

IN THE HIGH COURT OF FIJI
AT LABASA
CIVIL JURISDICTION
MISCELLANEOUS ACTION NO. HBM 04 OF 2018

BETWEEN: SURESH CHAND

APPLICANT

AND: SANT RAM AND SHIU RAM

RESPONDENT

Appearance: Applicant - Mr. H. Robinson
Respondent - Ms. Lutu I. K.

Date of Hearing : 21st January, 2019

Date of Judgment : 23rd January, 2019

JUDGMENT

Introduction

[1] This is an action filed for committal for non-compliance of a consent orders entered in the Magistrate's Court. Both parties relied on the affidavits they filed they did not adduce any oral evidence. Defendant raised preliminary objections to the application regarding the non-compliance of Order 52 rule 2(2), Order 52 rule 3(3) and Order 52 rule 3(2) of the High Court Rules of 1988.

Facts

[2] The Plaintiff filed this action for committal on 6.7.2018 by way of *ex parte* notice of motion seeking leave for committal.

[3] The application for seeking leave contained statement of facts and affidavit in support and the motion seeking leave of the court.

- [4] Further supplementary affidavits were filed and leave was granted by a judge on 14.9.2018
- [5] The sealing of the Order granting leave was filed on 24.8.2018 and it was sealed on 24.8.2018
- [6] The Notice of Motion for Order of Committal was filed on 25.8.2018 along with an affidavit of support.

*The affidavit of service states that 'true copy of the within Notice of Motion for Order of Committal together with the Affidavit in support in this action which appeared to me have been regularly issued out of the High Court of Fiji at Labasa against the within named Respondents and which was dated the 25th day of September 2018. A copy whereof of the said Notice of Motion for Order of Committal and the Affidavit in Support are **annexed hereto and marked "A" and "B" respectively**' was personally served to the Defendants.(emphasis added)*

- [7] There are no annexed documents to the affidavit of service.
- [8] In the affidavit in support of the motion for committal *inter alia* stated
- i. The Plaintiff filed an action in Magistrate's Court for the transfer of subdivision of land comprised in CT 21230 situated in Savusavu.
 - ii. The Defendants consented on 15.8.2014 to transfer the above-mentioned land to the Plaintiff without a further payment of money.
 - iii. The Plaintiff had transferred the same to a third party in violation of consent order of 15.08.2014.
- [9] In the affidavit in opposition, *inter alia* stated,
- i. Only sale and purchase agreement was executed with a party who had allegedly given Plaintiff the land, and due to default of the said party, the agreement had come to an end.
 - ii. Admitted the transfer of the land after consent order was entered.
 - iii. Steps were taken in 2018, to set aside the consent order entered in the Magistrate's Court after committal proceedings were instituted.

Analysis

- [9] It is mandatory requirement to obtain leave for committal through *ex parte* application which the Plaintiff obtained on 14.9.2018.

- [10] Once the leave is obtained the Plaintiff must file a motion for entering the matter for hearing and it should also be served personally to the person or persons against whom the committal is sought along with copy of statement and affidavit in support of the application for leave.
- [11] The Supreme Court Practice (UK)(1999) (White Book) at p887 deals with the issue of personal service and states;

'Personal service- No order will normally be issued for the committal of a person unless he has been personally served with the order, disobedience to which is said to constitute the contempt, or, if the owner is directed to a group of persons or a corporation, some appropriate member has been personally served. Furthermore the prosecutor must give each person sought to be committed the fullest notice that an application is being made for his committal (R v Poplar Borough Council (No. 2) [1922] 1 K.B. 95) – e.g. by inserting his name in the notice of motion and serving personally upon him a copy of the notice and of the affidavit in support, showing what is alleged against him. Personal service of the notice of motion, enjoined by the rule, requires not merely the personal service of a copy, but an opportunity of inspecting the original (see Parker v Burgess (1834) 3N. & M. 36). But the Court may dispense with personal service where the respondent is evading service. Service may be dispensed with only where there is no other course available to uphold the authority of the Court and protect the applicant; the dispensation should be recorded in the committal order (Wright v Jess [1987] 1 W. L.R. 1076; [1987] 2 All E.R. 1067, CA).

Failure to comply with a proper procedure, such as personal service, is not necessarily fatal to the lawfulness of a contempt order. The court has complete discretion, under s. 13 (3) of A.J.A. 1960 to perfect an invalid committal order in a contempt case, but that power should only be used in exceptional cases and should be dictated by the need to do justice having regard to the interests of the contemnor, the victim of the contempt and other court users. Where a contemnor has not suffered any injustice by the failure to follow the proper procedures (such as service) the committal order could stand subject to variation to take account of any technical or procedural defects (M v P (Contempt of Court: Committal Order, Butler v Butler) [1992] 3 W.L.R. 813; [1992] 4 All E.R. 833 (Lord Donaldson of Lynton M.R. Nolan and Scott L.J.)).

Where a new or adjourned date is fixed for the hearing of the notice of motion, personal service ought to be effected of notification of the date (*Phonographic Performance Ltd v Tsang* (1985) 82 L.S. Gaz. 2331, CA).

[11] Though the counsel for the Defendants stated that no personal service was effected, there is no evidence to support it in the affidavit in opposition. So, it is a statement from the counsel and cannot be part of evidence. In contrast, in the affidavit of service there is a sworn statement that personal service was effected. In the circumstances on the balance of probability there is evidence of personal service, and the preliminary objection for that is overruled.

[12] In the affidavit of service that is filed there are no annexed documents as stated therein, hence it is incomplete and there is no evidence of the compliance with Order 52 rule 3(3) which states as ;

*'(3) Subject to paragraph(4), the notice of motion , accompanied by a copy of the **statement and affidavit in support of the application for leave under rule 2, must be served personally on the person sought to be committed.**'*

[12] The affidavit of service does not state that statement of facts and affidavit in support of the application seeking leave was served to the Defendants. Since I do not have the benefit of perusing the copy of documents served there is no proof of that fact.

[13] Since the application for leave was sought *ex parte* the particulars stated in the said application needs to be served to the Defendant. This is a mandatory requirement and Plaintiff must comply with that and failure to do so is fatal.

[13] Order 52 rule 3(2) of the High Court Rules of 1988 states as follow:

"Unless within 14 days after such leave was granted the motion is entered for hearing the leave shall lapse"

[14] The motion seeking committal after obtaining the leave was filed on 25.9.2018 and it was listed for hearing on 23.10.2018, and by that time the leave that was granted had lapsed.

[15] In the written submission the counsel for the Plaintiff argue that till the order is sealed 14 day time period will not be effective. I do not agree with that interpretation. Why they waited for 10 days to file orders for sealing of the order granting leave was not explained. Since there was a requirement of 8 days' notice to the Defendant in committal proceedings the Plaintiff knew that when they

submitted orders to be sealed on 24.9.2018 that leave will lapse when the matter is entered for hearing, due to insufficient time.

- [16] The argument that there is no civil judge sitting in Labasa cannot be considered as a relevant factor. When the Plaintiff filed the motion seeking hearing of the committal on 25.9.2018 already 11 days have lapsed and it is impossible to list it before a judge within 14 days since at least 8 day time period is required from service to the hearing of the said motion.
- [15] If a judge is not physically available there are sufficient means and facilities at the dispense of the Registry to obtain a listing before a judge in order to comply with the requirements contained in the High Court Rules of 1988. Even an injunction can be obtained using telephone and this is still done in UK, too. (See *Douglas and others v Hello! Ltd*[2001] 2 All ER 289; *Holder v Law Society* [2003] 3 All ER 62) In such a scenario the argument that compliance of order 52 rule 3(2) the High Court Rules of 1988 cannot be complied due to non-availability physical presence of a judge in High Court (Civil) all the time, cannot be accepted.
- [16] The need to enter the hearing of contempt within 14 days indicate the urgency of dealing with the contempt and if a party seeking contempt is not keen and diligent , the leave will lapse before the entering of the matter for hearing, as happened in this case.


Conclusion

- [16] Due to the non-compliance of Order 52 rule 3(2) the leave granted by a judge on 14.9.2018 had lapsed before entering of the motion for hearing of the committal. Lack of evidence of compliance of mandatory provision of Oder 52 rule 3(3) is fatal, for this application. The action for committal is dismissed *in limine*. Considering the circumstances of the case I will not award any costs.

Final Orders

- a. The Motion seeking committal is struck off.
- b. No costs.




Deepthi Amaratunga
Judge