KESHO REDDY

A

v

SWARAN LATA

[HIGH COURT, 1994 (Pathik J), 21 October]

B Appellate Jurisdiction

Practice (civil)-appeal against refusal by the Magistrates Court to grant leave to appeal out of time.

Following dismissal in the Magistrates Court of a petition for divorce the petitioner unsuccessfully applied to the Magistrates Court for leave to appeal C out of time. On appeal against the refusal of leave the High Court considered the applicable principles and dismissed the appeal.

Cases cited:

Avery v Public Service Appeal Board (No. 2) (1973) 2 NZLR 86
D *Charles Osenton & Co v Johnston* [1942] AC 130
Eaton v Storer 22 Ch. D. 92
Evans v Bartlam [1937] AC 473
Gatti v Shoosmith [1939] 3 All ER 916
Kenneth John Hart and Air Pacific Limited (FCA Reps 84/317)
R v Bloomsbury and Marylebone County Court, ex parte Villegwest Ltd [1976]
E 1 WLR 362
Revici v Prentice Hall Incorp and Others (1969) 1 All ER 772
Weldon v De Bathe 3 TLR 1986 87

Appeal against refusal by the Magistrates Court to grant leave to appeal out of time.

F *A. Sen* for the Appellant
M. Sadiq for the Respondent

Pathik J:

This is an appeal by the Appellant who was the Petitioner in this action against the order of the learned Magistrate, Labasa given on 15 April 1994 refusing G application to appeal out of time on the ground that the Magistrate erred in law and in fact in failing to exercise his discretion.

The facts of the case in so far as they are relevant to this application are as set out in the Magistrate's Order at page 159 of the Court Record and are as follows:-

> "The petitioner-applicant sued the respondent for divorce on the ground of her adultery with the co-respondent. The case was heard by my brother Magistrate A. Katonivualiku and the judgment had been delivered on 9/7/1993 dismissing the petition. The petitioner was ordered to pay maintenance for the respondent at the rate of $15 per week and for the child who is with her at the rate of $10 per week. The maintenance for the respondent was suspended until the outcome of the appeal as the petitioner's counsel had given verbal notice of appeal on 9/7/93 itself soon after the delivery of judgment...."

The appellant did not file the Grounds of Appeal but instead on 31 January 1994 filed a motion applying for extension of time to do so. The learned Magistrate dismissed the application on 15 April 1994. Thereafter he filed a motion for stay of the maintenance order and that was also refused on 31 May 1994.

The reasons given by the appellant's counsel for the delay in making this application are as set out in paragraph 3 of the said Order as follows:-

> "The reasons urged by the petitioner-applicant in support for his application for extension of time are, inter alia, that although the verbal intention to appeal was given in open court on 9th June - (This is an error; it should be 9th July 1993 as shown by the record) - the record had been received by him on 2nd day of November 1993, that as it was Christmas vacation his solicitors were not able to attend to the filing and that the copy of the record had been sent for an opinion and on account of the Christmas vacation delay had been caused."

Whilst examining the reasons the learned Magistrate had this to say in his Order:

> "The record shows that the copy of the record had been signed and ready on 28/10/93 and that the petitioner's counsel had been informed of it by letter dated 28/10/93. This application for enlargement of time filed on the 9th of February 1994 although it is dated 31st of January 94 which is very revealing.
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> Thus between the date when the copy of the record was ready and the filing of this application the time lapse is 2 months and 12 days. Christmas come in the last week of December and not in November. There is no court vacation in November either. The time taken by the court registry to prepare the court record is only 3 months 19 days ie from 9/7/93 up to 28/10/93 and not nearly five months as the applicant alleges.

> When the preparation of the copy of record has taken such a long time, it being a lengthy record, it is the more reason why an application of this nature should be filed with the least loss of time without waiting for Christmas vacation and opinions.
>
> The same counsel who appears for the petitioner-applicant now in this application appeared in the hearing of the case too and as such there was no need to have waited for the copy of the record to file the petition of appeal. If need be a copy of the judgement would have amply sufficient."

The learned Magistrate in the exercise of his discretion having considered the application came to the conclusion that it was "inordinate, excessive and unpardonable". In coming to this conclusion he had in mind the principles involved in applications of this nature, namely delay, the merits and prejudice it would cause to the order party. He has also stated in the Order that he had gone through the judgment and "there seems to be no merit whatsoever and very little chance of success."

Both counsel made submissions on the hearing of this appeal. Mr. Sen's arguments were along the same lines which he had put before the learned Magistrate when he applied for extension of time as contained in pages 135 to 147 of the Record herein.

The question for my determination is whether the learned Magistrate was right in refusing and whether it was a proper exercise of discretion on his part.

The principles to be taken into consideration in deciding how judicial discretion is to be exercised are expressed by Lord Greene M.R. in Gatti v Shoosmith [1939] 3 All ER 916 at p.919:-

> "the fact that the omission to appeal in due time was due to a mistake on the part of a legal adviser, may be a sufficient cause to justify the court in exercising its discretion. I say 'may be', because it is not to be thought that it will necessarily be exercised in every set of facts. Under the law as it was conceived to be before the amendment, such a mistake was considered to be in no circumstances a sufficient ground. What I venture to think is the proper rule which this court must follow is: that there is nothing in the nature of such a mistake to exclude it from being a proper ground for allowing the appeal to be effective though out of time; and whether the matter shall be so treated must depend upon the facts of each individual case. There may be facts in a case which would make it unjust to allow the appellant to succeed upon that

> argument. The discretion of the court being, as I conceive it, a perfectly free one, the only question is whether, upon the facts of this particular case, that discretion should be exercised."

A

The cases of Evans v Bartlam [1937] AC 473 and Charles Osenton & Co v Johnston [1942] AC 130 establish the rule that "an appellate tribunal will interfere with the exercise of a judicial discretion, whether or not it relates to a mode of trial, if the tribunal reaches the clear conclusion that no weight or no sufficient weight has been given to relevant considerations which are important to the just determination of matters in issues, and that injustice may be done if it does not interfere".

B

An excessive delay, which it was in this case, may induce a Court in its discretion to refuse to extend the time (per Jessel M R in Eaton v Storer 22 Ch. D. 92 C.A.). But there is a very wide inherent jurisdiction to enlarge any time which the court or judge has ordered (R v Bloomsbury and Marylebone County Court, ex parte Villerwest Ltd [1976] 1 WLR 362) and as stated by Lord Justice Brown in Weldon v De Bathe 3 TLR 1986 - 87:

C

> ".... the Court ought not to fetter its discretion as to extending the time for appealing by laying any strict definition on the point, but would always exercise its discretion for the purpose of doing justice."

D

Since this appeal involves an attack on the exercise of discretion, I have closely examined the reasoning of the learned Magistrate in arriving at his decision. I do not find any fault whatsoever in the approach the Magistrate adopted in this case and I am of the view that it was a proper exercise of his discretion. The appellate court in these circumstances would be loathe to interfere with that exercise.

E

The appellant despite having given verbal notice of appeal had not till the date of hearing of this appeal included his grounds of appeal in any of his applications except his counsel indicated two or three grounds in his oral submission which I find are devoid of merit. He had taken no steps to file any grounds. In a situation such as this the appellant's position is as put by Richmond J in Avery v Public Service Appeal Board (No.2) [1973] 2 NZLR 86 at p.91:

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> "When once an appellant allows the time for appealing to go by then his position suffers a radical change. Whereas previously he was in a position to appeal as of right, he now becomes an applicant for a grant of indulgence by the Court. The onus rests upon him to satisfy the Court that in all the circumstances the justice of the case requires that he be given an opportunity to attack the judgment from which he wishes to appeal."

G

The reasons given by Mr. Sen for delay are most unsatisfactory and I will go far as to say that the appellant was completely oblivious of the Rules of Court. The rules are there to be obeyed and not to be flouted at the whim of a party to the action by moving at his own leisure. The delay here is not a short one, and apart from that it has not been satisfactorily explained.

On the question of delay at p.92 Richmond J. further said:

> "No doubt there may be many cases where this type of argument might prevail upon the Court to grant leave. Clearly however the Court is not restricted to such consideration. The rules do not provide that the Court may grant leave if satisfied that no material prejudice has been caused by the failure to appeal in time ..."

Further, in Revici v Prentice Hall Incorp and Others [1969] 1 All ER 772 it was held:

> " (1) the rules of the court must be observed and it mattered not that the plaintiff has offered to pay the costs and that no injustice would be done to the other side; and
>
> (2) if there was non compliance with the rules it must be explained; and prima facie if no excuse was offered no indulgence should be granted. "

Mr. Sen raised the point that copy record was not made available. But in a case of this nature counsel must have a reasonable note of the evidence and of the judgment sufficient to set up a petition and try to retain liberty to extend or amend it on receipt of the required record.

Much as I would not like to deny a litigant the right to the use of the Courts, but the appellant had not shown that the learned Magistrate was in error in refusing to extend the time. In this case not only did the appellant not file Grounds of Appeal but also applied for a stay of the maintenance order pending his appeal thus causing more hardship to the Respondent wife. If that was not enough the appellant failed to pay arrears under the order for maintenance until a warrant was issued. To put it mildly the actions of the appellant have been an abuse of the process of the Court.

The Magistrate considered the application after hearing submissions and it cannot he said that he refused the application without due deliberation. This application was determined on its own facts which disclose no real basis for the exercise of the Court's discretion in the appellant's favour. The delay I find is inordinate and it has not been satisfactorily explained. The learned

counsel was fully aware of the time limits and hence there was no mistake as to that. On merits I adopt in this case the following statement from the judgment in Kenneth John Hart v Air Pacific Limited (Civ. App. 23/83 F.C.A. p.7 cyclostyled judgment):

> "Although the merits of case and the likelihood of a successful appeal was said at p.846 in Gatti v Shoosmith (supra) not to be a matter of concern in an application of this sort, we do observe that the proposed appeal would be against findings of fact and the judge's disbelief of the appellant."

In view of what I have stated hereabove I would not be justified in interfering with the learned Magistrate's discretion.

In the outcome, for the reasons given hereabove I find that there is no merit in this appeal and it is dismissed with costs which is to be taxed unless agreed.

(Appeal dismissed.)