

CANADA / JUDGMENT

Bhimani v. Beninteso

2020 BCCA 79

COURT

British Columbia Court of Appeal

DECIDED

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2020 BCCA 79 Bhimani v. Beninteso COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Bhimani v. Beninteso, 2020 BCCA 79 Date: 20200210 Docket: CA46470 Between: Aly Shiraz Bhimani Appellant (Claimant) And Jessica Beninteso Respondent (Respondent) Before: The Honourable Madam Justice Saunders (In Chambers) On appeal from: An order of the Supreme Court of British Columbia, dated September 26, 2019 (Bhimani v. Beninteso, 2019 BCSC 2074, Vancouver Docket E182029). Oral Reasons for Judgment The Appellant, appearing in person: A.S. Bhimani Counsel for the Respondent: M. Lam F. MacLean Place and Date of Hearing: Vancouver, British Columbia February 10, 2020 Place and Date of Judgment: Vancouver, British Columbia February 10, 2020 Summary: The application is for security for costs of the appeal, of trial costs, and for sums ordered to be paid to the respondent under s. 230(2)(b) of the Family Law Act, S.B.C. 2011, c. 25. Held: Application granted in part. The criteria for security for costs of the appeal are met. In particular, the appeal is of doubtful merit; the record demonstrates non-compliance with court orders, including payment of sums assessed against the appellant, to the extent it appears the costs are unlikely to be readily recoverable should the respondent succeed on appeal; and there is no evidence before the court that the appellant is unable to post a sum if ordered to do so. The costs of the order appealed have not been determined in the British Columbia Supreme Court, and no order is made in respect to them. The sum ordered to be paid to the respondent under s. 230(2)(b), although described by the judge as a fine, was entered as an order under s. 230(2)(b)(ii) of the Act and is a judgment in favour of the respondent as a penalty for non-compliance with court orders. Security for that judgment, too, should be posted. In total the appellant must post \$6,000 as security for costs of the appeal and \$3,500 as security for the judgment.

[1] SAUNDERS J.A.: There were applications before me this morning brought by both the appellant, Mr. Bhimani and the respondent, Ms. Beninteso.

[2] Mr. Bhimani's application is for a no-fee order. Ms. Beninteso's application is for:

- 1) an order to quash the appeal for lack of merit;
- 2) an order for security for costs of the appeal;

- 3) an order for security for costs in the British Columbia Supreme Court in respect to two orders that were made (the orders of Master Dick and Mr. Justice Myers);
 - 4) an order that Mr. Bhimani pay penalties ordered against him in the British Columbia Supreme Court and arrears of child support and provide disclosure that has been ordered by the British Columbia Supreme Court as a condition of the appeal proceeding; and
 - 5) costs of the application in any event.
- [3] At the beginning of the hearing, I advised Mr. Bhimani that a no-fee order relates to court fees required to be paid by this court's Rules, and does not erase his obligation to pay fees necessary to obtain appeal books or any transcripts he is required to file. On learning this, Mr. Bhimani abandoned his application for no-fee status, saying his family would help him with those expenses. Counsel for Ms. Beninteso then asked for costs of the late abandoned application. I denied that request. Much of the preparation for the no-fee application was duplicated in preparation for Ms. Beninteso's application. Costs of Mr. Bhimani's abandoned application will be costs in the cause.
- [4] Mr. Bhimani's application has been disposed of. I turn now to Ms. Beninteso's applications.
- [5] In an application to quash the appeal for lack of merit, my powers are set out in s. 10 of the Court of Appeal Act, R.S.B.C. 1996, c. 77: 10 (2) In an appeal or other matter before the court, a justice may do one or more of the following:
- (a) make an order incidental to the appeal or matter not involving a decision of the appeal on the merits; [Emphasis added.]
- [6] In *Kaiser (Re)*, 2007 BCCA 253, Mr. Justice Donald, in chambers, noted that although there is inherent jurisdiction in the court to quash an appeal that is devoid of merit, this is the power of the court when constituted as a division. He succinctly stated at para. 16 that "[t]he Act does not give the power to a single justice in chambers." A division of this court recently quoted this passage with approval in *Milani v. Milani*, 2019 BCCA 361 at para. 13.
- [7] I consider the application to quash the appeal on the basis it is without merit is a decision of the appeal on the merits and, therefore, is beyond my s. 10(2)(a) authority. The application to quash the appeal is dismissed.
- [8] Before I turn to the other applications, I need to describe this litigation. This is family litigation between the parties. They lived in a marriage-like relationship and are now separated. Mr. Bhimani claimed in the litigation, among other matters, that he was entitled to a share of the family property. Ms. Beninteso claimed for child support. In response to Mr. Bhimani's claim, she said the claim for family property was brought beyond the limitation period, which requires legal action to be commenced within two years of separation. Thus the separation date was vital to the jurisdiction of the court to decide the property issue that Mr. Bhimani was advancing. Justice Myers found the separation date was more than two years before the litigation commenced and, accordingly the limitation period

precluded Mr. Bhimani from bringing the action. On that basis, he dismissed Mr. Bhimani's action for a share of property. Mr. Bhimani contests that order in this appeal.

- [9] As I said, the action also involved questions of child support. The parties entered into a consent order requiring Mr. Bhimani to pay interim child support in the amount of \$266.37 a month, predicated on an income for him of a little over \$28,000 a year. Mr. Bhimani has not paid this amount regularly, in fact, he made only one payment on the order. He has been subject to garnishing orders by the Family Maintenance Enforcement Program in the approximate amount of \$150 per month for the past few months. The arrears of child support are now over \$12,000.
- [10] In the course of the proceedings, orders were made requiring disclosure of quite a long list of items. Some of those documents were required to be disclosed by the consent order that was entered into by the parties, but by the time the matter reached Master Dick, many of those documents, if not all of them, had not been produced. Master Dick's order set out a long list of documents that were to be provided, including, for example: credit card statements; employment documents; medical documentation; bank statements; and so on. Before me, Mr. Bhimani says, for example, he did not have a bank, so no bank statements could be provided. But that is not in evidence before me, that is just a statement, and it does not have the force of having been sworn and all the serious consequences that relate to putting information in evidentiary form.
- [11] Master Dick, dissatisfied with the degree of disclosure that had been provided, ordered Mr. Bhimani to pay \$1,000 to Ms. Beninteso for failure to comply with the earlier disclosure orders. I take it that the order of Master Dick was made under s. 230(2)(b)(ii) of the Family Law Act, S.B.C. 2011, c. 25.
- [12] In the order appealed, Justice Myers ordered a further payment of \$3,500 to be made to Ms. Beninteso for non-compliance with previous orders because still the disclosure had not been provided. The judge described this amount as a fine, but the entered order simply requires payment by Mr. Bhimani to Ms. Beninteso of that amount, that is, it appears to be a s. 230(2)(b)(ii) order, not a s. 230(2)(b)(iii) fine.
- [13] As to security for costs, the income for Mr. Bhimani was agreed for the purposes of the consent order at more than \$28,000. Mr. Bhimani's tax returns show his income in the range of \$11,000, in very rough terms, over the relevant period. Mr. Bhimani says today that he is unemployable because he has suffered a traumatic head injury, but apart from asserting this he has not filed evidence. Today, he handed up a letter from a physician, which is likely the same letter he handed up to Madam Justice DeWitt-Van Oosten earlier this year on another appearance in this court, but it has not been appended to an affidavit. I have asked that the letter be copied and put in the court file so there is a record of what I have looked at today. I do note, however, apart from saying that Mr. Bhimani suffers from a traumatic head injury, the sort of information required to discern his employability is just not on the record at all. The documents filed in the litigation reveal that Mr. Bhimani has no assets and no debts.

- [14] I turn now to the application for security for costs.
- [15] The authority a single judge has to order security for costs of an appeal is set out in s. 24(1) of the Court of Appeal Act: 24 (1) A justice may order that an appellant pay to or deposit with the registrar security for costs in an amount and in a form determined by the justice.
- [16] The criteria that we apply on such an application is stated in *Creative Salmon Company Ltd. v. Staniford*, 2007 BCCA 285 at para. 9. The following considerations are relevant: the appellant's financial means, the merits of the appeal; the timeliness of the application; and whether the costs will be readily recoverable: *Lu v. Mao*, 2006 BCCA 560 at para. 6. The ultimate question to be answered by a justice in chambers is whether making an order for security for costs is in the interests of justice. The onus on the application is placed on the appellant, Mr. Bhimani, to show that the interests of justice require that security for costs not be ordered.
- [17] Here, I observe Mr. Bhimani says he lacks means to pay large sums, but he has not provided the evidence required to back this up. In particular, he has not provided the disclosure ordered by the Supreme Court in the sternest of terms, which led it to impose penalties. It appears that his expenses are greater than his income and so from that, I deduce he has other sources of support, but those sources of support are not explained to the court. I cannot say on the information before me that Mr. Bhimani is unable to post any amount, but the question would be how much can be posted.
- [18] So, I turn to the questions I should ask.
- [19] On the merits of the appeal, I observe that the question that Mr. Bhimani puts on the appeal is one of fact, which is, was the judge right in determining the separation date was more than two years before the litigation was commenced. On questions of fact, the appellant faces a very high hurdle. The test that Mr. Bhimani must meet is whether he can establish that there is an obvious and overriding error of fact. The court will consider whether there was a body of evidence from which the judge could draw his or her conclusion. We are not a trial court, so we will not have the opportunity to choose between one version of events and the other version of events. It was up to the trial judge to do that. The question for us will be whether there is a foundation of evidence for the trial judge to reach his conclusion. It seems to me that the appeal presented by Mr. Bhimani is quite weak and he is unlikely to succeed on appeal. I will not say it is hopeless, but for purposes of this application, I must say the appeal appears to me to be of doubtful merit.
- [20] As to the timeliness of the application, I acknowledge that the application has been brought reasonably promptly after the appeal was started. The next question is whether the costs will be readily recoverable from Mr. Bhimani in the event that he loses the appeal and costs are ordered in favour of Ms. Beninteso. It seems to me from the history we have on this file of Mr. Bhimani not satisfying the disclosure orders, not paying the child support regularly, and not paying the amounts of the penalties that have been ordered, it is quite likely it would be very difficult for the respondent to recover in a timely way, any costs that might be

ordered in her favour on the appeal. All of that supports an order for security for costs in this court.

- [21] I turn now to the question of security for the trial costs.
- [22] There is only one order in issue here; that is the order of Justice Myers. Ms. Beninteso seeks security for costs related to two orders - the orders of Justice Myers and Master Dick. The latter order is not appealed. Ms. Beninteso has presented a draft bill of costs for the Supreme Court that rolled the two applications together, and that bill of costs has not been assessed. It is unusual for us to order security for costs of the trial court where the costs have not been assessed. Here there is even an extra complication of the costs having been rolled together. To come to any decision as to what amount should be posted, if I were of a mind to give security for trial costs, I would have to just stab at separating costs of the separate proceedings. This would be inappropriate to do, given the total amount itself is in question. Accordingly, I do not consider that I should order security for the trial costs.
- [23] Ms. Beninteso also applies for an order that Mr. Bhimani pay the penalties that have been ordered to be paid; namely, the \$1,000 and the \$3,500 amounts. The application for payment of the penalties is combined with an application that I order payment of the arrears of child support and the disclosure ordered be provided, as a condition of the appeal proceeding.
- [24] It seems to me that these requests are better addressed by separating the payment of the penalties, which are in the nature of judgments of the trial court, and the payment of the arrears of child support and the disclosure as separate matters. As to the penalties, they are in the nature of judgments of the Supreme Court and I have authority under s. 10(2) to order security for payment of them. The \$1,000 penalty, however, is not part of the appeal and I do not consider it is properly engaged in the application. On the other hand, I see no reason at all why Mr. Bhimani ought not to secure the penalty he has been assessed for non-compliance of the court order, in the order appealed. But rather than order he pay that sum to Ms. Beninteso right now, because it is part of the judgment appealed, I consider I should order security for that judgment sum, \$3,500. To order payment directly to Ms. Beninteso would be contrary to *The Owners, Strata Plan LMS3259 v. Sze Hang Holding Inc.*, 2010 BCCA 80, in which Mr. Justice Smith wrote "there is nothing in the Court of Appeal Act that would confer authority on me sitting here today to order as a condition of continuing with this appeal that judgments in favour of the respondents in other matters be paid."
- [25] On the question of what should be posted as security for costs, I am of the view that Mr. Bhimani should post \$6,000 as security for costs of the appeal. In addition he must post \$3,500 as security for the penalty judgment in favour of Ms. Beninteso made by Justice Myers. All in all, that adds up to \$9,500. I understand that is a considerable sum, but there is no evidence before me that it is beyond Mr. Bhimani's capacity.
- [26] Now, I come to the orders of child maintenance and compliance with the disclosure orders.

- [27] I am asked to order the arrears be paid as a condition of continuing. That is not, in my view, an order that should be made. This court has the authority to refuse to hear an appeal where the appeal relates to an order that has not been complied with, and we exercise this authority for non-payment of child support. So, it may be, Mr. Bhimani, that the court refuses to hear your appeal if you do not bring yourself up to date on your child support obligations, or at least make a very strong attempt to do so, by the time the appeal starts. I am not saying you cannot proceed with the appeal until you are up to date, as it may be it takes you some time to figure out how to catch up, but you must pay your child support and the court is very firm on that. You may expect the court to question you closely on the question of your compliance when the appeal comes on for hearing, if you are able to press it that far.
- [28] In summary, there is quite a sum for you to post as security for costs of the appeal and as security for the trial judgment - the two amounts of \$6,000 and \$3,500 must be posted. I will give you until Friday, April 10, 2020 to do so. This is longer than we usually give, but I think it may take you a little bit of time to organize yourself to do that. Until the money is posted, the appeal is stayed.
- [29] The costs of the applications today will be in the cause. "The Honourable Madam Justice Saunders"

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