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Chand v Khan [2000] FJLawRp 72; [2000] 1 FLR 50 (3 April 2000)

[\[2000\] 1 FLR 50](#)

HIGH COURT

Civil Appellate Jurisdiction
HBA 5/00S

MAAN CHAND

v

WALIMAN KHAN

Scott, J

3 April, 2000

Leave to testify at hearing of appeal — appeal against Small Claims Tribunal award - whether unfair because witnesses not called to testify— Small Claims Tribunal Decree s33(1); Magistrates' Court Rules Order XXXVII rr 8 & 16; Order XXXVII

The plaintiff alleged he was not given an opportunity to call witnesses present at the hearing. The referee stated that in an original and a supplementary report that no witnesses were presented by either party. On appeal to the Magistrates' Court, the Magistrate held a hearing to determine the truth of the appellant's claim and dismissed the appeal. The appellant applied to the High Court to present further evidence and appealed to the High Court but were both applications were discontinued.

Held — Magistrate exceeded jurisdiction in allowing further evidence to be called at the hearing of the appeal to show that the referee's record and report were incorrect.

(2) Further evidence at the hearing of an appeal can only be adduced when 3 conditions are satisfied:

- (i) that the evidence could not with reasonable diligence have been made available at the trial;
- (ii) that the evidence would have had an important effect on the outcome of the trial; and
- (iii) that the evidence must apparently be credible.

The 3 conditions were not applicable to an allegation that the tribunal did not allow witnesses to be called and the referee's report should have been accepted at face value.

Application to adduce further evidence fails.

Cases referred to in Decision

appl *Sheet Metal and Plumbing (Fiji) Limited v Uday Narayan Deo* (1999) 45 FLR 80 HBA 7/99S

appl *SCC v Ratulevu* HBA 1/2000S

appl *Ladd v Marshall* [1954] 1 WLR 1489; [1954] 3 All ER 745

*Sevuloni R Valenitabua for the appellant
respondent in person*

3 April, 2000.

DECISION

Scott, J

This is an application by the Appellant for leave to testify at the hearing of an appeal against a Decision of the Suva Magistrates' Court dated 3 December 1999 (Ms. Gwen Phillips) dismissing an appeal by the Appellant against an award of the Small Claims Tribunal (Mr. D.S. Dass) dated 12 January 1999.

On 30 March the Appellant discontinued both the application and the Appeal but in view of the course which the proceedings took I think it is desirable briefly to set out a number of considerations which should be borne in mind both by legal practitioners and Resident Magistrates when considering appeals from the Small Claims Tribunal (SCT).

As pointed out by Fatiaki J in **Sheet Metal and Plumbing (Fiji) Limited v. Deo** (HBA 7/99S) and also in **SCC v. Ratulevu** (HBA 1/2000S) the scope for appealing against awards of the SCT provided by Section 33 (1) of the SCT Decree is extremely limited. An appeal only lies where it can be said that:

- either (a) the proceedings were conducted by the Referee in a manner which was unfair to the Appellant and prejudicially affected the result of the proceedings; or
- (b) the Tribunal exceeded its jurisdiction.

There is no appeal against the merits of an award.

The hearing in the SCT took place on 12 January 1999. The dispute concerned repairs to a van which the claimant (Respondent herein) alleged had not been carried out despite being paid for. The claimant was awarded \$500.00.

According to the transcript of the proceedings (page 18) neither party had any witnesses.

On the day of the hearing the Appellant appealed. The grounds of appeal were a reproduction of Section 33 (1).

On 4 October 1999 Counsel for the Appellant sought and obtained leave from the Resident Magistrate to file particulars of the grounds of appeal.

On 5 October the amended grounds of appeal were filed (page 1 of the record of the proceedings in the Suva Magistrates' Court) principally alleging that the proceedings before the SCT were unfair in that the Appellant was not given an opportunity to call witnesses whom he had present on the day of the hearing.

Following receipt of the amended grounds of appeal a supplementary report from the Referee was called for by the Resident Magistrate. The supplementary report is at page 15 of the record of the proceedings in the Magistrates' Court, the original report of the Referee is pages 2 & 3 of the record of the SCT. In both the original report and the supplementary report the Referee states that no witnesses were presented by either party. In the supplementary report the Referee makes it clear that he fully explained the Tribunal's practices and procedures to the parties before the hearing and that in particular he told them that they could call any witnesses whom they had available.

Notwithstanding these reports the Resident Magistrate decided to conduct a hearing to determine the truth of the Appellant's claim that he was not afforded an opportunity to call his witnesses. The Appellant was called and so were two supporting witnesses. The Respondent herein also gave evidence. At the conclusion of the hearing the Resident Magistrate rejected the appeal. On the question of witnesses she accepted that the claimant was a witness of truth and rejected the evidence given by the Appellant and called on his behalf. The Appellant then filed an appeal against the Resident Magistrate's decision and as already seen, now seeks leave to adduce yet further oral evidence on the hearing of the appeal to the High Court.

Although the Resident Magistrate's decision to allow further evidence to be heard on the appeal was doubtless taken for the best of motives my view, with respect, is that she was mistaken. Order XXXVII Rule 16 of the Magistrates' Court Rules gives power to a Resident Magistrate to hear further evidence on appeal but as a general rule leave to hear further evidence must only be given if the three conditions set out in **Ladd v. Marshall** [1954] 1 WLR 1489; [1954] 3 All ER 745 are satisfied. These are:

- (i) that the evidence could not with reasonable diligence have been made available at the trial;
- (ii) that the evidence would have had an important effect on the outcome of the trial; and
- (iii) that the evidence must apparently be credible.

None of these three conditions is really applicable to an allegation that the Tribunal did not allow witnesses to be called at all and therefore it is necessary to turn to the record of the proceedings itself which, if the Appellant is to be believed, must be defective and misleading.

The Magistrates' Court Rules do not give guidance in these circumstances (see Order XXXVII Rule 8) but in **Thompson v. Andrews** [1966] 2 All ER 419 the Court of Appeal rejected an application to consider evidence which tended to contradict the primary judge's note on the proceedings before him. Where the record is silent on a matter then evidence suggesting that it was raised might more readily be admitted but in the appeal before the Resident Magistrate with which we are dealing the intention of adducing fresh evidence was to show that the Referee's record and report were not correct. On the authority of **Thompson v. Andrews** (supra) my view is that this course was impermissible.

In my opinion the Referees Report should have been accepted at their face value and therefore there was no merit whatever in the Appellant's appeal to the Magistrates' Court. As has been seen the mistaken approach taken by the Resident Magistrate did not in any event assist the Appellant whose claim to have had witnesses waiting was not believed by her. In these circumstances both the applications for leave to call yet further evidence before the High Court and the appeal itself to the High Court were clearly doomed and were accordingly discontinued.

I would only add that the purpose of the Small Claims Tribunal is to provide simple swift justice. Awards of Tribunals are not generally appealable. The High Court does not look with favor on hopeless appeals being lodged in the Magistrates' Courts. It looks with even less favor on further hopeless appeals to the High Court.

Application dismissed.

Marie Chan