

RAJENDRA PRASAD UDIT MISHRA v DIRECTOR OF PUBLIC PROSECUTIONS (ABU0050 of 2010)

5 COURT OF APPEAL — CIVIL JURISDICTION

CALANCHINI AP, BASNAYAKE, MUTUNAYAGAM JJA

17 May, 8 June 2012

10 **Practice and procedure — appeal — ex parte order — vacate ex parte order — whether appropriate procedure followed — flawed procedure — remedy from same court that made order — abuse of process — Proceeds of Crime Act ss 19C, 19E, 19F.**

15 The High Court made an ex parte order forfeiting property to the State. The ninth defendant filed a notice of appeal in the Court of Appeal, seeking to vacate the order made against him ex parte.

Held –

20 The procedure adopted in this case was flawed. This appeal was filed in the Court of Appeal, and was to vacate an ex parte order made by the High Court. The ninth defendant expected the Court of Appeal to review the ex parte order of the High Court, but instead should have first sought a remedy from the same court that made the ex parte order.

Appeal dismissed.

Cases referred to

Vint v Hudspith (1885) 29 Ch D 322, cited.

25 *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721, followed.

G. O’Driscoll for the Appellant.

N. Tikoisuva for the first Respondent.

30 **Calanchini AP.** I agree with the reasons and conclusion expressed by Basnayake JA

[1] **Basnayake JA.** This is an appeal by the 9th defendant - appellant (9th defendant) from a judgment dated 10.9.2010 of the learned High Court Judge at Lautoka on the grounds inter alia that the judgment is irregular and in breach of the Rules of Natural Justice in that the 9th defendant was not given an opportunity of defending himself.

40 [2] The facts in this case are as follows. The plaintiff-respondent (plaintiff) is the Director of Public Prosecutions. In terms of s 19C of the Proceeds of Crime (Amendment) Act 2004, the Director of Public Prosecutions may apply to a court for an order forfeiting to the State all or any of the properties that are tainted. Tainted means proceeds of an offence. When such an application is made and the court is satisfied on a balance of probability that the property is tainted property, the court may order that the property be forfeited to the State.

45 [3] On 28.5.2010 the plaintiff made an application to High Court of Fiji at Lautoka for an order to forfeit a property currently owned by the 9th defendant-appellant (9th defendant). This property is situated at lot No 18, Savunawai, Nadi, Fiji.

50 [4] The 1st defendant was an accounts clerk at a resort by the name of “Turtle Island” owned by Spor Fiji Ltd. Eighty four cheques belonging to Spor Fiji Ltd were forged and being paid in to the accounts of the 1st, 2nd and 4th defendants in this case.

[5] According to an affidavit filed by the investigating officer these cheques were forged by the 1st defendant between the period May 2006 and May 2007. Out of 84 cheques, the 1st defendant was the payee in 44 cheques.

5 [6] The 1st defendant's salary per fortnight was \$345.00. However he had deposited \$481,134.47 in to two accounts opened by him.

[7] Several motor vehicles purchased by the 1st defendant were found to be tainted property as per s 19E of the Proceeds of Crimes Act and as such were ordered to be forfeited by the High Court Judge at Lautoka.

10 [8] The property referred to in paragraph No 3 above was purchased by the 1st defendant on 27.1.2007 for a sum of \$142,000.00. A sum of \$127,800 of the purchase money was paid of the funds withdrawn from bank accounts belonging to the 1st defendant.

15 [9] At the time of purchasing this property it was written in the name of the 3rd defendant, mother of the 1st defendant. She is elderly, unemployed and impecunious.

Purchase of the property by the 9th defendant

20 [10] On 15.4.2008 this property was purchased by the 9th defendant from the 3rd defendant for \$10,000.00. Although the 9th defendant purportedly signed the transfer document in the presence of the lawyers, it transpired that the 9th defendant was not in Fiji at the time. It also transpired that there was no record of either paying or receiving this money. The learned High Court Judge considering the fact of the paltry purchase price (\$10,000) and the forgery of the 25 9th defendant's signature concluded that it was a false transaction. It also revealed that that this property is still in the control of the 1st defendant who collects rent from it.

30 [11] The learned Judge stated that (at paragraph 30) on a balance of probabilities that the property was purchased largely with tainted money and as a consequence it is tainted property, no matter who the registered owner, and ordered it to be forfeited. After the appealable period this property was allowed to be sold by the Attorney-General and proceeds to be deposited in the Consolidated Fund Account.

The appeal filed by the 9th defendant

35 [12] The 9th defendant on 8.11.2010 filed notice of appeal in the Court of Appeal stating that the learned High Court Judge had erred in law and in fact or had, without any basis or evidence, made the following finding on baseless assumptions:

40 (a) *"Immigration records show that the ninth defendant was not even in Fiji at the time, yet the transfer was purportedly signed in the presence of Mr Iqbal Khan, Solicitor.*

(b) *Nor is there any record of the \$10,000.00 being paid or received by the third defendant.*

45 (c) *The purchase price of \$10,000.00 is in any event a totally inadequate and unrealistic sum to pay for the property and that together with the obvious forgery of the ninth defendant's signature on the transfer suggests that the whole deal was bogus".*

Submission of the learned counsel for the 9th defendant

50 [13] The learned counsel for the 9th defendant moved that this case be sent back to the High Court for a re-hearing. The learned counsel submitted that the 9th defendant is residing in America. The plaintiff knowing this fact made an

application for substituted service. The learned counsel complained that the 9th defendant was not served with the originating summons and submitted that the 9th defendant ought to have been served with originating summons and thus moved that the order dated 10.9.2010 be vacated.

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“Appropriate Procedure”

It appears that the procedure adopted in this case is flawed. The 9th defendant is seeking to vacate an order made against him ex parte. The ex parte order was made by the learned High Court Judge at Lautoka. The 9th defendant without first seeking to vacate the ex parte order by the same Judge or in the same court has filed an appeal in the Court of Appeal.

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[14] In *WEA Records Ltd v Visions Channel 4 Ltd* [1983] 1 WLR 721 Sir John Donaldson M R with Dunn and Purchas LJJ agreeing, dismissed the appeal, not on the merits but on the ground that it is an abuse of the process of the court. Sir John Donaldson M R held that “in terms of jurisdiction, there can be no doubt this court can hear an appeal from an order made by the High Court upon an ex parte application. This jurisdiction is conferred by s 16 (1) of the Supreme Court Act 1981. Equally there is no doubt that the High Court has power to review and to discharge or vary any order which has been made ex parte. This jurisdiction is inherent in the provisional nature of any order made ex parte.

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The Court of appeal hears appeals from orders and judgments. It does not hear original applications save to the extent that these are ancillary to an appeal, and save in respect of an entirely anomalous form of proceeding in relation to the grant of leave to apply to the Divisional Court for judicial review...Ex parte orders are essentially provisional in nature. They are made by the Judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession, whether or not it assists his application, this is no basis for making a definitive order and every Judge knows this. He expects at a later stage to be given an opportunity to review his provisional order in the light of evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order.

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This being the case it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an ex parte order without first giving the Judge who made it or, if he was not available, another High Court Judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision. This is the appropriate procedure even when an order is not provisional, but is made at the trial in the absence of one party” (emphasis added). (Also *Vint v Hudspith* (1885) 29 Ch D 322).

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[15] The case under review is an appeal filed in the Court of Appeal, Fiji. This appeal was to vacate an ex parte order made by the learned High Court Judge at Lautoka. By filing this appeal in the Court of Appeal, the 9th defendant expected the Court of Appeal to review the ex parte order of the learned High Court Judge of Lautoka. Instead the 9th defendant should have first sought a remedy from the same court that made the ex parte order. The 9th defendant thus has abused the process of this court and on this ground this appeal cannot stand. Thus this appeal is dismissed with costs fixed at \$3000.00.

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50 **Mutunayagam JA.** I agree with the reasoning and the conclusion arrived at by Basnayake JA

The Orders of the Court are:

Appeal dismissed.

Costs fixed at \$3000.00 in favour of the plaintiff.

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Appeal dismissed.

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