

IN THE HIGH COURT OF FIJI AT LABASA
APPELLATE JURISDICTION

Civil Appeal No. HBA 05 of 2013

BETWEEN : **DAVEN CHAND, DAVENDRA SHARMA, DEO RAJ SINGH**
and **DIP LAL** all of Labasa Town as trustees and members of
Nasea Sat Sang Ramayan Mandali respectively. **APPELLANTS**

AND : **SHALEN SHYAM, UTTRAM CHAND** and **STASH CHAND**
as President, Secretary and Treasurer respectively of Nasea Sat
Sang Ramayan Mandali, Labasa **RESPONDENT**

BEFORE : **Justice Deepthi Amaratunga**
COUNSEL : **Mr. Suhil Chand Sharma** for the Appellants
Mr. Kohli for the Respondents
Date of Hearing : **4 March 2014**
Date of Judgment : **9 April 2014**

JUDGMENT

INTRODUCTION

1. At the outset the counsel for the Appellant stated that the only ground he was perusing in this appeal was the jurisdiction of the Magistrates' Court to order a cost against the legal practitioner. So, the issue is not the procedure or the amount of cost ordered, but the jurisdiction of the Magistrates' Court to make an order for costs against a lawyer.

ANALYSIS

2. The minutes of the Magistrates' Court record dated 13th October, 2007 reads as follows

'Mr. Kohli: Received a letter from Mr. Sharma asking for adjournment as he is engaged in Sigatoka Magistrate's Court in a medical negligence case. He is asking for my consent to an adjournment. I have no objection to Mr. Sharma's request.'

Court: Court cost of \$500 to be paid by Mr. Sharma personally 28 (sic) days. In default 5 months imprisonment. Mr. Sharma double booked himself. (emphasis is mine)

3. The Magistrate had ordered 'court cost' to be paid by the lawyer Mr. Sharma personally, and had also imposed a default custodial sentence. First, what was meant by 'court cost' is not clear. There is no such terminology found in the Magistrates' Court Act (Cap 14), or Magistrate Court Rules.
4. The Magistrates' Court Act (Cap14) Section 8 states as followed

'8. In the event of there being no provision in these Rules to meet the circumstances arising in any particular cause, matter , case or event, the court and or the clerk of the court and or the parties shall be guided by any relevant provision contained in the Supreme Court Rules.'
5. The record indicate that the counsel for the Plaintiff had not attended the court on the hearing day and had failed even to inform that fact to the court by engaging another lawyer to request for an adjournment. According to Mr. Kholi, the counsel for the Defendant, had received a letter seeking an adjournment, and the reason given to him in that letter was an engagement in another court. It is very unsatisfactory behaviour on the part of a counsel not to inform the court, and avoid the court on the day of hearing. This will not only contribute to inordinate delay in the litigation, but also hamper case management. Any postponed hearing will equally postpone a potential hearing that awaits hearing, in the future, too. So, postponements of the hearing should be avoided as much as possible and in an unavoidable circumstance, it should be notified to the court and to the other parties as early as possible. The counsel for the Plaintiff had refrained from attending to court on the day of the hearing.
6. It seemed that the Resident Magistrate was concerned about the manner in which the counsel for the Plaintiff sought the hearing vacated by avoiding the court on the date of the hearing. The learned Resident Magistrate have taken note of the hearsay evidence stated from the bar table by the opposing counsel and came to conclusion that the counsel for the Plaintiff had 'double booked' , and ordered 'court cost of \$500 to be

paid by Mr. Sharma personally ... in default 5 months imprisonment.' The counsel for the Defendant had indicated to the Magistrate that he was not objecting to the postponement and that would have prompted the Magistrate not to award a cost in favour of Defendant, but to order 'court cost'.

7. The counsel for the Appellant stated that he is relying on the issue of jurisdiction in this appeal, as to whether the Magistrate can order a cost personally against the lawyer, but I can see there are more issues than that. To answer the issue raised in appeal, one needs to look at the Magistrates' Court Act (Cap 14) Section 8 read with the High Court Rules of 1988 along with Legal Practitioner's Decree 2009. He also said he did not wish to challenge the procedure adopted or the sum awarded, but solely rely on the issue of the jurisdiction.
8. When the Magistrates' Court Act (Cap 14) is silent on an issue, the provisions contained in the High Court Rules of 1988 can be utilized in terms of Section 8 of the Magistrates' Court Act, (Cap 14), and Order 62 Rule 12 of High Court Rules 1988 provides a cost being ordered personally against the legal practitioner. So, a Resident Magistrate has jurisdiction to order a cost against a legal practitioner. Though it is sufficient to stop there, according to the only issue raised by the counsel for the Appellant, I would not do so, considering the nature of the order appealed.
9. The Resident Magistrate's order is 'court cost of 500'. I have not been able to find such provision in the Magistrates' Court Act or in the High Court Rules that allow 'court cost'. So prima facie there is no such category stipulated in law. In the Order 32 rule 18 of the High Court Rules of 1988, a wasted hearing fee can be ordered against legal practitioner for adjournment of "hearing in chamber", and this is not recoverable in costs in terms of Order 32 Rule 18(3). This cannot be applied for the present instance for three reasons, one was that it was not a hearing in chamber and it cannot be recoverable in costs, and thirdly this was not ordered as wasted hearing fee.
10. The Resident Magistrate, not only ordered 'court cost' against the lawyer, but also imposed a custodial sentence in default of that order. There is no provision in law for

such penal provision for the default of cost order against legal practitioner unless the person is prosecuted for contempt for non compliance of court order in committal proceedings. So, clearly the order of the Magistrate is illegal and should be quashed.

11. The learned Resident Magistrate had acted entirely on the premise that the counsel for the Plaintiff had 'double booked' and for that finding he had relied on the statement of the Defendant's counsel who only stated that he relied on a letter purportedly sent by the Plaintiff's counsel that he was engaged in another court. This is clearly a matter for the Independent Legal Commission to inquire in to and take necessary action. In the circumstances this matter should be brought to the attention of the Chief Registrar and the legal practitioner's unit for necessary action, the court cannot rely on what was stated from bar table as done in this instance.

CONCLUSION

12. The Magistrate's Court has jurisdiction to order a cost personally against a legal practitioner, and the proper procedure is found in the Legal Practitioner's Decree and the High Court Rules of 1988. The 'cost' ordered by the Resident Magistrate cannot be ordered as he had ordered 'court cost' and had also imposed a custodial sentence in default of that. Such order in a civil action is illegal and should be quashed. The allegation of the 'double booking' needs to be investigated and appropriate action should be taken by the relevant body in terms of the Legal Practitioner's Decree 2009. Considering circumstances of the case I will not award any cost.

FINAL ORDER

- a. The order of the cost awarded by Resident Magistrate dated 7th October, 2013 is quashed.
- b. No cost awarded for this appeal.

Dated at Suva this 9th day of April, 2014.



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Amaratunga
Justice Deepthi Amaratunga
High Court, Suva