

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Winding Up No. 58 of 2015

IN THE MATTER of Committal Proceeding
Under Order 52 of The High Court Rules 1988
Against The Respondent For Contempt Court
Orders

BETWEEN: **VIMALESH KUMAR SINGH** as an Administrator in the Estate of Vijay
Wati Singh aka BIJAE WATI SINGH aka VIJAY WATI late of Battan Singh
Avenue, Vunivivi Hill Nausori, Fiji Retired, Deceased, Testate.

APPLICANT

AND: **SURESH KUMAR SINGH** of 73 High Street, Toorak, Suva,
Businessman.

RESPONDENT

Counsel : **Applicant:** Ms. Karan N.
: **Respondent:** Mr. O'Driscoll G.
Date of Hearing : 16.4.2021
Date of Judgment : 14.06.2022

JUDGMENT

INTRODUCTION

1. Applicant instituted this action for committal, on behalf of deceased Plaintiff's estate regarding Respondent's willful refusal to comply with payments of three installments, pursuant to order made on 24.8.2017. Respondent admits his failure to pay last three installments, in his affidavit in reply filed on 7.4.2021, but states that he has a claim against the estate of deceased Plaintiff, and the payment is set-off. This is a misconception, and Respondent was informed about the position by the solicitors for Applicant who is executor of the estate of deceased Plaintiff. Any claim against estate is a separate issue and that cannot be used to delay and refuse the payments in terms of the order of the court. Applicant had proved beyond reasonable doubt that Respondent for committal.

FACTS

2. This action for winding up was settled, and settlement was made through orders of the court on 24.8.2017.
3. Once the settlement was made order of the court it no longer an undertaking or settlement entered in mediation, but an order of the court. Orders were made by Master on 24.8.2017.
4. Subsequent to the orders, Plaintiff had died 5.5.2018 and Applicant had accordingly obtained probate on 16.10.2018.
5. Applicant had opened an account in the name of Estate of Plaintiff in the Bank of South Pacific, and Respondent had deposited \$10,000 in terms of order 2(a)(x) on 3.7.2020 to the said bank account, but there after had refused to pay last three installments relating to the order of the court.
6. In terms of orders made on 24.8.2017 Respondent was required to make payments by way of thirteen installments. Respondent had made ten installments and last three installments were not paid in terms of order 2(a)(xi), 2(a)(xii) , and 2(a)(xiii). All the said installments were \$10,000 each totaling a sum of \$30,000.
7. It was admitted in oral evidence of Applicant that Respondent had made a payment \$500 on 5.8.2020, so the amount payable by Respondent is \$29,500
8. In the affidavit of Respondent filed on 7.4.2021, he had admitted he owed \$29,500 to the estate arising from the orders made on 24.8.2017 but stated that he had a claim for equal sum hence , the debt to the estate in terms of the order of the court is set off
9. Respondent had annexed a letter written by his solicitor to solicitors for the Applicant , as SK1 in paragraph 5 of his affidavit filed on 7.4.2021, and in the said letter stated,

“Our instruction are that the estate owes our client a sum of \$29,500, which had been previously notified to the Executor. As such the sum owed equals the balance remaining under the mediation agreement and our client takes the position that he has fully paid all money owing to the estate. **His only option to recover the debt owed to him was to offset that against the payments under the mediated settlement**”(emphasis added)
10. In the said letter annexed SK1, to the affidavit of Respondent, had also annexed some details of his alleged claim against estate of Plaintiff. These issues are beyond the scope of inquiry as to committal.

11. At paragraph 10 of the affidavit of Respondent he further admitted non payment in terms of the orders made on 24.8.2021 and stated, he was withholding what he thought was due to him from the estate of Plaintiff.
12. At the hearing both Applicant and Respondent gave evidence. This is in addition to the materials before the court through affidavits and documents annexed to them. There was no issue of any matter contained in such affidavits or annexed documents.

LAW AND ANALYSIS

13. From the above it is clear that Respondent had willfully failed to pay in terms of the orders made by court on 28.8.2017. He also attempts to justify his willful non payment of last three installments of the total sum.
14. If he had paid the burden is with Respondent to prove it. Instead, Respondent is claiming a set off, which he cannot unilaterally decide.
15. He stated that payments were due to mediation settlement, but avoids that what settlement was made orders of the court. Hence, who he arrived at settlement, does not change the character of the court order issued with the consent of the parties.
16. If the Respondent's position is correct, there will not be any use of any mediated or settlements entered between the parties being made orders of the court.
17. Halsbury's Laws of England (Vol 24 2019) under Civil Contempt 106. Committal states,
"The power to order committal for civil contempt is a power to be exercised with very great care. The court will not order committal where the contempt is of a minor or technical nature."(foot notes deleted)
18. In my mind the actions of Respondent were neither minor nor technical. He had unilaterally decided to set off an unproven claim against estate of Plaintiff. This is deliberate act to circumvent orders of the court, which needs strict compliance.
19. Having admitted nonpayment of the last three installments in terms of the orders of the court made on 24.8.2017, Respondent is estopped from denying that fact. Respondent through his solicitors had promised to make payments to Estate Account, too.
20. Applicant had produced statements of Estate Account from 30.6.2020 and it shows only one receipt from Respondent to the value of \$10,000 on 30.6.2020 and another \$500 on 5.8.2020.

21. No payment was made within 30 days from 30.6.2020 as promised, by Respondent through his solicitors
22. In the letter dated 2.10.2019 annexed as SK-2 to the affidavit of Respondent, the solicitor for the Respondent stated,
- “In reference to the order dated 24th August 2017, paragraph 2(a) clearly relevantly states: “(a) The agreed sum shall be paid in instalments payments as follow.....
....our client (Respondent) is paying the 14,600 as Capital Gain Tax and \$14,900 to the **Estate Account** on even date..... **Further installments will be made to the estate account every 30 days.** There remains an issue about the estate owing some money to Suresh Singh, however that can be revisited later.”(emphasis added)
23. What can be deduced from the said letter of solicitors for the Respondent are:
- Respondent had committed on 2.10.2019 to agreement of 24.8.2017, despite his alleged claim.
 - Respondent had reiterated that he will make payments of \$10,000 every 30 days.
 - Respondent had identified that he had to make payments to Estate Account as opposed to the account of deceased Plaintiff.
24. From the above letter legal position was correctly identified there was no misconception on the part of Respondent to make payments “every 30 days”, after, the “First Installment Date” in terms of the said orders by the court on 24.8.2017.
25. Since the first installment date fell on a day after demise of Plaintiff there was no issue of Respondent making payment to deceased Plaintiff’s account as per orders 1(b) of orders made on 24.8.2017. So Respondent is estopped from denying what he had expressly agreed through his solicitors in his affidavit of 7.4.2021 annexed as SKS-2.
26. Accordingly Applicant had not produced the details of the account of deceased with BSP Account No 80111671. This was not needed as to admissions of the Respondent made through affidavits and letters of their solicitors. Any payment made prior to death of Plaintiff to Account No 80111671, was not made in terms of orders of the court made on 24.8.2017.
27. Respondent in the submissions had taken the position that Applicant had failed to prove non payment of installments through statements of bank account No 80111671, assigned in the order, but this is an afterthought as Respondent had not only admitted non payment

of last three payments, but also in sworn statements attempted to justify that non payment through an alleged claim for the same amount.

28. Respondent in the written submission had stated he had paid \$29,500 to BSP Account No 80111671, which was clearly not a payments made in pursuant to order 2(a) of the orders of the court made on 24.8.2017 as the “first installment date” occurred after demise of Plaintiff, and Respondent through his solicitors had consented to pay the Estate Account.
29. Any payments made to Plaintiff during her life time was beyond the scope of this proceedings, but it was clear that Respondent had correctly identified this early and promised to pay “every 30 days” despite alleged claim against estate.
30. This position was crystalized, as Respondent made payments in terms of Order 2(a) till 3.7.2020.
31. By the letter of 23.9.2020, annexed SKS-1 Respondent’s solicitors had admitted the remaining sum of \$30,000 but state that due to alleged claim against estate the said sum is set off. This is clearly not only a misconception, but also a high handed act by Respondent.
32. So Respondent had committed contempt of court by not complying with the last three installments. The legal position he and his solicitor had raised contains no merits. This was properly identified the solicitor in his letter annexed to Respondent’s affidavit as SKS-2.
33. Respondent and or his solicitor cannot unilaterally change the terms of the orders of the court, if so there will not be any authority to the orders of the court and parties and their lawyers may violate them at their choice.
34. Respondent cannot take refuge under a solicitor’s instruction in a case of civil contempt.
35. Order 52 rule 5 (3) of High Court Rules 1988, stated that without the leave of the court, Applicant is confined to the allegations contained in the statement. The statement filed on 24.2.2021 had clearly stated the non payment of three installments by Respondent in contrary to the orders of the court made on 24.8.2017.
36. Order 52 rule 5 (4) of High Court Rules 1988, grants Respondent an option of giving oral evidence. He has done so, but this does not change the nature of this inquiry where parties have already submitted their sworn affidavits, with annexed documents, and statements. The scope of committal in civil actions is confined to statements already filed and materials submitted through affidavits and admissions already made through affidavits and or annexed documents.

46. In *Rewa Co-op Dairy Co Ltd v Eagle Ridge Investment (Fiji) Ltd* [2007] FJHC 108; CA No 188 OF 2004 (9 March 2007) Justice Pathik had impose a fine of 2,000 for a ‘deliberate and mischievous’ act of committal.
47. Accordingly I impose a fine of \$2,000 to Respondent for committal. Respondent is granted 21 days to pay the fine, and failure a month imprisonment. In addition to this considering circumstances of this case and conduct of Respondent, an additional order for, Respondent to deposit \$29,500 in the account belonging to estate of Plaintiff, within seven days, in terms of orders of the court and his admissions to Applicant through letters of his solicitor annexed as SKS-2 to his affidavit.
48. Cost of this application is summarily assessed at \$2,000 to be paid by Respondent to Applicant within 21 days.

FINAL ORDERS

- a. Respondent is ordered to deposit, within **seven days**, **\$29,500** in PSP Account No. 82401972 belonging to the estate of Plaintiff.
- b. Respondent is ordered to pay a fine of \$2,000 within 21 days, for the contempt of court failure to pay the fine will result in imprisonment of one month.
- c. Cost of this action is assessed summarily at \$2,000 to be paid by Respondent to Applicant, within 21 days.

Dated at Suva this 14th day of June, 2022.



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Justice Deepthi Amaratunga
High Court, Suva