

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

CIVIL APPEAL NO.ABU 56 OF 2017
(High Court of Suva in Probate Action No. HPP 06 of 2010)

BETWEEN : **ANOOP KUMAR**
Appellant

AND : **ADIT KUMAR AND ARUN KUMAR**
Respondents

Coram : **Basnayake JA**

Counsel : **Mr. R. P. Singh for the Appellant**
Mr. D. Kumar for the Respondents

Date of Hearing : **15 November 2018**

Date of Ruling : **30 November 2018**

RULING

- [1] The proceedings commenced before this court by way of summons by the appellant (defendant) seeking leave to appeal out of time of the judgment of the learned High Court Judge dated 2 February 2017 and the decision dated 21 March 2017. By this judgment, the appellant was found guilty and convicted for contempt of court. On 21 March 2017 the appellant was imposed with a fine of \$5000.00 to be paid within 30 days and in default, to commit the appellant to prison for a period of three months. The appellant was

also ordered to comply with the Order dated 15 July 2015 and to distribute the balance estate to the beneficiaries within a period of sixty days from 21 March 2017. In default the appellant was sentenced to another period of imprisonment of three months. The appellant was also ordered to pay the second and the third plaintiffs (respondents) a sum of \$1000.00 as costs within 15 days.

- [2] The appellant and the respondents (2nd and 3rd plaintiffs) were beneficiaries of the estate of their father Surendra Prasad. Surendra Prasad died intestate on 2 March 1982. On 9 September 1982 the appellant was appointed the administrator of the estate. The respondents by way of originating summons in Probate Action No. HPP 06 of 2010 sued the appellant claiming several reliefs. On 15 July 2015 the High Court made order against the appellant to provide the respondents with complete accounts of income and expenditure on the farm (estate) and all monies received on the sale of land within 14 days and to distribute the balance estate to the beneficiaries within 3 months from the date of judgment (15 July 2015). The appellant did not lodge an appeal against this judgment.
- [3] Due to the failure to comply with the orders of court, the respondents by way of a motion supported with an affidavit moved court to initiate proceedings against the appellant for contempt of court. The court after an inquiry found the appellant to have willfully disobeyed the order of court in the distribution of the balance estate to the beneficiaries within the specified period and by judgment dated 2 February 2017 convicted him for contempt of court. On 21 March 2017 the court imposed the sentence on the appellant (as per paragraph 1 above).
- [4] The appellant made this application on 26 May 2017 (dated 25 May 2017) pursuant to section 12 (2) (f) of the Court of Appeal Act, Rule 26 (3) of the Court of Appeal Rules and High Court Rules 1998 seeking leave to appeal out of time against the judgment dated 2 February 2017 and the sentence dated 21 March 2017. The appellant in an affidavit dated 25 May 2017 giving reasons for the delay in filing a leave to appeal application states that the solicitors filed an application for leave in the Court of Appeal

bearing No. ABU 0026 of 2017 on 11 April 2017, which was struck out on 21 April 2017, for the reason that leave needs to be taken from High Court. An application was filed thereafter in High Court. This application was withdrawn on 19 May 2017 as time had lapsed. The present application for enlargement of time was filed in the Court of Appeal on 26 May 2017.

- [5] The learned counsel for the appellant states in his written submissions that the length of the delay is three and a half months. The reason for the delay is the counsel misreading and misapplying the rules. The learned counsel submitted that the appellant has good grounds to succeed this appeal.
- [6] The appellant is seeking leave to appeal out of time against the conviction and sentence. In terms of the Court of Appeal Rules (Rule 35 (3) a person desiring shall commence his appeal by sending to the Registrar a notice of application for extension of time....(no time period mentioned). In terms of Rule 40 the notice shall be in Form 6 of the second schedule. The appellant is also required to send the appropriate grounds upon which he desires to question his conviction and/or sentence.

The proposed grounds of appeal

- [7] The following grounds of appeal have been annexed to the application.

- “1. *The learned Trial Judge of the High Court erred in law and in fact in finding the appellant in contempt of court when there was no willful neglect of the orders of the Court by the Appellant.*
2. *The learned Trial Judge of the High Court erred in law and in fact in dismissing the application filed by the respondent by way of summons dated 15th August, 2016 without first hearing the appellant in support of the said summons.*
3. *The learned trial Judge of the High Court erred in law and in fact in finding that the respondent willfully failed to distribute the Estate of Surendra Prasad when the appellant had by way of*

their letter of 14th of October, 2015 sought distribution of the Estate.

4. *The learned trial Judge of the High Court erred in law and in fact in finding that the appellant was in contempt of Court in not distributing the estate of Surendra Prasad when the manner of distribution of the Estate was not outlined in the Orders of the Honorable Court meted out on the 21st of March, 2017.*
5. *The learned Trial Judge of the High Court erred in law and in fact in ordering that the Appellant pay a sum of \$5000.00 and in default be imprisoned for three months ("the punishment") when the punishment is excessive in all the circumstances of the case."*

[8] The learned counsel for the respondent submitted that the appellant is yet to obey the orders of court in the distribution of the estate and continues to be in contempt. The learned counsel submitted that the appellant had disobeyed on the payment of costs as well. The learned counsel submitted that the appellant had made these applications in order to distract the respondent from insisting on compliance with the orders of court.

[9] The principles governing extension of time are well known. The length of the delay, reasons for the delay, chance of appeal succeeding if time for appeal is extended, the degree of prejudice to the respondent if the application is granted. In terms of Rule 16 of the Court of Appeal Rules an appeal against an interlocutory judgment or order must be filed within 21 days of the order. Rule 16:-

Subject to the provisions of this rule, every notice of appeal shall be filed and served under paragraph (4) of rule 15 within the following period (calculated from the date on which the judgment or order of the court below was pronounced that is to say

- (a) In the case of an appeal from an interlocutory order 21 days;*
- (b) In any other case 6 weeks.*

This leave to appeal out of time application was made 9 weeks from the impugned order (Sentence date dated 21 March 2017).

- [10] On an application for leave out of time substantial reasons would need to be advanced before such an enlargement would be granted (**Director of Public Prosecutions v Jikar Ali** 21 FLR (1975) 115. Pathik J in **Rajendra Prasad Brothers Ltd. V Fiji Insurance (Fiji) Ltd** [2002] FJHC 220 (9 August 2002) and **Bank of Hawaii v Reynolds** [1998] FJHC 82 at 6 adopting the principle from **Ratnam v Cumaraswamy and Anor** [1964] 3 All ER 933 at 935, that, “*Rules of court must, prima facie, be obeyed; and, in order to justify a court in extending the time during which some steps in procedure requires to be taken, there must be some material on which the court can exercise its discretion. If the law were otherwise, a party in breach would have an unqualified right to an extension of time which would defeat the purpose of the rules which is to provide a time table for the conduct of litigation*”.
- [11] **Revic v Prentice Hall Incorporated and Others** (1969) ALL ER 772 Lord Denning MR said, “*We insist on the rules as to time being observed. We have had occasions recently to dismiss many cases for want of prosecution when people have not kept to the Rules as to time. So here, although the time is not so very long, it is quite long enough....not a single ground or excuse is put forward to explain the delay and why he did not appeal. The plaintiff had three and a half months in which to lodge his notice of appeal to the judge and he did not do so. I am quite content with the way in which the judge has exercised his discretion. I would dismiss the appeal and refuse to extend the time anymore*”.
- [12] With regard to the procedure, Pathik J in **Rajendra Prasad Brothers Ltd v FAI Insurance (Fiji) Ltd** (supra) cited the High Court of Australia case of **Adam P Brown Male Fashion Pty Ltd v Philip Morris Inc & Anor** [1981] HCA 39 [1981] 148 CLR 170 at 177 wherein cited Sir Fredrick Jordan **in Re Will of F. B. Gilbert** [1946] 46 (NSW) 318 at 323, “*There is a material difference between an exercise of discretion on a point of practice or procedure and an exercise of discretion which determines substantive rights. In the former class of case, if a tight rein were not kept upon interference with the order of judges of first instance, the result would be disastrous to the proper administration of justice. The disposal of cases could be delayed interminably, and costs*

heaped up indefinitely, if a litigant with a long purse or a litigious disposition could, at will, in effect transfer all exercise of discretion in interlocutory applications from a judge in chambers to a Court of Appeal”.

[13] The learned counsel for the appellant submitted in his written submissions that the delay is a period of three and a half months (written submissions dated 25 July 2017 in paragraph 17 at page 7). It appears that the time has been computed from 2 February 2017 on which date the appellant was convicted. This application was filed on 26 May 2017. The appellant was sentenced on 21 March 2017. Considering the impugned order is one of interlocutory, the time period is 21 days. Even if the date of sentence is considered as the date to reckon the period, 21 days would lapse on 11 April 2017. This application was filed 45 days after the expiry of the time period. In **Mc Gaig v Manu** [2012] FJSC 18 (27 August 2012) extension of time was refused by the Supreme Court of Fiji although the delay was only 2 days. In **Ali v Dominion Insurance Limited** [2011] FJHC 689 (31 October 2011) the application was dismissed as it was 16 days out of time. In **Khan v Suva City Council** [2011] FJHC 272 (13 May 2011) the application was 22 days out of time and was refused.

[14] The reason for the delay in this case as mentioned in the affidavit and a written submission is filing an application in the wrong court. The appellant is appealing against a conviction and a sentence passed on a contempt matter, the reason for contempt being disobedience to implement a court Judgment. This judgment was delivered on 15 July 2015. No appeal had been filed against this judgment. The order in the judgment is to distribute the estate which was the subject matter in this case with the beneficiaries. The learned Judge having found that the appellant had not obeyed the judgment convicted the appellant for contempt of court on 2 February 2017 and sentenced him on 21 March 2017. The learned counsel for the respondents complains that the appellant has still not executed the order that was made as far back as 15 July 2015 and thereafter reiterated on 2 February 2017. The prejudice caused can be immeasurable considering the fact that the appellant was appointed as administrator in September 1982.

[15] The grant of leave to appeal out of time is entirely a matter of discretion of the court. If the delay could be explained in a convincing manner and the appellant has a reasonable prospect of winning, leave could be considered irrespective of the length of the delay. I am not at all convinced with regard to the reason that the appellant has given. The appellant in this case appears to be looking into all the loopholes in order to get away from distributing the estate. Once he had produced a letter from the Sugar Industry Tribunal (Document "F" annexed to the appellant's affidavit dated 25 May 2017). The appellant appears to be dodging even paying costs ordered by court. Considering the foregoing facts and the reasons I am of the view that this is not a case that is worth considering anymore. By allowing further concessions and granting time will only help the wrongdoer to have his own way and further frustrate the respondent and bring hatred towards the justice system. Therefore leave to appeal out of time is refused with costs in a sum of \$3000.00 payable within 28 days from today.

Orders of the Court are:

1. *Leave to appeal out of time refused.*
2. *Costs in a sum of \$3000.00 payable to the respondent by the appellant within 28 days.*



A handwritten signature in black ink, consisting of a series of loops and flourishes, positioned above the printed name of the justice.

.....
Hon. Justice E. Basnayake
JUSTICE OF APPEAL