhar Iqbal Khan v Michael Fenech CBV0002.05S (4 May 2005) Ward JA in this court said (at p.4) in relation to stay:

"Execution in this case is payment of a sum of money. Only in the rarest of cases is that sufficient to justify a stay as subsequent success in the appeal will be implemented by repayment to the appellant. This is not a case of performance or restraint of some action or destruction of property which will irreversibly change the status quo and render a successful appeal nugatory. The description in the petitioner's affidavit of the consequence of having to pay before the application for special leave is heard is insufficient to meet that test."

19. Defendants cannot use the right of appeal to delay payment ordered by court in the exercise of my discretion. It is rare to grant stay in a judgment for money. The balance of convenience favours Plaintiff, hence refusal of stay of execution.

#### FINAL ORDERS

- a. Summons for stay refused.
- b. Cost of this application is assessed summarily at \$ 3,000 to be paid within 21 days.

Dated at Suva this 12<sup>th</sup> day of October, 2021.



Justice Deepthi Amaratunga  
High Court, Suva