

IN THE HIGH COURT OF FIJI
AT SUVA
APPELLATE JURISDICTION

Civil Appeal No. HBA 24 of 2019

BETWEEN: SELINA HELEN SAMISONI

APPELLANT

A N D: ISIMELI SALABIAU

RESPONDENT

Counsel : Appellant: In Person
: Respondent: In Person
Date of Hearing : 12.3.2020
Date of Judgment : 27.3.2020

JUDGMENT

INTRODUCTION

1. This is an appeal from decision of Resident Magistrate delivered on 21.8.2019 (dated as 24.7.2019 in ruling) refusing to extend time for appeal against decision of Small Claims Tribunal (SCT). Notice of intension to appeal was filed on 27.8.2019 and grounds of appeal were filed on 20.9.2019. Appellant had not appear in SCT on time, on 5.3.2018, the date of hearing, and an award was made by the referee. Appellant had come late on the same day and filed an application for re-hearing. After notice of her application for re-hearing, both parties were present on 22.3.2018 and re-hearing was ordered. The re-hearing was on 5.4.2018. On that date, again Appellant was absent and no one informed referee that she had left Fiji a day before. The referee restored earlier orders exercising his **discretionary power** in terms of Section 32(5) of SCT Act 1991. Though Appellant was aware on the same day, through her assistance that matter was concluded on that day she had not appealed within fourteen days from 5.4.2018. There was no appeal against said order filed within the section 33(3) of SCT Act 1991. An application for extension of time for appeal was filed in court below on 11.6.2018. Said application also sought a stay of execution in respect of decision made on 5.4.2018. After hearing of Resident Magistrate refused both applications in the said Ruling of 21.8.2019. Though the said Ruling of court below applied an erroneous provision, her appeal was not successful. This appeal is

rehearing of the application of court below. (See *Aaryan Enterprise v Mehak Unique Fashion* [2011] FJHC 727; Civil Appeal 17.2011 (decided on 10 November 2011)(Per Calanchini J). So the Appellant's request in the court below was reconsidered in this appeal and refused. The delay is excessive and the reason for delay cannot be accepted as Appellant had opportunity to inform SCT before leaving Fiji or on the day of rehearing through her assistant who was informed that matter was concluded. Appellant had not indicated when she came to Fiji in order to consider delay was reasonable. The proposed appeal against referee made on 5.4.2018 was an exercise of discretion in terms of Section 32(5) of SCT Act 1991, which cannot be reviewed or appealed. (see NZ High Court Case of *Murray v The Disputes Tribunal* [2012] NZHC 2206 (decided 30 August 2012) SCT Act 1991¹. Legislation has made a compromise and curtailed appeals only on limited area in order to facilitate prompt and inexpensive mode of recovery.

ANALYSIS

2. When this matter first mentioned before me to fix for hearing Appellant appeared in person and sought time to retain a solicitor and for this sufficient time was given. When the matter was mentioned again to fix hearing Appellant indicated that her solicitors had indicated cost of appearance would not justify the amount awarded, hence she said she would only submit submissions with the assistance of lawyers. Hence both parties indicated their willingness to have hearing on the same day. Both parties made oral submissions and they were also granted time to file written submissions.
3. Appellant filed written submissions in person with some cases. Respondent who is the claimant did not file any submissions.
4. In my judgment when an appeal relating to decision of SCT is before a court it should be given priority as promptness is essence of SCT Act 1991. If delay is experienced for small claims below \$5,000 its purpose and utility is lost.
5. In order to establish an effective inexpensive and prompt determination of claims below \$5,000 SCT Act 1991 had granted referee of SCT to have regard to law but at the same time not bound by strict legal principles and technicalities as in a court of law in terms of Section 15(4) of SCT Act 1991. These are some of the compromises made for SCT to be effective mode of recovery of small claims.
6. Section 15 of SCT 1991 reads;

"Functions of other jurisdictions

15.-(1) The primary function of a Tribunal is to attempt to bring the parties to a dispute to an agreed settlement.

¹ The provision regarding appeals in NZ Disputes Tribunal(successor to Small Claims Tribunal) is analogous to Section 33 and 15 of SCT Act 1991

(2) If it appears to the Tribunal to be impossible to reach a settlement under subsection (1) within a reasonable time, the Tribunal shall proceed to determine the dispute.

(3) If an agreed settlement is reached, the Tribunal may make one or more of the orders which it is empowered to make under section 16 or under any other Law, and shall not, where giving effect to the agreement of the parties, be bound by the monetary restriction proved for by subsections 16(3) and (4).

*(4) The Tribunal shall determine the dispute **according to the substantial merits and justice** of the case, and in doing so shall have **regard to the law but shall not be bound to give effect to strict legal rights or obligations or to actual forms or technicalities.***

(5) Without limiting the generality of subsection (4), a Tribunal may, in respect of any agreement or document which directly or indirectly bears upon the dispute between the parties, disregard any provision therein which excludes or limits,

(a) conditions, warranties, or undertakings; or

(b) any right, duty, liability, or remedy which would arise or accrue in the circumstance of the dispute; if there were no dispute; if there were no such exclusion or limitation.

(6) To give effect to its determination of the dispute or in granting relief in respect of any claim, which is not disputed, the Tribunal shall make one or more of the orders which it is empowered to make under section 16 or under any other law."

7. For the sake of promptness and to be effective and inexpensive certain technicalities and forms, and strict legal rights are not required for a claim in SCT. After the accident with Appellant's vehicle HBK3, Claimant's vehicle HD719 was transferred, to claimant. This evidence was produced in the court below and order of referee dated 5.3.2018 state that documents were produced in Appellant's absence that day.
8. The Ruling of the court below, in the first paragraph states that application for extension of time was filed in terms of Section 248 of the Criminal Procedure Code² (sic).
9. Learned Resident Magistrate had applied Section 248(3) of Criminal Procedure Act 2009 for consideration of extension of time in the paragraph two of the Ruling. This is erroneous application of law, which I will deal it later in this judgment.

² Criminal Procedure Act 2009 (commenced on 1.2.2010)

10. Appellant was absent when initial hearing was conducted in SCT, but was granted a re-hearing upon an application. Again on the date of re-hearing she had left Fiji for business without informing SCT. So referee had restored earlier orders on 5.4.2018 in terms of Section 32(5) of SCT Act 1991. This is a power to referee when a party defaults for second time.
11. According to affidavit in support of the application seeking extension of time Appellant had not revealed sudden business reason for leaving Fiji one day before re-hearing. She states that this departure was informed to her only a day before her travel, receipt of the tickets indicates that it was paid 2.4.2018. The reason for immediate departure was not given. When she had already asked her personal assistant to go to SCT why she did not take steps to inform SCT her unavailability prior to rehearing of the matter was not explained.
12. She had failed to inform when she was informed about the said travel, but state that it was few days before.
13. She had not taken steps to inform referee when the matter was taken that she had gone abroad a day before. According to affidavit in support an assistant had gone to SCT on the same day and was informed that the matter was over. The conduct of Appellant in SCT was not satisfactory, to say the least.
14. When a re-hearing was ordered, some measures needed to be taken to inform SCT her departure on the date of re-hearing. After matter was concluded on 5.4.2018 Appellant's assistant was aware of that fact, and had instructed lawyers handle the matter.
15. Appellant's lawyers had conducted a search of SCT proceedings on 26.5.2018 and there is no reason given why they could not be appointed earlier to conduct the search.
16. So, if Appellant was diligent she had the knowledge through her assistant on 5.4.2018 that SCT had concluded the matter.
17. Appellant had instructed her solicitors to search for file and again the affidavit in support of Appellant had not indicated when such instructions were given.
18. Order of referee to restore earlier decision was not appealed within fourteen days in terms of SCT Act 1991. So the solicitors of the Appellant were aware of the time period and through them Appellant must also know the time period and there is no reason to delay for such a long period over two months.

19. The essence of SCT Act 1991 is promptness and having failed twice to appear on time in SCT, Appellant should not act in contumelious manner in preferring her appeal.
20. SCT is also an effective inexpensive mode to obtain an award for damage, hence claimant should not be frustrated by repeatedly not attending to SCT deligently and also not preferring an appeal within time.
21. SCT Act 1991 allows appeals only in limited grounds and they are stated in Section 33(1), and this is to discourage undue delay in obtaining relief.
22. SCT Act 1991 deals with appeals from SCT in following manner

“Appeals

33.-(1) Any party to proceedings before a Tribunal may appeal against an order made by the Tribunal under section 15(6) or section 31(2) on the grounds that:

*(a) the proceedings were conducted by the Referee in a manner which was **unfair to the appellant and prejudicially affected the result of the proceedings**; or*

*(b) the **Tribunal exceeded its jurisdiction.***

(2) An appeal brought pursuant to subsection (1) shall be made:

(a) if against an order made by a Resident Magistrate exercising the jurisdiction of a Tribunal to the High Court; and

(b) in any other case, to the Magistrates' Court.

*(3) An appeal shall be brought by a party by the filing of a **notice of appeal in Form 6** of the First Schedule to this Decree, together with the fee prescribed in the Second Schedule in the High Court or any Magistrates' Court (as the case may be) **within 14 days of the Tribunal's order.***

(4) As soon as practicable after such notice of appeal has been filed the High Court or the Registrar of that Magistrates' Court (as the case may be) shall:

(a) lodge a copy thereof in the Tribunal's records relating to the proceedings;

(b) fix the time and place for the hearing of the appeal and shall notify the appellant;

(c) serve a copy of even notice of appeal together with a notice of the time and place for hearing the appeal on even other party to the proceedings before the Tribunal and each such party may appear and be heard.

(5) The filing of a notice of appeal against an order shall operate as a stay of any process for the enforcement of that order but the High Court or the Magistrates' Court may at any time on the application of a party to the proceedings order that any process may be resumed or commenced or the process having been resumed or commenced, order that it be further stayed.

Referee to furnish report

34.-(1) Within 14 days after a notice of appeal has been lodged in the Tribunal's records under section 33(3) the Referee who heard the proceedings shall furnish to the Registrar a report on the proceedings and on the manner in which the proceedings were conducted and the reasons therefor.

(2) A Referee shall keep a record of the proceedings of a Tribunal sufficient to enable him, if required, to furnish a report under subsection (1).

(3) If, for any reason, the Referee who heard the proceedings is unavailable to furnish the report, the same shall be compiled by the Registrar from such information as he is able to collect from the records of the Tribunal or otherwise."(emphasis added)

23. So there is a requirement to lodge notice of appeal within fourteen days from the order of SCT in terms of Section 33(3) of SCT Act 1991, and this cannot be extended when the delay is excessive as in this case, as that would defeat the purpose of SCT Act 1991 and discourage claimants from seeking relief. Since promptness is a primary objective of SCT Act 1991, extension of time can only granted when the delay is not excessive as in this case.
24. Unless some good reason for delay, was shown, the extension should not be allowed. When the delay is over one month extension should only be given when there is *prima facie* excess of jurisdiction or entire time period of delay is justified through evidence in the form of affidavit. Appellant had not done so. She had only indicated her time of departure and had not indicated when she returned. Even as to her departure there was no evidence of her reason for departure, to consider this as urgent.
25. Appellant was not present before SCT on 5.4.2018 and referee had ordered that decision made on 5.3.2018 to be restored in terms of Section 32 (5) of SCT Act 1991.
26. There is no provision in SCT Act 1991 which deals with extension of time period granted in terms of Section 33(3) of SCT Act 1991.
27. Section 33(3) of SCT Act 1991 requires a party to file a 'notice of appeal in form six of first schedule' within stipulated time.

28. Form six of first schedule to SCT Act 1991 contains grounds of appeal as well. So there is no requirement to file separate grounds of appeal. So Form Six of first schedule which named as Notice of Appeal also contains grounds of appeal. This indicates that promptness is the essence of SCT Act 1991 and court should not allow parties to disregard the importance of hearing of SCT, though monetary jurisdiction is limited to \$5,000. Though the value is less it forms a very important part of providing access to justice in speedy and cost-effective manner.
29. Appellant did not dispute her liability for the damage she inflicted through collision from behind. So, she needs to pay for that, irrespective of registration of that vehicle at the time of accident. It is not mandatory to obtain registration to claim for a damage to a vehicle in SCT in terms of Section 15(4) of SCT Act 1991. Claimant had obtained registration of HD 719 by 13.12.2017, and the registered owner had not made a claim against Appellant. So the technical argument as to ownership at the time of accident has nor merits. Even if I am wrong on that Appellant was granted opportunity to object to the claim and she had not come to court on time, had not appeared at hearing when rehearing was conducted and had not preferred an appeal against the order of 5.4.2018 for more than two months. Delay in inordinate.
30. Appellants objection as to the notice of order not being served has no merits as she was aware of the matter being concluded on the same day and had even instructed lawyers regarding this claim. Time to appeal starts from date of order made on 5.4.2018.
31. It should also be noted that scope of appeal against decision of SCT is restricted and they are that the proceedings were conducted by the Referee in a manner which was unfair to the appellant and prejudicially affected the result of the proceedings; or that SCT had exceeded its jurisdiction.
32. In this instance Appellants in court below had relied on Order 37 rule 4 of Magistrates Court Rules 1945 for extension of time. Learned Resident Magistrate had not considered said provision but had applied Criminal Procedure Act 2009 which is erroneous.
33. Section 248(3) of Criminal Procedure Act 2009 applies to appeals from Magistrate's Court made to High Court in terms of Section 246 of Criminal Procedure Act 2009. Section 246 of Criminal Procedure Act 2009 is applicable only to criminal cause or matters and extension is granted by High Court for a '*good cause*' and the definition of word good cause is explained in Section 248(3) of Criminal Procedure Act 2009. This provision has no application to the Appellant's application in the court below for extension of time for appeal against the decision of SCT.
34. Justice Calanchini (as he then was) in Civil Appeal No 17 of 2011 (decided on 10.11.2011) held,

'As a result I am satisfied that Order 37 rule 4 gives the power to Magistrates Court to extend the 14 days period to appeal from decision of Small Claims Tribunals which are analogous to the "Court below" being a reference to courts presided over by Second or Third Class Magistrates and which have ceased to exist'

35. So Appellants had relied on Order 37 rule 4 of Magistrates Court Rules 1945 in court below, but this had not been considered. This alone will not suffice to set aside the Ruling refusing extension of time. Appellants should satisfy the grounds for extension of time.
36. High Court decision of *Aaryan Enterprise v Mehak Unique Fashion* [2011] FJHC 727; Civil Appeal 17.2011 (decided on 10 November 2011) further held,

The right of appeal to this Court from an interlocutory decision in the Magistrates Court is given by section 36 of the Magistrates Court Act. Under section 39 of the same Act the High Court may entertain any appeal from a Magistrates Court on any terms which it thinks just.

The powers of the High Court sitting as an appellate court from a decision of a Magistrates Court are set out in Order XXXVII Rules 18 and 19. In particular Rule 18 states:

"The appellate court __ __, generally, shall have as full jurisdiction over the whole proceedings as if the proceedings had been instituted and prosecuted in the appellate court as a court of first instance, and may rehear the whole case or may remit to the court below to be reheard, or to be otherwise dealt with as the appellate court directs."

Then Rule 19 goes on to state:

"The appellate court shall have power to give any judgment and make any order that ought to have been made, and to make such further or other orders as the case may require, including any order as to costs. __ __"

*In my judgment the jurisdiction conferred on this Court as an appellate court under Order XXXVII to hear appeals from the Magistrates Court entitles the Court to consider the matter in question as a court of first instance (i.e. afresh) unfettered by the decision of the learned Magistrate and as a result, I am entitled to exercise my own discretion. Under Order XXXVII I am not restricted to reviewing the manner in which the learned Magistrate exercised her discretion. (See *CM Van Stillevoeldt BV -v- EC Caviars Inc* [1983] 1 All ER 699).*

37. Accordingly I exercise my own discretion as to the extension of time. The rules relating to extension of time is well settled and they are:

- a. Length of Delay.

- b. Reasons for the Delay.
- c. The Chances of an appeal succeeding if time for appeal is extended.
- d. Degree of prejudice if application is granted.

The length of delay

38. Application for extension of time in court below was filed on 11.6.2018. This was more than two months after referee had affirmed the decision on the day fixed for re hearing on 5.4.2018. Prima facie this is excessive but cannot be considered in isolation and needs to consider reasons for Delay stated in the affidavit in support filed in court below which found in page 15 of Record of Magistrate's Court.

Reasons for Delay

39. In the affidavit in support court below Appellant had stated

“Prior to this (i.e re hearing) I left for United States of Ameariaca for a few days for urgent work attendance at our main office in Florida. Notice of my travel was only given to me a day before I was to fly out. “

40. If her stay in USA was only for “few days” why she took more than two months to file a notice of appeal is not clear. She had not indicated the time of arrival to Fiji in her itinerary, which indicated date of departure from Fiji on 4.4.2018 at 2.10 PM.
41. She had not indicated what was the urgency for her to travel quickly a day before re hearing was fixed.
42. Even if she had a good reason to depart there is no indication as to when she returned to Fiji after “few days”. So considering the evidence before court below there are no sufficient reasons for delay of more than two months. By the same token the length of delay of over two months in excessive and extension of time for such a long period for an appeal from SCT is rare.
43. Appellant had indicated that she had asked one of her assistant to go to SCT on 5.4.2018 and she was informed that the matter was concluded. After that Appellant had instructed he solicitors to conduct search file of SCT. Why such search was delayed till 26.5.2018 was not explained.
44. There are unexplained periods of time in the affidavit in support of the Appellant, in the court below. The reasons for delay is not fully explained (eg reasons for sudden departure, time of arrival to Fiji, when she appointed solicitors, why it took time till 23.5.2018 to peruse file of SCT when already aware of matter being concluded on 5.4.2018).

45. The purpose of SCT Act 1991 is to grant 'prompt and inexpensive' relief to litigants. So delay of more than two months for the reasons given in the affidavit in support in court below cannot be accepted as proper justification for extension of time.

Chances of Appeal being Successful if extension is granted

46. Appellant is seeking to appeal against orders of SCT made on 5.4.2018.

47. The grounds of appeal in terms of Section 33 of SCT Act 1991 are limited. There is no issue as to referee not having jurisdiction to make that order.

Part IV of SCT Act 1991 deals with re-hearing of appeals and states.

PART IV - REHEARING AND APPEALS

Rehearing

32.-(1) Subject to subsection (2), a Tribunal may, upon the application or a party to any proceedings, order the rehearing of a claim, to be had [sic] upon such terms as it thinks fit.

(2) A rehearing may be ordered under subsection (1) only if an order has been made under section 15(6) or section 31(2) and, in the latter case, shall be limited to rehearing the enforcement proceedings taken under that section.

(3) Every application for a rehearing shall be in Form 5 of the first Schedule, shall be lodged together with the fee prescribed in the Second Schedule and shall be made within 14 days after the Tribunal's order and shall be served upon the other parties to the proceedings.

(4) When a rehearing is ordered:

(a) the Registrar shall notify all parties to the proceedings of the making of the order and of the time and place appointed for the rehearing; and

(b) the order of the Tribunal made upon the first hearing shall cease to have effect.

(5) Notwithstanding subsection (4)(b), if the party on whose application a rehearing is ordered does not appear at the time and place for the rehearing or at any time and place to which the rehearing is adjourned, the Tribunal may, without rehearing or further rehearing the claim direct that the original order be restored to full force and effect.

(6) This Decree shall apply to a rehearing in all respects as it applies to an original hearing." (emphasis added)

48. There was discretion granted to referee to 'restore' the orders granted on 5.3.2018 as Appellant had not appeared at re hearing. There was no evidence that she had instructed

her assistance to inform referee that she had left Fiji a day before for a business matter. Appellant had not even informed SCT by letter her unavailability, before leaving Fiji. This could be easily done by letter and in the circumstances in my judgment referee had exercised his discretion which is not appealable in court below in terms of Section 33(1) of SCT Act 1991.

49. So, there are no chances of appeal being successful if extension of time is granted.
50. A party is prejudiced through accident. There is no dispute that vehicle needed repair. Appellant cannot rely on registration at LTA to deny Respondent's claim. SCT is not bound by strict application of strict legal technicalities in terms of Section 15(4) of SCT Act.

Prejudice if extension is granted

51. There is no need to state that party who had suffered damage awaits compensation. SCT Act 1991 is designed to provide speedy and inexpensive relief. There should be end to Litigation. Appellant had left Fiji a day before re-hearing in SCT. This is the second time Appellant had not participated in SCT. Referee is granted discretion to restore orders already made in order to expedite the matter. There is prejudice to claimant through long delay, due to the actions of Appellant.
52. Justice Calanchini in *Aaryan Enterprise v Mehak Unique Fashion* [2011] FJHC 727; Civil Appeal 17.2011 (decided on 10 November 2011) further held
- 'The question of prejudice does not arise in view of the failure of the Respondent to adequately explain the extensive delay of 19 days and to demonstrate any reasonable prospect of succeeding in the appeal'*

CONCLUSION

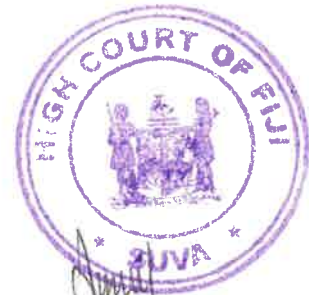
Court below had applied an erroneous provision to consider extension of time to file an appeal. The application of 248 of Criminal Procedure Act 2009 is wrong. There is no provision in SCT Act 1991 for extension of time when fourteen day time period for appeal against an award of a referee in SCT. So, Magistrates Court Rules are used to extend time but again there should be consideration of length of delay, reason for delay, prejudice to parties and success of the prospective appeal if an extension of time is granted. Time of delay is excessive considering that one of the main objectives of SCT Act 1991 is promptness. Appellant had left Fiji day before for a business reason but this reason was not given in the affidavit in support. At the hearing Appellant did not participate, so referee granted an award against the Appellant after perusal of documents. She made an application for re-hearing and on the date of re-hearing again Appellant did not attend SCT and referee in the exercise of his discretion restored the order made on 5.3.2018. In the proposed appeal Appellant is challenging said exercise of discretion of the referee in terms

of Section 32(5) of SCT Act 1991. In *Murray v The Disputes Tribunal* [2012] NZHC 2206 (decided 30 August 2012) SCT Act 1991. In a NZ High Court decision it was held that decision of referee's exercise of discretion cannot be challenged even by judicial review. The legislation has compromised such right of a party before SCT in order to achieve its objectives contained in the preamble of SCT Act 1991. Even if I am wrong on that, the delay of more than two months is excessive such as long extension is rare for appeals from SCT.. Appellant was aware of the re-hearing when she left Fiji and through an assistant became aware of that matter being concluded on the same day. Appellant had retained a solicitor for appeal. There is no date as to when she returned. She had not informed SCT her sudden departure and the reason for leaving Fiji. In the circumstances referee had exercised his discretion to restore previous orders made on 5.3.2018. This act of referee cannot be considered prejudicial as SCT enjoys wide discretion as to evidence needed to prove a fact and not bound by technicalities and strict application of law. So there are no merits in the appeal if the time is extended. For the reasons given in this decision appeal is dismissed and decision of the Resident Magistrate is affirmed. Since the appeal is dismissed there is no reason to consider stay of execution of orders. Considering circumstances no costs awarded.

FINAL ORDERS

- a. Appeal is dismissed. Orders of Court below affirmed for reasons given in judgment.
- b. Parties to bear their costs.

Dated at Suva this 27th day of March, 2020.



Justice Deepthi Amaratunga
High Court, Suva