

IN THE HIGH COURT OF FIJI
AT SUVA
CIVIL JURISDICTION

Civil Action No. HBC 103 of 2020

BETWEEN: **NAVIN NIRLESH PRASAD** of Raralevu Cemetry Road, Nausori, Fiji,
Director.

APPELLANT
[ORIGINAL SECOND DEFENDANT]

AND: **KASABIAS PTE LIMITED** a limited liability company having its
registered office 75 Suva Street, Suva.

FIRST RESPONDENT
[ORIGINAL PLAINTIFF]

AND: **PRASADS HOME BUILDERS PTE LIMITED** a limited liability
company having its registered office at Raralevu Cemetry Road,
Nausori, Fiji.

SECOND RESPONDENT
[ORIGINAL FIRST DEFENDANT]

Counsel : Plaintiff - Respondents: Mr. Prasad. N
Defendant- Applicant: Ms. Singh. A

Date of Hearing : 05.9.2022

Date of Judgment : 30.9.2022

JUDGMENT

INTRODUCTION

1. In this action default judgments were entered against Defendants for default of Pleadings. The default judgment was entered against second Defendant for a sum of \$50,000 and also for interest in the sum of \$1,041.66. On **4.9.2020** second Defendant was served with Default judgment and an affidavit of service was filed to confirm this regard. On **4.10.2021** second Defendant filed summons to set aside judgment in default and leave of the court to file and serve a statement of defence in terms of Order 19 rule 9 of High Court Rules 1988. Second Defendant had taken more than one year from the service of default judgment, to seek setting aside of the same. So Plaintiff had filed a separate action for bankruptcy in the Magistrate's Court on 16.4.2021. Section 7 of

Interpretation Act 1967 read with Section 94 of Bankruptcy Act 1944, along with Bankruptcy (Delegation of Jurisdiction) Order 1987, jurisdiction vested with Bankruptcy Act 1944, is delegated to 'a Resident Magistrate'¹. With such Delegated Jurisdiction, Magistrate's Court is empowered to stay any action against the debtor (i.e second Defendant), or allow to continue any action in 'any court', under appropriate conditions. So second Defendant had an opportunity to seek stay of proceeding either in Magistrate's court in terms of Section 11 of Bankruptcy Act 1944 read with Section 105 of the same Act. There were no such stay order being made. Instead, second Defendant had made a belated application to stay default judgment on 23.2.2022 to Master. By that time due to delay of second Defendant, Plaintiff had taken steps to enforce the judgment against second Defendant, through proceedings in Magistrate's Court. Receiving order was made by Magistrate's Court on **2.12.2021** and it was already advertised on 24.12.2021. As such, Master was correct in refusal to stay default judgment as it had been already enforced through Bankruptcy Act 1944. Threshold for leave to appeal against interim order is high and second Defendant had slept over his rights till a receiving order, when there were provision to stay any court proceedings.

ANALYSIS

2. Second Defendant had more than one opportunity to stay any court proceedings, relating to second Defendant, not limiting to the proceeding in Magistrate's Court. Section 11 of Bankruptcy Act 1944 states,

Section 11 deals with power to stay proceedings and it states:

"11.-(1) **The court** may, at any time after the presentation of a bankruptcy petition, **stay any action, execution** or other legal process against **the property or person of the debtor**, and any court in which proceedings are pending against a debtor may, on proof that a bankruptcy petition has been presented by or against the debtor, either stay the proceedings or allow them to continue on such terms as it may think just.

(2) Where the court makes an order staying any action or proceedings, or staying proceedings generally, the order may be served by sending a copy thereof, under the seal of the court, by post to the address for service of the plaintiff or other party prosecuting such proceeding."(emphasis added)

3. Section 94 of Bankruptcy Act 1944 granted the jurisdiction under said Act, to High Court, but under said provision such jurisdiction can be delegated to a Magistrate Court. Accordingly, Bankruptcy (Delegation of Jurisdiction) Order 1987 had delegated such jurisdiction to Magistrate's Court.

¹ Order 2 of Bankruptcy(Delegation of Jurisdiction) Order 1987

4. Section 105 of Bankruptcy Act 1944

Section 105 more precisely deals with the stay of proceedings and it provides:

"The court may at any time, for sufficient reason, make an order staying the proceedings under a bankruptcy petition, **either altogether** or for a **limited time**, on such terms and subject to such conditions as the court may think just."

5. Despite being fully aware of the Bankruptcy Proceedings since April 2021 second Defendant, took no steps in terms of the above mentioned provisions.

6. Proposed Grounds are not annexed but had included in affidavit in support which is not the correct procedure to state grounds of appeal. Second Defendant allege Master erred in fact and law by:

a. **Maintain the status quo until the Intended Appellant's application to set aside Default Judgment was determined –**

This is misconceived position. Master could not order stay of proceedings in Magistrate's Court. There is no law for Master to stay proceedings in another court.

b. **Refusing stay knowing that the Intended Appellant will suffer irreparable harm and prejudice**

Any harm to second Defendant could have been dealt in Magistrate's Court, but had not done so.

c. **Refusing stay since Receiving Order was granted.**

Not clear what the error of law or fact. No law was referred to show Master was wrong.

d. **In failing to exercise discretion on granting interim stay of execution of Default Judgment.**

Exercise of discretion cannot be arbitrary and a party who had come more than one year after service of default judgment cannot say suddenly that he needed a stay of judgment. If he wanted to set aside he had ample time to do so.

e. **Failing to exercise power to grant stay of execution of Default Judgment knowing that Default Judgment was yet to be executed hence.**

What is the law and fact that is erroneous not mentioned.

- f. **Failing to note that proposed statement of defence annexed raises the issue of law on guarantee which out to have.**

This is yet to be decided at hearing and cannot be a ground for stay considering other circumstances.

7. In *Housing Authority of Fiji v. Bulileka Hire Services Ltd* [2019] FJCA 136 (27 June 2019) Hon. Mr Justice Suresh Chandra at paragraph 32 to 34 stated as follows:

"[32] The Defendants - Appellants in the affidavit supporting the application for leave to appeal has not set out any exceptional circumstances, nor set out any matters relating to any prejudice or harm that would be caused to them if leave is not granted.

[33] For the reasons set out above the application for leave to appeal of the Defendants-Appellants is refused.

[34] Since the application for leave to appeal is refused, the consideration for the granting of a stay does not arise."

CONCLUSION

8. Master's interim orders had not raised any legal or factual errors for this court to grant leave to appeal. Accordingly application for leave to appeal is refused and cost of this application is summarily assessed at \$500.

FINAL ORDERS

- a. Leave to appeal against Master's interlocutory order made on 23.2.2022 is refused.
b. Cost of this application is summarily assessed at \$500.

Dated at Suva this 30th day of September, 2022.



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Justice Deepthi Amaratunga
High Court, Suva