

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

CIVIL APPEAL NO. ABU 77 of 2020
(Suva Civil Action No: HBC 287 of 2018)

BETWEEN : **ROSY REDDY** *Appellant*

AND : **YANKTESH PERMAL REDDY** *First Respondent*

AND : **YANKTESH PERMAL REDDY**
ROHIT REDDY
KALPANA REDDY
GIYANANAND NAIDU
(Giyananand Naidu – deceased and being substituted by Order of this Court (as per Order dated 10th May, 2021)) *Second Respondent*

AND : **REDDY CONSTRUCTION COMPANY LIMITED** *Third Respondent*

AND : **REDDY EXTERPRISES LIMITED** *Fourth Respondent*

AND : **CLYDE EQUIPMENT (PACIFIC) LIMITED** *Fifth Respondent*

AND : **REDDY HOLDINGS LIMITED** *Sixth Respondent*

AND : **FINEGRAND LIMITED** *Seventh Respondent*

Coram : Almeida Guneratne, AP

Counsel : Ms F. Fa for the Appellant
Mr R. Singh for the Respondents

Date of Hearing : 29 July, 2021

Date of Ruling : 20 August, 2021

RULING

- [1] This is a renewed application for leave to appeal the decision of the High Court dated 26th June, 2019 notwithstanding the lapse of time and an order that the committal proceedings being Civil Action No. HBC 287 of 2018 be stayed until the determination of the Appeal. The Appellant has also sought Costs of this action on an indemnity basis.
- [2] When the matter was initially taken for hearing, upon it transpiring that one of the Respondents as appearing in the original caption had become deceased I made order that the Appellant take steps to effect substitution in the room of the said deceased for the purpose of continuing the proceedings.
- [3] The Appellant having complied with the said order, when the substantive matter was taken for hearing (via skype) both Counsel requested Court to make a ruling on the written submissions already filed of record.

The Relevant Factual Background to the Dispute

- [4] The Appellant sought leave from the High Court (“the Court”) to apply for committal proceedings against the Respondents (hereinafter referred to as “the Contemnor”) in terms of Order 52 and the Rules thereunder of the High Court Act (1988).
- [5] The Court having granted leave, when the matter was taken for hearing the Appellant moved to cross-examine “the Contemnor”.
- [6] Having considered the submissions made by parties including the HBC decision in 212 of 1989 and the Supreme Court Practice direction of 1988 Vol.1 page 783 which the Appellant had adverted to the learned High Court Judge reasoned and concluded as follows which I recap thus:

“[6] *The learned counsel submitted that to disallow the calling or oral evidence and to rely on the affidavit evidence turns the proceedings into an interlocutory one, which it is clearly not.*

[7] *The Court has not disallowed the plaintiff from adducing evidence at the hearing of the committal proceedings. It is her right to call evidence to prove the allegations against the defendants. The question here is whether the plaintiff can compel the defendants to testify at the hearing. The paragraph cited by the learned counsel for the defendant speaks about responsibility of the plaintiff to establish the allegations leveled against the defendants. The defendant in contempt proceedings has the right to testify on his behalf or to refrain from giving evidence. The contempt proceedings are quasi criminal in nature however that is not a ground for the court or for the plaintiff to compel the defendant to testify in court at the hearing. The defendants cannot be compelled to assist the plaintiff in proving her case.*

[8] *For these reasons the court is of the view that the oral application made by the learned counsel for the plaintiff is without merit.”*

[vide the decision of the High Court]

The (a) Renewal Application for Leave to Appeal against the said decision of the High Court notwithstanding the lapse of time and (b) for a stay of the Committal proceedings pending the intended Appeal

[7] I have given my mind to the several affidavits and submissions made by parties.

Determination

[8] Given the fact that the present application is a renewal one seeking leave to appeal notwithstanding the lapse of time, the Appellant is obliged to first clear the threshold bars of satisfying the tests of the length and reasons for the delay and the criterion of prejudice to the parties. [vide: **NLTB v Khan & Anr.** CBV 2 of 2013 (15 March 2017).

I have taken note of what has been submitted at paragraphs [11] to [14] in the Appellant’s supplementary affidavit dated 9th February, 2021. I am satisfied with the matters urged and averred therein.

The decisive test or final hurdle for leave to appeal notwithstanding lapse of time

[9] Has the appellant showed that the intended appeal has some prospect of succeeding? What is required to show that there is such a prospect? There is a plethora of decisions on this

where judges have sought to define the test. I have expressed my own views in several rulings.

- [10] The essence of those several views to my mind is that, though the Court from which leave is sought has taken a particular view of a matter or issue in the light of the legal principles and precedents impacting on the matter or issue whether there is the possibility of a contrary view being taken.

The Basis on which leave is sought

- [11] In the Appellant's written submissions the High Court decision has been assailed principally relying on Order 38 Rule 2(3) of the High Court.
- [12] As against that the Respondents in their written submissions have countered the same for the reasons stated therein.
- [13] The said rival submissions have been made in regard to the decision of the learned High Court Judge which I have recapped at paragraphs [6] above.

Assessment of the aforesaid rival submissions as against the decision of the High Court

- [14] The background thrust of the Appellant's submission is based on discovery of documents and seeking answers to interrogatories within the framework of the High Court Act. (Orders and Rules). That, no doubt the Appellant was entitled to seek.

The Nature and Relevant Principles in Committal Proceedings

- [15] The function of committal proceedings is to ensure that no one shall stand trial unless a *prima facie* case has been made out.
- [16] If so, I do not think such a *prima facie* case could be made out by seeking to compel a defendant to cross-examination (See: **R v Carden** (1879) 5QBD1 at 6,
- [17] Indeed when the defendant in his defence has not been initially examined? And also where he could opt not to give evidence?

- [18] Furthermore, even whatever depositions made by the alleged contemnor are admissible at an ensuing trial, nevertheless, the contemnor could decline to give evidence in the first instance (that is, subjecting himself to even examination) (see: **R v Chapman** [1912] 29 TLR 117.
- [19] If so, could a contemnor be compelled to cross-examination? At a stage when he has not been examined? Could a party instituting contempt proceedings (committal proceedings – fish for evidence to proceed with his/her endeavor through an attempt to look for that evidence by seeking an order of Court to compel the alleged contemnor to cross-examination?
- [20] The burden of proof is fairly and squarely on the party invoking committal proceedings, the Contemnor not being required to do anything in as much as the proceedings are quasi-criminal in nature.
- [21] Thus, I hasten to say at this point that the law relating to discovery and interrogatories cannot in law take away from that.
- [22] Although, the present matter has arisen in consequence of a civil action that does not make a difference. Committal proceedings being in the nature of a quasi-criminal nature I reiterate the propositions I have enunciated hereinbefore in the context of the present case which were principally based on and derived from **Archbold** in his celebrated work on “Pleading; Evidence and Practice ...” (43rd edition particularly at pages 423 and 1285).
- [23] The Appellant in her written submissions has relied on Order 38 Rule 2(3) of the High Court Act.

“In any cause or matter begun by originating summons, originating motion or petition, and on any application made by summons or motion, evidence may be given by affidavit unless in the case of any such cause, matter or application any provision of these Rules otherwise provides or the Court otherwise directs, but the Court may, on the application of any party, order the attendance for cross-

examination of the person making any such affidavit, and where, after such an order has been made, the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court.”

[24] The essential elements in the said provision may be analysed as follows:

(i) “the Court may ... Order the attendance for cross-examining”

Thus the Court retains discretion whether to order the attendance for cross-examination. It is that discretion which the High Court exercised with reasons.

(ii) “after such an order has been made” the person in question does not attend, his affidavit shall not be used as evidence without the leave of the Court”

Here no order was made. Even if an order had been made any affidavit of a deponent “is not liable to be used as evidence...”

(iii) “... without the leave of Court”

Of course, as pointed out earlier contingency (ii) never arose because the Court in its discretion did not order the attendance for cross-examination.

[25] For the aforesaid reasons I am of the view that the said provision does not aid the Appellant.

[26] At this point I felt it would not be inappropriate to briefly trace the historical background as to committal proceedings in English Law. I say that, and I do feel fortified in saying so having regard to Sections 18 and 23 of the High Court Act read with Rules 6 and 7 of the Fijian Court of Appeal Act.

[27] I reproduce below the entirety of that English background as follows:

“Committal proceedings Formerly, a preliminary hearing in a magistrates’ court held before a case was sent to be tried before a jury in the Crown Court. There were two forms of committal proceedings under section 6 of the Magistrates’ Courts Act 1980: committal without consideration of the evidence or committal with consideration of the evidence. No oral evidence was heard. The prosecution had to establish

a prima facie case before the case could be committed to the Crown Court and the defence could make a submission of no case to answer. The test for the magistrates was whether the prosecution evidence taken at its highest was such that a jury properly directed could not properly convict on it (R v Galbraith [1981] 1 WLR 1039).

[vide: The Oxford Dictionary of Law (9th ed. at page 131]

[28] Perhaps, that background in its entirety may not fit into the matter at hand. Nevertheless, in my view it does in as much as the crux of the issue to be determined is whether a contemnor could be compelled to cross-examination at a stage when he/they had not even been examined.

Conclusion

[29] On first principles, the learned High Court Judge had concluded that it cannot be done. I am in agreement with his conclusion.

[30] For the aforesaid reasons I could not see any basis to grant leave to appeal against the decision of the High Court for I could not see any prospect of success in appeal if leave to appeal is to be granted.

[31] Consequently, I did not see the need to address on certain other issues the Respondents have raised.

Orders of Court

1. Leave to appeal against the decision of the High Court dated 26th June, 2019 is refused and/or dismissed.
2. Consequently the Stay Order that has been sought is *ipso facto* refused.

3. The Appellant is ordered to pay a sum of \$1,500.00 to the Respondents within 21 days of notice of this Ruling.
4. In the result, the indemnity costs sought by “the Appellant” do not arise for consideration.
5. Consequent proceedings in the High Court are to proceed on the basis of what the learned High Court Judge has articulated in paragraph [7] of his judgment.



A handwritten signature in blue ink, appearing to read "J. Almeida Guneratne".

Hon. Justice Almeida Guneratne
ACTING PRESIDENT, COURT OF APPEAL

