

834

IN THE COURT OF APPEAL, FIJI ISLANDS
ON APPEAL FROM THE HIGH COURT OF FIJI

CIVIL APPEAL NO.ABU0018 OF 2001S
(High Court Probate Action No. P33639)

BETWEEN:

PHILIP JAGDISHWAR SINGH

Appellant

AND:

UMA KIRAN also known as UMA KRISHNA
also known as UMA KIRAN KRISHNA

Respondent

Coram:

Reddy, P
Smellie, JA
Penlington, JA

Hearing:

Thursday, 21st November 2002, Suva
Tuesday, 26th November 2002, Suva

Counsel:

Mr Sahu Khan and Ms Natasha Khan for the Appellant
Mr V. M. Mishra for the Respondent

Date of Judgment: Friday, 29th November 2002

JUDGMENT OF THE COURT

The Appellant's Notice of Appeal gave notice of appeal against three judgments of Byrne J given in the High Court, namely:

- (a) His Judgment dated 7 December 1999 holding that the appellant was guilty of contempt of court in not providing the respondent with a full account of the Estate of Indermati Sukh also known as Indar Mati (daughter of Suruj Nath (of Lautoka, Fiji, Businesswoman) and a full and complete inventory for the period between 17 December 1996 and 27 May 1997; and
- (b) His Judgment dated 30 June 2000 dismissing the appellant's application to set aside the Judgment of 7 December 1999; and
- (c) His Judgment dated 23 February 2001 imposing a fine of \$300, in default one month's imprisonment, the fine to be paid within seven days, by 2 March 2001.

The respondent contends that the first two challenges are out of time. The appellant on the other hand contends that all three appeals are within time. Because of the unanswerable point - the O.42 r.3 point - which we discuss later we extend time for the two appeals which are out of time.

Background

The deceased Indermati Sukh died on 9 January 1995. The appellant and the respondent are brother and sister. The deceased was their mother. She left a will dated 26 June 1987. She gave her entire estate to the respondent. The nett worth of her estate at the time of death was about \$187,000.

The original proceeding was in the Probate jurisdiction of the High Court Pursuant to Letters of Administration dated 17 December 1996, the appellant was the administrator of the estate until the respondent successfully applied for and obtained on 27 May 1997 a grant of probate and an order revoking the grant of Letters of Administration to the appellant.

After the grant of probate, the respondent alleged that the appellant continued to hold himself out as the administrator of the estate and continued to deal with funds belonging to it. As the result she filed an application for an injunction to restrain the appellant from so acting. That application came on for hearing before Byrne J in Chambers on 8 June 1998. The Judge made an injunction restraining the appellant from holding himself out as the administrator of the estate and from dealing with any of its funds or assets until further order of the Court. There was no appeal against this judgment.

By May 1999 just over four years after the deceased's death the appellant had still not filed any accounts in the estate. As the result on 24 May 1999 the Chief Registrar of the High Court sent the appellant a letter requiring him to file accounts within one month of being required so to do by the Chief Registrar. The appellant did not comply with the Chief Registrar's request.

The Chief Registrar then filed an application for an order that the appellant file an inventory of the estate and exhibit accounts. That application came before Byrne J on 9 August 1999 when the Judge made an order requiring the appellant to provide full accounts in the Estate. The Judge's order was sealed. The operative part of the order stated:

"That Philip Jagdishwar Singh (s/o Ram Sukh) of Lomolomo, Lautoka, Fiji, Businessman the Administrator of the Estate of Indermati Sukh alias Indar Mati pursuant to grant of Letters of Administration made on the 17th day of December 1996 until the said grant was revoked by Order dated 27th day of May 1997 do provide the present Executor and Trustee Uma Kiran aka Uma Krishna aka Uma Kiran Krishna daughter of Ram Sukh of Lautoka, Fiji, Businesswoman by virtue of Probate No. 34326 and/or her Solicitors Messrs Mishra Prakash & Associates of Lautoka, Fiji with a full account of the estate for that period and a full and complete inventory of the said estate".

At the foot of the sealed order there was an "***Indorsement of Penal Notice***" which was in the following form:

"TO: the above-named PHILIP JAGDISHWAR SINGH son of Ram Sukh of Lomolomo, Lautoka, Fiji, Businessman.

If you neglect to obey this Order you will be liable to process of execution for the purpose of compelling you to obey the same."

Here it is to be noted that neither in the body of the order as sealed nor in the Penal Notice was there a statement as to the time within which the appellant was to comply with the order. We shall return to this matter when we deal with the O.42 r.3 argument point.

A Mr Gounder, a registered bailiff, made an affidavit of service in which he deposed to serving the appellant with a sealed copy of the order of 9 August 1999 he said that the appellant refused to acknowledge service.

By September 1999 accounts had still not been filed and so on 24 September 1999 the respondent made a statement requesting the leave of the High Court to apply for an order of committal pursuant to O.52 r.2 of the High Court Rules and the inherent jurisdiction of the Court on the grounds that the appellant had failed to comply with Byrne J's Order of 9 August 1999. In addition to failing to supply accounts, the appellant had failed to hand over to the respondent some funds, a motor vehicle and some other chattels in the estate.

839

On 7 October 1999 Byrne J made an order granting leave to the respondent to apply for an order of committal and/or for an order of attachment.

On 12 October 1999 pursuant to the leave granted to her, the respondent moved for an order of committal against the appellant.

The application for committal came on for hearing before Byrne J on 7 December 1999. The appellant did not appear and was not represented by counsel. Byrne J heard short oral evidence about service, the posting of the letter of 24 May 1999, the absence of any account from the appellant and of the alleged failure of the appellant to account for estate income, a motor car, and some other estate assets.

The judge delivered judgment on the day of the hearing. He had no hesitation in finding the appellant guilty of the contempt. He ordered that a warrant of arrest be issued requiring the appellant to appear in the High Court on 21 January 2000 to show cause why he should not be sentenced for his disobedience of the order of the court requiring him to file accounts and an inventory.

In early 2000 the appellant moved to set aside the judgment of Byrne J of 7 December 1999. That application was heard by Byrne J on 31 January 2000 and 28 March 2000. The appellant maintained that he had not been served with the papers ahead of the hearing in December 1999. He said he was unable to remember being served with a copy of the order of 9 August 1999. In a reserved judgment delivered on 30 June 2000

the judge refused to set aside his judgment of 7 December 1999. The judge preferred the evidence of Mr Gounder to that of the appellant.

In his judgment of 30 June 2000 Byrne J ordered the appellant to deliver accounts in the estate by 31 July 2000. Accounts were filed by the appellant within the time ordered and an inventory was delivered 14 days later.

On 23 February 2001 the appellant appeared for sentence in respect of the contempt of court. As we have stated earlier the appellant was fined \$300.00 and in default one month's imprisonment. The Judge ordered the fine to be paid within 7 days of his order.

The order of 23 February 2001 was sealed on 3 April 2001 and on the same day the appellant filed his notice of appeal.

The Further Evidence Point

Ahead of the hearing in this court on 21 November 2002 the respondent filed an application seeking leave to use at the hearing of the appeal an affidavit from the respondent sworn on 11 November 2002. In that affidavit the respondent deposes that the appellant, even now, has not complied with his obligations as the former administrator of the estate.

In anticipation of leave being granted the appellant made and filed an affidavit in reply in which he denies the respondent's allegations.

In the circumstances of this case and having regard to the way the hearing of the appeal developed - and we shall refer to that matter shortly - we exercise our discretion under Rule 22 (2) of the Court of Appeal Rules. We admit those affidavits as part of the evidence.

The O.42 r.3 Point

In opening the appeal Mr Sahu Khan took the point that the sealed order of 9 August 1999 was defective in that it did not specify a time for compliance by the appellant. It will be recalled that this was the order of Byrne J on the application of the Chief Registrar requiring the appellant to file an inventory and accounts. We have already set out the operative part of the order as sealed and the Penal Notice.

Mr Sahu Khan relied on O.42 r.3 It provides:-

3.(1) Subject to paragraph (2), a judgment or order which requires a person to do an act must specify the time after service of the judgment or order, or some other time, within which the act is to be done."

Paragraph (2) is not in point and can be disregarded for present purposes.

Mr Sahu Khan submitted that the order as sealed and served (assuming Mr Gounder's evidence was true) breached O.42 r.3. He also referred us to O.45 r.4(1). Under the latter rule where a person is required by an order to do an act within a specified time and he or she neglects to do so the order may be enforced by, inter alia, an order of committal against the person who has disobeyed the order. It is well recognised that failure to comply with an order to file an inventory within a specified time can be the subject of an application for contempt. *Baker v. Baker* [1860]2 S & T 380; *Marsham v. Brookes* [1863]32 LJP 95. See also 1991 Supreme Court Practice Volume 1 Para 52/1/5.

Mr Sahu Khan submitted that if the appellant was to be required to file an inventory and accounts then the order to comply with O.42 r.3 had to state a time for such step to be taken; and the sealed order in this case did not do so.

Mr Sahu Khan then drew our attention to the indorsement on the sealed order which we have set out earlier. In respect of that notice he submitted that it did not state a time for compliance or give a warning that a disobedience of the order would render the appellant liable for contempt proceedings.

Mr Sahu Khan cited 52 Atkins Court Forms (2nd Edition) 109 where it is stated:

"In the case of applications affecting the liberty of the subject strict compliance with the rules is necessary and the Respondent is entitled to take any technical objection in regard to the procedure since the proceedings are penal,...."
(The emphasis is ours)

Concluding his submissions on the O.42 r.3 point counsel submitted that there had not been strict compliance with the relevant rules, and that therefore there was no proper basis for the order of committal. As the result, so he contended, the order of committal ought to have been set aside. There would then be no basis for the fine imposed on the appellant.

The Adjournment During the Hearing of the Appeal

During the hearing on 21 November 2002 we took a short adjournment. It seemed to us that the O.42 r.3 point was fatal to the respondent and that there was therefore no basis for the contempt order or the subsequent fine. On returning to court we informed counsel as follows:-

“During the adjournment it was considered where the matter has got to so far. We are inclined to the view that the absence of a specific time in the Order of 9/8/99 is a defect - which the Respondent may not be able to overcome. On the other hand the Court has great sympathy with the Respondent’s position. It is disquieting that after all this time, fully aware of his responsibilities, the Appellant has still not discharged all his duties. In the circumstances, in view of Section 13 of the Court of Appeal Act, we have all the powers of the High Court we suggest to the parties that this matter is best resolved by the following consent orders -

- (1) Appeal allowed.*
- (2) The Court exercise its powers to remedy any defects in procedure under Section 13 of Court of Appeal Act, and Rule 22 of the Court of Appeal rules.*

- (3) *That the Appellant comply with all outstanding obligations as former administrator by noon on 20th of December 2002 and failure to do so will amount to contempt of the High Court.*
- (4) *Each party to bear own costs."*

The hearing of the appeal was then adjourned until 26 November 2002. When it was resumed counsel intimated that there had not been any resolution of the matter by the parties. We immediately indicated our view that the O.42 r.3 point was fatal to the contempt order and fine and that we proposed to allow the appeal.

Reasons for Upholding O.42 r.3 Point

We now shortly set out our reasons for our conclusion in respect of the O.42 r.3 point.

First, there is the clear wording of the rule itself. It is imperative in its terms. The rule states that the order must specify a time after service for compliance.

Secondly, the order as sealed and served did not specify the time after service of the order the appellant was required to file an inventory and accounts.

Thirdly, we note that the slip rule was not employed and there was no application to correct so as to give effect to the original intention of the court. Likewise there was no application for a supplementary order adding a time for compliance.

Fourthly, the penal nature of contempt proceedings and the necessity for strict compliance is paramount.

And lastly, we have had regard to the cases of Hitachi Sales (UK) Ltd v. Mitsui Osk Lines [1986]2 Lloyds Reports 574 (CA) applying Van Houten v Foodsafe Ltd [1980] 124 SJ 277(CA). These cases are two illustrations of the strict application of the corresponding rule (0.42 r.2) in the United Kingdom. See also 1991 Supreme Court Practice Vol.1 page 694 para 42/2/2 ; 9 Halsbury's Laws of England (4th Edition) page 36 para 60.

In our view there was no proper foundation for the contempt order and fine. The orders of Byrne J. of 7 December 1999 and 23 February 2001 must therefore be set aside..

The Present Position in the Estate

There is a conflict of evidence disclosed in the two affidavits filed in this court as to the present position in the estate.

There is a conflict of evidence disclosed in the two affidavits filed in this court as to the present position in the estate.

The appellant supplied accounts and an inventory in late July early August 2000 following the order of Byrne J dismissing the appellant's application to set aside the contempt order of 7 December 1999. The respondent contends however that as at now the appellant still refuses to hand over a motor vehicle No. CK035 in the name of the deceased or her personal chattels or jewellery or funds specified earlier in the evidence. As well she alleges that the appellant through his agents has accepted certain rents due to the estate.

In the appellant's reply affidavit he denies the present allegations made by the respondent. He asserts that to the best of his knowledge information and belief he has complied with all his obligation as the former administrator of the estate. He deposes that there are no outstanding obligations.

We are unable to resolve this conflict. We are disturbed however that now, nearly 8 years after the deceased's death there is an allegation by the respondent that her brother, the appellant, has not complied with all his obligations as the former administrator of the estate of their late mother. There must be an end to this ongoing dispute. The deceased left a simple will. She gave her entire estate to the respondent. Finality must be achieved in this estate.

Our Proposed Orders

Given these circumstances we have had regard to our power under Section 13 of the Court of Appeal Act Cap.12 Ed 1978 (as amended) on the hearing and determination of appeals. Under that section we have "***all the power, authority and jurisdiction of the High Court***". See also Rule 22 of the Court of Appeal Rules.


We therefore propose of our own motion to make an order requiring the appellant to comply with all his outstanding obligations as the former administrator in the estate by noon on Friday 20 December 2002. A failure to comply would be grounds for a contempt application by the Respondent. The onus, of course, would be on the respondent to establish to the requisite high standard of proof the appellant's alleged default or defaults. If, on the other hand, the appellant has complied with all his obligations by the stipulated time and date then that would be an end to the matter.

Result and Costs

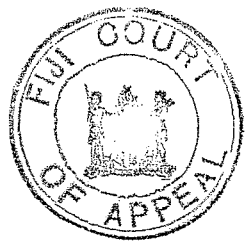
The formal orders of the Court are as follows:-


1. The appeal is allowed. The orders of Byrne J of 7 December 1999 and 23 February 2001 are set aside. The sentence of the fine of \$300.00 in default one month's imprisonment is quashed.

- 2. The case is remitted back to the High Court.
- 3. The appellant is ordered to comply with all his outstanding obligations as the former administrator of the estate by noon on Friday 20 December 2002. The appellant is warned that if he is in default in respect of this order he will liable to an order of committal and/or any other orders available for the enforcement of judgments and orders of the High Court.
- 4. The appellant and the respondent are to bear their own costs.




 Reddy, P





 Smellie, JA



 Penlington, JA

Solicitors:

Messrs. Sahu Khan & Sahu Khan, Ba for the Appellant
 Messrs. Mishra Prakash & Associates, Lautoka for the Respondent