

UDAY RAJ SEN and Anor v ATTORNEY-GENERAL OF THE FIJI ISLANDS (ABU0031 of 2007)

COURT OF APPEAL — CIVIL JURISDICTION

5 WARD P, ELLIS and MCPHERSON JJA

19, 25 June 2007

10 **Practice and procedure — appeal — contempt — “judge shopping” — whether the phrase was an attack on the judge’s person and the High Court — phrase related to other parties’ actions — whether the affidavit was regularly made.**

15 Bahadur Ali with others filed multiple cases in different courts against Business Development and Lending of Credit Corporation (Fiji) Ltd (Corporation). In one of the cases, the first Appellant (A1), general manager of the corporation, through the second Appellant (A2), A1’s lawyer, prepared and submitted an affidavit in support of an application to have the action transferred to another judge who was already hearing a case involving the same parties. In the affidavit, A1 alleged that Bahadur Ali’s group was “judge shopping”. The judge found the Appellants’ use of the term “judge shopping” to be an attack on his person as well as the High Court and found the Appellants guilty of contempt. At issue is whether the Appellants’ use of the term “judge shopping” constituted contempt.

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Held — The affidavit was regularly made and it is clear that the term “judge shopping” was not directed against the judge or the High Court. It is clear that the term was used to describe Bahadur Ali’s actions. The orders of the High Court resulted in an unnecessary and incorrect finding of contempt, incorrect procedures were followed and an inappropriate penalty given. The High Court’s decision was quashed.

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Appeal allowed.

No cases referred to.

30 *B. C. Patel* and *A. Neelta* for the first Appellant

J. Apted and *M. Moody* for the second Appellant

M. Rakuita for the State as amicus curiae

35 [1] **Ward P, Ellis and McPherson JJA.** This is an appeal against a finding of, and punishment for, contempt. The first Appellant (A1), Mr Sen, is the general manager of Business Development and Lending of Credit Corporation (Fiji) Ltd and the second (A2), Mr Kapadia, is a senior practising lawyer.

40 [2] The suggested contempt appeared in an affidavit sworn by Mr Sen before a Commissioner for Oaths. It had been filed in the High Court by Mr Kapadia in support of an application to discharge an ex parte injunction that had been granted against Credit Corporation on the application of one Bahadur Ali and others.

45 [3] It appears from the papers that this action was the third legal action started by Bahadur Ali against Credit Corporation, one previous action having been filed in the Lautoka High Court and the other in the Suva High Court. Apart from the interim injunction already referred to, Bahadur Ali had also made five earlier applications for interlocutory relief.

50 [4] On 1 February 2007, the A2 appeared on behalf of Credit Corporation and applied to have the action transferred to another judge, Singh J, who was already handling another matter between the same parties in which similar relief had

been sought and refused. Those other proceedings had already spawned substantial affidavits over a period of 2 years.

5 [5] The judge adjourned the matter to the master to deal with the application for a transfer. We mention in passing that it would appear that he had accepted there were proper grounds for such a transfer.

10 [6] The affidavit by the A1 in support of that application was lengthy and recited the curial history of the various proceedings in the High Court and the Court of Appeal. It included various allegations about the conduct of the Plaintiff, Bahadur Ali. In para 11 reference is made to a sale and purchase agreement into which Credit Corporation had entered and it continued:

15 11. ... I verily believe that the plaintiffs have also written to the Director of Lands in an attempt to prevent the consent being granted for the transfer. The Plaintiffs have also failed to disclose this fact. No urgency for an ex parte order has been shown by the plaintiffs as they have been aware for over two years that the defendants were selling the land.

12. I verily believe that these proceedings are an obvious abuse of process of this Honourable Court and tantamounts to “judge shopping” by the plaintiffs and ought to be immediately struck out and/or transferred to Mr Justice Singh to be dealt with by him accordingly.

20 13. That I further state that the undertaking in damages given by Bahadur Ali who is not a director or shareholder of the fourth plaintiff is an abuse of process.

...

[7] We have set out enough to illustrate the general nature of the complaint being made in that affidavit.

25 [8] When the matter came before the master, he stated that he considered the words “judge shopping” in para 12 were a contempt of court and that he would draw it to the judge’s attention.

30 [9] The judge, it appears, had not noticed the offending words hitherto but, once he was aware of them, responded strongly. We are advised (because it is not in the record) that he recalled counsel, expressed his displeasure at the A2 and adjourned the matter for the A1 to appear.

35 [10] On 5 February both Appellants appeared. It can be seen from the transcript that the judge took the firm and immediate view that those words constituted contempt and were a direct slur on his personal reputation. At the outset, he prevented Mr Nagin, who appeared for both Appellants, from presenting an apology or explanation although, at the conclusion of the hearing, counsel was able to assure the judge of his clients’ regret and apology. Mr Nagin also asked if it could be terminated by an apology from both Mr Sen and Mr Kapadia and the matter put at rest with the offending para 12 expunged from the record.

40 [11] The judge gave a reserved decision on 9 March 2007. He referred to the contents of para 12 and the concern he had felt when his attention was drawn to it. He continued:

45 Seeing this state of affairs I was very disturbed and called both counsel in my chambers and expressed my great concern at the said paragraph and questioned Mr Kapadia on it. I asked the Master to stay during this chamber hearing. The said Sen was not present.

50 This paragraph 12 I found was contempt in the face of the court so I adjourned the matter to 5 February 2007 to hear Mr Kapadia and Sen to show cause on contempt hearing in court.

[12] In a lengthy ruling, he sets out his various conclusions:

I reject all Sen's explanations as to what he meant when he used the word "Judge shopping" and I even go to the extent of saying that he has not come out with the truth. Sen has made a very serious allegation against the judiciary including the High Court Registry in penning these words in paragraph 12 and taking *oath* on it. This he did for reasons best known to him.

By going to the length of taking an oath before a Commissioner of Oaths, who is a Barrister and Solicitor, he has dug his own grave. To make matters worse, for an experienced legal advisor to let this paragraph go past him, which he now regrets, is beyond comprehension. That paragraph is couched in very simple English and one can give no other interpretation to the words than what they say and what they mean. Anyone reading it will come to no other conclusion that there is a practice of judge shopping in the High Court Registry implicating the Head of the Registry and the Judge handling it. You do not need much common sense to deduce that meaning of that paragraph ...

It is my firm view that this is a clear case of contempt of court. It was one committed in the face of the court.

This court cannot just sit by and do nothing particularly in the present climate in Fiji when wild allegations of all sorts are being hurled implicating the judiciary ...

The explanation given for the use of the word "judge shopping" is not acceptable at all. It should not have been necessary to explain away what they meant by the use of the word "judge shopping".

This paragraph has done a lot of damage to me as I am the one handling this case at this moment. A damage inflicted on one who is the most senior judge appointed under the Constitution of Fiji in this country as well as the most senior, except for one, legal practitioner on the Barristers Roll in Fiji and also one who has been in the legal profession for over 50 years having qualified in 1956.

To impute "judge shopping" directly or indirectly will not be taken lightly and to say this on oath after discussion with a legal practitioner boggles one's mind ...

The dignity of the court has to be upheld. I will be failing in my duty if I do not impose appropriate punishment on lawyers allowing the filing of such contemptuous document in the registry. This practice has to cease forthwith to protect the reputation of the legal profession in this country. I would bluntly say to all legal practitioners not to fool around with the judges of our courts.

I must at this juncture make it abundantly clear that the power of punishment which a judge wields for contempt of court is vested in him, not for the vindication merely of his personal dignity, but for the upholding of the majesty of the law and courts. ...

In the outcome for the above reasons, on the facts and the said affidavit and on the oral evidence before me, I find Uday Raj Sen guilty of contempt of court for swearing an affidavit which contains paragraph 12 thereof which is false. In the case of Mr Kapadia as counsel being instrumental in allowing such an affidavit to be sworn and filed in the High Court Registry I hold that it tantamounts to *unprofessional conduct* on his part.

In all the circumstances of this case I do not see how the two can escape an order being made against them

In the result, on Sen I impose a *fine of \$1000 (one thousand dollars)* in default 3 months imprisonment to be paid immediately *AND* as for *Mr Kapadia* I refer this ruling to the Fiji Law Society to note its contents and to take action on this member of theirs in the manner they deem fit *AND* further as Mr Nagin has agreed the offending paragraph 12 is ordered to be expunged from record (affidavit). A copy of this Judgment and transcript of the hearing on contempt issue is to be provided to the society by the chief registrar.

[13] We cannot avoid saying that we find ourselves considering this case with a degree of incredulity. The short and simple answer to the whole appeal is that the phrase to which such exception has been taken is clearly applied to the other party and not to the court.

5 [14] Whether or not the suggestion was true is not a matter for this appeal. What is clear is that it was supported by facts relating to that party's previous conduct which are properly set out in the remainder of the affidavit. We cannot read the passage containing the phrase as implying any involvement by the judge, the High Court or the registry. It is directed at and only directed at the Plaintiff
10 in support of an application that appears regularly made. Its weight or relevance to that application is a matter for the judge hearing it to evaluate.

[15] Had that fact been recognised, this whole matter would not have arisen. Instead, the misunderstanding appears almost to have kindled and rekindled itself by its own heat. Despite directing himself correctly that the offence of contempt
15 is principally for the protection of the courts, the learned judge, whose integrity was never assailed, has reacted to what he wrongly saw as a personal attack. As a result an unnecessary and incorrect finding of contempt was entered, incorrect procedures were followed and an inappropriate penalty and other orders imposed.
20 Two members of the public, including a senior and respected lawyer who was properly representing his client's interests, have been wrongly condemned and have had to wait until this appeal to clear their names.

[16] We have been greatly assisted by careful and well-presented written and oral submissions by counsel for the Appellants and for the State, taking a neutral
25 stance as amicus. They correctly and fully express the law of contempt and its relationship to the facts of this case.

[17] We intend no discourtesy to counsel if we do not refer to their submissions specifically but we consider the proper course is simply to allow the appeal and set aside the various findings and orders made.

30 **Result**

[18] Appeal allowed.

The orders of the High Court made on 9 March 2007 namely:

- 35 (1) that Mr Sen is guilty of contempt;
- (2) that Mr Kapadia's conduct as counsel is tantamount to unprofessional conduct;
- (3) that Mr Sen shall pay a fine of \$1000;
- (4) that the ruling dated 9 March 2007 be referred to the Law Society to note;
- 40 (5) that para 12 be expunged from the record; and
- (6) that the Chief Registrar provide a copy of the judgment and transcript to the Law Society are quashed.

If the fine has been paid by Mr Sen, it is to be returned to him forthwith.

We understand that the Law Society is awaiting the result of this appeal and
45 we ask that a copy of this judgment be supplied to it by the Chief Registrar.

Appeal allowed.