

## SHIU NARAYAN

v.

## BHAJAN

[SUPREME COURT, 1963 (Hammett Ag. C.J.), 9th August, 6th September]

## Appellate Jurisdiction

Practice and procedure—application for extension of time to file grounds of appeal—appellant must elect whether to apply to Magistrate's Court or Supreme Court—Magistrates' Courts Rules, Order 36 rr. 3, 4.

Order 36 rule 4 of the Magistrates' Courts Rules provides that an appellant who fails to file his grounds of appeal within the prescribed time shall be deemed to have abandoned the appeal "unless the court below or the appellate court shall see fit to extend the time".

*Held.*—Order 36 rule 4 does not authorise consecutive applications to the Magistrate's and Supreme Courts. The appellant must elect, and if his application to the Magistrate's Court is refused his only remedy is to appeal against the refusal.

Case referred to:

*Isad Ali v. Reginam* [1958–59] F.L.R.1. Application in Chambers for extension of time to file grounds of appeal—reported by direction.

*Pillay* for the applicant.

*Regan* for the respondent.

HAMMETT Ag. C.J. [6th September, 1963]—

This is an interlocutory application for—

- (1) A stay of execution, and
- (2) An extension of time within which to file grounds of appeal.

The facts are as follows:—

On the 27th March, 1963, the plaintiff issued a summons in the Magistrate's Court at Nausori claiming the sum of £35, being damages for negligently causing the death of the plaintiff's bullock.

On the 16th May, 1963, the case was heard and both sides were represented by counsel.

On the 30th May, 1963, judgment was given for the plaintiff for £35 and costs assessed at £10 10s. 0d. The defendant gave notice of intention to appeal immediately after the judgment. Nothing further was done until the 17th June, 1963, when the plaintiff issued a Writ of Execution to enforce the judgment.

On the 16th July, 1963, defendant's solicitors applied to the Magistrate's Court for a stay of execution and for extension of time within which to file grounds of appeal under the provisions of Order XXXVI Rule 4 of the Magistrates' Courts Rules.

On the 18th July, 1963, this application was refused with £2 2s. 0d. costs to the plaintiff.

On the 25th July, 1963, the defendant applied to the Supreme Court for a stay of execution and for extension of time within which to file his grounds of appeal, again under the Magistrates' Courts Rules, Order XXXVI Rule 4.

Order XXXVI Rules 3 and 4 read as follows:—

“ 3. The appellant shall within one month from the date of the decision appealed from, including the day of such date, file in the court below the grounds of his appeal, and shall cause a copy of such grounds of appeal to be served on the respondent.

4. On the appellant failing to file the grounds of appeal within the prescribed time, he shall be deemed to have abandoned the appeal, unless the court below or the appellate court shall see fit to extend the time.”

It is clear that Rule 4 gives an option to an appellant to apply for an extension of time within which to appeal either to the Magistrate's Court or to the Supreme Court. It appears to me that appellant must make his election, however, and must apply for this relief either to the Magistrate's Court or to the Supreme Court. He cannot apply first to the one Court and then to the other. The refusal of the Magistrate's Court to grant a stay of execution and an extension of time within which to appeal is a final order which disposes of the interlocutory application then before that court. The appellant cannot then come to the Supreme Court with the same application *de novo*. His only remedy is to appeal to the Supreme Court against the interlocutory decision of the Magistrate's Court. In this connection I would refer to the case of *Isad Ali v. Reginam* (1958-59) Fiji Law Reports at p. 1, in which, for similar reasons, it was held that the refusal of a subordinate court to grant bail under section 321 (1) of the Criminal Procedure Code is a final order disposing of the application then before that court. As was said in that case: “ If his application is refused by the lower court his remedy is to appeal against the order of refusal to the Supreme Court ”.

For these reasons this application is dismissed with costs which I assess at £3 3s. 0d.

*Application dismissed.*

Solicitors for the applicant: *Sherani and Co.*

Solicitor for the respondent: *R. L. Regan.*