

IN THE HIGH COURT OF FIJI
APPELLATE JURISDICTION

Civil Appeal No. HBA 34 of 2011

BETWEEN : **SHIU KARAN NARAYAN** of Covec Technology, Tamavua,
Businesswoman.

APPELLANT

AND : **MUKESH KUMAR and ROSHNI DEVI KUMAR** of Nakasi,
Nausori, Contractor and Domestic Duties.

RESPONDENT

BEFORE : **Justice Deepthi Amaratunga**
COUNSEL : **Ms. Vasiti M.** for the Appellant
Mr. Kumar S. for the Respondent
Date of Hearing : **18 March 2014**
Date of Judgment : **20 March 2014**

JUDGMENT

INTRODUCTION

1. This is an appeal against the learned Resident Magistrate's decision refusing the extension of the time period of the Notice of Intention to Appeal. At the hearing the counsel for the Appellant abandoned the ground no 1 of the grounds of appeal and conceded that the Notice of Intention to Appeal was filed outside the 7 day time period and only argued the issue whether the Magistrate could extend the time period for the Notice of Intention to Appeal.

ANALYSIS

2. The leading authority in this regard is a decision of High Court in the case of ***Crest Chicken Ltd v Central Enterprises Ltd*** [2005] FJHC 87; HBA0013j.2003s (unreported) decided on 19 April 2005. The counsel for the Appellant state that since there was no

application for extension of time in that case, the determination whether the Magistrate had jurisdiction to extend the time was obiter statement in the said judgment.

3. In the case of *Crest Chicken Ltd v Central Enterprises Ltd* [2005] FJHC 87; HBA0013j.2003s (unreported) decided on 19 April 2005, the High Court in an appeal held that the Magistrate does not have jurisdiction to extend the time period of the notice of appeal. In that case, the notice was filed outside the stipulated time. But in the registry it was accepted and when the matter was raised to the Magistrate at the time of the issue of stay of the decision, the Magistrate allowed the stay on the basis that there was an appeal. At the hearing of the appeal in that case Justice Pathik succinctly narrowed down the issue before the court and stated as follows;

'The issue is very simple. Dr. Sahu Khan says that the Magistrate acted ultra vires in accepting the Notice of Intention to Appeal out of time. It follows that he could not have accepted the Grounds of Appeal followed by application for stay the same day.

As for award of exemplary damages the respondent says that the Magistrate was right in doing so.

Statutory provision for Time to file Notice of Intention of Appeal

It is Order 37 Rule I of the Magistrate's Courts Rules which sets out the time within which Notice of Intention to Appeal shall be given. The Order reads as follows:

1. Every appellant shall within seven days after the day on which the decision appealed against was given, give to the respondent and to the court by which such decision was given (hereinafter in this Order called "the court below") notice in writing of his intention to appeal:

Provided that such notice may be given verbally to the court in the presence of the opposite party immediately after judgment is pronounced. (Substituted by Rules 20th November, 1946, and amended by Rules 6th November, 195).

***This is a mandatory Rule and it does not give the Magistrate power to extend time.** Even if he had, no application was made by the appellant for extension for it was already late in filing or giving Notice of Intention to appeal within the seven days after judgment was pronounced.*

Had the legislature intended it could have specifically provided for application to extend time. It did not do so in Or. 37 R.1 but Or. 37 R.4 which provides as follows, gave the Magistrate's Court power to extend time to file grounds of appeal.

4. On the appeal failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.'

4. Even assuming that what was held was obiter, still the judgment has a persuasive effect and I agree with the reasoning of the issue relating to the extension of time relating to the Notice of Intension of Appeal. This decision was delivered in 2005 and at least close to a decade this issue was not challenged and it had withstood the test of time.
5. The Notice of Intention to Appeal can be made even orally at the time of the delivery of the judgment. Such a relaxed method is permitted in law for a very good reason. Even if that opportunity is not utilized another window is opened and that is to study the judgment and to file and serve the Notice of Intention to Appeal within seven days in terms of Order 37 rule 1 of the Magistrate's Courts Rules. I do not think the intention was to grant further extension of time period, because the said provision already grants two options and when both options are exhausted no further extensions are warranted.
6. The reasoning given by Justice Pathik in the case of *Crest Chicken Ltd v Central Enterprises Ltd* [2005] FJHC 87; HBA0013j.2003s (unreported) decided on 19 April 2005, is sound and should be followed. I have not been submitted a reason why I should deviate from the accepted legal principle, at least since 2005. The contention that this issue was an obiter statement in the said judgment, cannot be a reason not to follow it. The said case was a decision of the High Court and even if the said issue is obiter, it will still remain with a persuasive effect.
7. The learned counsel for the Appellant contended that the determination in the said case relating to the Order 37 rule 1 of Magistrate's Courts Rules was obiter as there was not application to extend the time in that case, but Justice Pathik in the conclusion held;

'In the outcome for the above reasons the appeal before the Court is invalid for non-compliance with the mandatory provisions of Or. 37 r. 1 of

the Magistrate's Courts Rules. There was never at any time an application to apply for extension of time to give Notice of Intention to Appeal out of time or to file Grounds of Appeal. This was a sine qua non to enable the learned Magistrate to consider the stay application herein.

This being the case, as I have found, and in view of the orders which I will make I do not consider it necessary to deal with the Grounds of Appeal or the appeal.'

8. So, one cannot say the said determination regarding the Order 37 rule 1 is obiter as that was the main reason for dismissing the appeal of the said case even without considering the merits of the appeal. In ***Jacobs v LCC*** [1950] AC 361 at 369, [1950] 1 All ER 737 at 741 Lord Simon held,

'...However this may be, there is, in my opinion, no justification for regarding as obiter dictum a reason given by a judge for his decision, because he has given another reason also.'

9. In the case of ***Crest Chicken Ltd v Central Enterprises Ltd*** [2005] FJHC 87; HBA0013j.2003s (unreported) decided on 19 April 2005, Justice Pathik had dismissed the appeal in that case on two grounds. First, it was held that the Order 37 rule 1 of the Magistrate's Courts Rules, was a mandatory provision and next ground was that there was no application to court for extension of time. So, what was determined in relation to the Order 37 rule 1 was not obiter, though there was an additional ground to dismiss the appeal, in the said case, even without considering the merits.
10. The counsel for the Appellant also contended that since there was no express provision, similar to Order 37 rule 4 which deals with the non compliance of the Notice of Intention to Appeal, the general provisions contained in Order 2 rule 2 and Order 3 rule 9 of the Magistrate's Courts Rules apply. I do not agree with that. The reasoning behind the Order 37 rule 4 is understandable. The first step of an appeal is the Notice of Intention to Appeal which needs to be followed with the grounds of appeal.
11. If there is a Notice of Intention to Appeal, according to the law, then only the issue of Grounds of Appeal will arise. One may, after giving Notice of Intention to Appeal, abandon the appeal and that is the reason for having a 'deeming provision' relating to

abandonment of appeal. There is no issue of abandoning an appeal arising when there is no appeal. The starting point is the notice of intention to appeal, and if that is not made according to law there is no appeal and there is no need of having a provision similar to Order 37 rule 4 for Notice of Intention to Appeal as the absence of it ipso facto denotes no appeal on foot, so it will be superfluous to state so. When the party does not file grounds of appeal, after giving the required Notice of Intention to Appeal, there is a valid notice and appeal is partially completed. That is the reason for having a ‘deeming’ provision regarding the abandonment of the appeal when there is no Notice of Intention to Appeal.

CONCLUSION

12. The learned Resident Magistrate was correct in holding when he rejected the Notice of Intention to Appeal which was filed outside the 7 day period. The counsel for the Appellant conceded that it was filed outside the time. The determination of the case *Crest Chicken Ltd v Central Enterprises Ltd* [2005] FJHC 87; HBA0013j.2003s (unreported) decided on 19 April 2005, that Order 37 rule 1 of Magistrate’s Court Rules, is mandatory, is not an orbiter statement , though there was an additional ground for rejecting the appeal in that case. There is no need of express provision similar to Order 37 rule 4 as regard to Notice of Intention to Appeal, to state that the appeal is deemed abandoned, as there is no appeal without proper Notice of Intention to Appeal. The appeal is dismissed and the cost is assessed summarily at \$1,500.

FINAL ORDER

- a. The Appeal is dismissed.
- b. The cost of the appeal is summarily assessed at \$1,500.

Dated at Suva this 20th day of March, 2014.

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Justice Deepthi Amaratunga
High Court, Suva