
CANADA / JUDGMENT

Bhimani v. Beninteso

2020 BCCA 174

COURT

British Columbia Court of Appeal

DECIDED

14 May 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCCA 174 Bhimani v. Beninteso

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Bhimani v. Beninteso,

2020 BCCA 174

Date: 20200514

Docket: CA46470

Between:

Aly Shiraz Bhimani

Appellant

(Claimant)

And

Jessica Beninteso

Respondent

(Respondent)

Corrected Judgment: The text of the judgment was corrected
in the Summary and at para. 3 on June 19, 2020.

Before:

The Honourable Madam Justice MacKenzie

(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
(via teleconference):

A.S. Bhimani

Counsel for the Respondent
(via teleconference):

F. MacLean

A. Sadowska, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

May 14, 2020

Place and Date of Judgment:

Vancouver, British Columbia

May 14, 2020

Summary:

The respondent wife applied pursuant to s. 24(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [Act] for dismissal of this appeal as abandoned on the basis the appellant husband failed to comply with an order made under s. 24(1) of the Act to post security for costs of the appeal. The underlying appeal is from the dismissal of a claim for division of family property and the imposition of a fine for non-compliance with disclosure obligations. The appellant has already been granted numerous adjournments in the proceedings. Held: Application granted. The appeal is dismissed as abandoned. Based on the factors relevant to the exercise of the discretion provided by s. 24(2) of the Act, it is not in the interests of justice to grant the appellant yet another adjournment. The appeal is dismissed as abandoned.

MACKENZIE J.A.:

Overview

- [1] The respondent, Jessica Beninteso, applies for an order dismissing this appeal as abandoned pursuant to s. 24(2) of the Court of Appeal Act, R.S.B.C. 1996, c. 77 [Act], on the basis that the appellant, Aly Bhimani, failed to comply with an order that he post security for costs of the appeal pursuant to s. 24(1) of the Act.
- [2] The underlying appeal is from an order of Justice Myers dismissing Mr. Bhimani's claim for division of family property under the Family Law Act, S.B.C. 2011, c. 25 [FLA], and imposing a fine of \$3,500 against Mr. Bhimani for non-compliance with disclosure obligations.
- [3] On February 10, 2020, Justice Saunders, sitting as a single justice of this Court in chambers, ordered Mr. Bhimani to post \$9,500 as security for costs by April 10, 2020 (2020 BCCA 79). The 60-day period was longer than is typically ordered. It is now more than an additional 30 days later and Mr. Bhimani has still not posted the security.
- [4] Originally this matter was scheduled to be heard in chambers on May 8, 2020. Mr. Bhimani was served with the motion materials on April 30, 2020. He did not respond. However, he was served with Ms. Beninteso's written submissions and brief of authorities on May 7, 2020. At the hearing on May 8, 2020, Mr. Bhimani objected to the hearing proceeding because he said he did not have time to consider those materials. On that basis, the judge in chambers on May 8, 2020, adjourned the matter to today.
- [5] For the reasons that follow, I would dismiss the appeal as abandoned. It is not in the interests of justice to grant Mr. Bhimani yet another adjournment in order for him to apply before a division of this Court, pursuant to s. 9(6) of the Act, to vary the time to post the security for costs and to seek an extension of time to make that application.

Background

- [6] Ms. Beninteso and Mr. Bhimani are former spouses who separated after living in a marriage-like relationship. They have a daughter together.
- [7] On July 25, 2018, Mr. Bhimani filed a notice of family claim for division of family property. Ms. Beninteso made a counterclaim for child support and applied to have Mr. Bhimani's claim dismissed on the basis it was out of time, and he had breached court orders and his disclosure obligations. She also sought an order imposing a fine against Mr. Bhimani for this conduct.
- [8] Ms. Beninteso's application was heard by Justice Myers on September 26, 2019. Mr. Bhimani did not attend. He notified Ms. Beninteso's counsel by email on the morning of the hearing he would not be attending, citing medical reasons but providing no documentation as to any medical condition. The judge noted that Mr. Bhimani had failed to appear at proceedings in the litigation on two prior occasions, each time providing short notice and no supporting documentation. Due to this history of non-appearances, the judge proceeded to hear Ms. Beninteso's application in Mr. Bhimani's absence.

- [9] On the evidence before him, the judge concluded the parties had separated on June 7, 2016, more than two years before Mr. Bhimani filed his claim. Citing s. 198 of the FLA, which requires that a claim for property division be brought no later than two years after the date of separation, the judge found Mr. Bhimani's claim was out of time and should be dismissed. He also ordered Mr. Bhimani to pay a fine of \$3,500 to Ms. Beninteso for his failure to comply with disclosure obligations. The judge noted that Mr. Bhimani had previously been fined \$1,000 for non-compliance with a disclosure order. The judge adjourned the issue of child support.
- [10] It appears that at some point the parties entered into a consent order requiring Mr. Bhimani to pay child support of \$266.37 per month. Mr. Bhimani has not been paying this amount and is in significant arrears. He has been subject to garnishing orders by the Family Maintenance Enforcement Program. I understand from Mr. MacLean that Mr. Bhimani has only ever made one voluntary child support payment.
- [11] On October 28, 2019, Mr. Bhimani filed a notice of appeal seeking to overturn the orders of Myers J.
- [12] Mr. Bhimani subsequently filed an application for an order that no fees are payable. Ms. Beninteso filed an application seeking orders that: the appeal be quashed on the ground that it lacks merit; Mr. Bhimani post security for costs of the appeal and for costs ordered in the court below; and Mr. Bhimani pay the fines ordered against him, his child support arrears, and produce documents ordered to be disclosed as conditions of the appeal proceeding. These applications were first heard by Justice DeWitt-Van Oosten on January 16, 2020, following an adjournment sought by Mr. Bhimani of a previous hearing date. That was the first adjournment in this Court.
- [13] At the hearing before DeWitt-Van Oosten J.A., Mr. Bhimani again sought an adjournment on the basis he needed additional time to secure pro bono legal assistance. Justice DeWitt-Van Oosten adjourned the applications for a second time, finding that Mr. Bhimani would benefit from the assistance of counsel as he was unemployed and had presented a letter from a physician offering prima facie evidence that he suffers from a traumatic brain injury. While she acknowledged that a further adjournment would prejudice Ms. Beninteso, the judge found that, on balance, the interests of justice warranted an adjournment. That was the second adjournment in this Court.
- [14] Justice Saunders subsequently heard these applications on February 10, 2020. Mr. Bhimani had abandoned his application for an order that no fees are payable upon learning that he would still be required to pay for appeal books and transcripts in the appeal proper.
- [15] Considering Ms. Beninteso's applications, Saunders J.A. found she did not have the authority to dismiss Mr. Bhimani's appeal for lack of merit, noting her limited powers as a single justice as set out in s. 10 of the Act.

- [16] Justice Saunders then concluded Mr. Bhimani should be required to post security for costs of the appeal in the amount of \$6,000, pursuant to s. 24(1) of the Act, and security for the fine imposed by Myers J. of \$3,500, pursuant to s. 10(2) of the Act. She considered first that the merits of Mr. Bhimani's appeal appeared "quite weak" and he is "unlikely to succeed on appeal" because he seeks to challenge only findings of facts. Justice Saunders then noted Ms. Beninteso's application was brought promptly, and it would likely be very difficult for Ms. Beninteso to recover a costs award, given Mr. Bhimani's history of not following court orders, not paying child support, and not paying fines imposed against him. Justice Saunders acknowledged it may be difficult for Mr. Bhimani to post the amount of security ordered, but found he had not submitted evidence to show it was beyond his capacity. With respect to his income, she noted that for the purposes of child support, the parties had agreed that Mr. Bhimani's income was over \$28,000, although his tax returns showed an income in the range of \$11,000. Mr. Bhimani did not provide any evidence of his employability.
- [17] Next, Saunders J.A. declined to order that Mr. Bhimani pay the child support arrears as a condition of continuing the appeal. However, she informed Mr. Bhimani that the division scheduled to hear his appeal (if and when that time came) may decline to hear it if he had not attempted to catch up on child support payments.
- [18] Justice Saunders ordered that Mr. Bhimani post security for costs of the appeal and the judgment below by April 10, 2020. She stayed the appeal until those payments were made. She noted that she was giving Mr. Bhimani more time than is usually granted for the posting of security.
- [19] Mr. Bhimani has still not posted the required security for costs. Further, he has also failed to file an appeal record and transcript due by December 27, 2019, and failed to file the appellant's factum and appeal book, which were due within 30 days after filing the appeal record. This failure to prosecute the appeal was the state of affairs before Saunders J.A., although Ms. Beninteso's application today is only for an order dismissing the appeal as abandoned under s. 24(2). In addition, Ms. Beninteso says that Mr. Bhimani continues not to pay child support.

Positions of the Parties

Ms. Beninteso

- [20] In support of her application, Ms. Beninteso has provided a sworn affidavit, in which she deposes the following, among other things:
- a) Mr. Bhimani has sought an adjournment at nearly every court proceeding in this litigation, which has caused her significant stress and financial difficulty;

- b) the present COVID-19 pandemic has not changed Mr. Bhimani's circumstances. He relies on it now to say that we are in unusual times, so he ought to be given ample time--more time--to post security for costs. But Ms. Beninteso says Mr. Bhimani claimed to be "indigent" at the hearing before Saunders J.A. on February 10, 2020, which she has already taken into account;
 - c) as of April 29, 2020, Mr. Bhimani's child support arrears total \$12,982.28; and
 - d) Ms. Beninteso will face substantial prejudice if the appeal is neither heard nor dismissed because there is a Certificate of Pending Litigation ("CPL") registered against her property, preventing her from selling it. She would like to sell the property and move as soon as possible for reasons relating to her privacy and safety and because she may need the funds to pay for the post-secondary education of the parties' daughter.
- [21] Ms. Beninteso also relies on an affidavit sworn by Krystal Wong, legal administrative assistant at the law firm representing Ms. Beninteso. Ms. Wong's affidavit details the communications between counsel for Ms. Beninteso and Mr. Bhimani (and his former counsel) regarding a previously scheduled chambers hearing in this Court.

Mr. Bhimani

- [22] Before me today, Mr. Bhimani seeks what is in fact an adjournment of this matter because he wishes to pursue the matter of having the time extended for him to post the security for costs ordered on February 10, 2020, by Saunders J.A. I have explained to him that would require an application before a division of this Court, pursuant to s. 9(6) of the Act, because it amounts to an application to vary the order of a single justice in chambers (the order of Saunders J.A. dated February 10, 2020). He would also require an extension of time by which to file such an application. This is so because an application to vary an order of a single justice under s. 9(6) must be made within seven days of the order for the posting of security for costs (R. 34 of the Court of Appeal Rules, B.C. Reg. 297/2001 [Rules]). He again relies on there being unusual circumstances due to the COVID-19 pandemic. He says this affects his ability to gather the funds to post security for costs. Mr. Bhimani suggests he might be able (or would be able) to obtain these funds from his sister and her husband who apparently have a dental practice. However, the dental office appears to have been temporarily shut down due to the COVID-19 pandemic.
- [23] I have nothing before me to indicate any support for Mr. Bhimani's submission that adjourning this matter would actually give him an opportunity to comply with the order to post security for costs. There are no affidavits from any of his family members about being prepared to loan him that money.

[24] Mr. Bhimani further says he was told by the Court of Appeal Registrar or the Court of Appeal Registry that he could not file any materials, unless they were urgent, until May 18, 2020. However, I have difficulty accepting that because the British Columbia Court of Appeal's website indicates that the process for filing urgent chambers applications and materials during the COVID-19 pandemic is available only until May 4, 2020. On May 4, 2020, the Court resumed accepting chambers applications that were not urgent.

Law

- [25] Under s. 24(2) of the Act, a single justice in chambers may dismiss as abandoned the appeal of an appellant who fails to comply with an order to pay security for costs of the appeal made pursuant to s. 24(1).
- [26] Section 10(2)(e) also provides a justice power to dismiss an appeal as abandoned where the appellant has failed to comply with provisions of the Act, the Rules, or an order extending or shortening the time for the doing of an act or taking of a proceeding. Although, as I have said, Ms. Beninteso's application is under s. 24(2).
- [27] Neither s. 24(2) nor s. 10(2)(e) provide authority to dismiss an appeal as abandoned for failure to comply with an order for security for costs of the trial judgment: *First Majestic Silver Corp. v. Santos*, 2014 BCCA 115.
- [28] The power to dismiss an appeal under s. 24(2) is discretionary and requires consideration of all relevant circumstances: *XY, LLC v. IND Diagnostic Inc.*, 2016 BCCA 469 at para. 43 (Savage J.A. in Chambers). The particularly relevant factors are set out in *Quinn v. Coutts*, 2018 BCCA 433 (Hunter J.A. in Chambers):
- [14] In my opinion, when a single judge is called upon to exercise the discretion conferred under s. 24(2), the following considerations among others would be relevant:

- What was the reason the appellant failed to comply with the order? Has the appellant offered a realistic assurance that security will be posted within an acceptable period of time? [See *Toch v. Grove*, 2010 BCCA 428 at para. 2 (Chiasson J.A. in Chambers).]

No such realistic assurance has been provided to this Court today.

- Will the delay in posting security cause prejudice to the respondent?

I am quite satisfied that Ms. Beninteso would experience serious prejudice from an adjournment, given the history of this matter and the number of previous adjournments.

- Do the apparent merits of the appeal justify declining to exercise the jurisdiction to dismiss under s. 24(2)?

The apparent merits do not justify declining to exercise this discretion. Justice Saunders has already determined that Mr. Bhimani's appeal is weak, and I would agree given Myers J. found that Mr. Bhimani was out of time to file his claim for division of property. Justice Saunders described the merits of Mr. Bhimani's appeal as appearing quite weak and stated he was unlikely to succeed on appeal because he seeks to challenge only findings of fact.

[29] In Quinn, Justice Hunter held it was in the interests of justice--the overall question--to dismiss the appeal because the merits of the appeal were very weak. The appellant's prospects of generating enough funds to post the security in the near future were bleak: at paras. 15-19. That is similarly the case before me today.

Analysis

[30] In my view, Ms. Beninteso has met the test to dismiss the appeal as abandoned under s. 24(2) of the Act. Mr. Bhimani has failed to comply with the order of Saunders J.A. to post the security for costs of the appeal by April 10, 2020. Thus, I have authority under s. 24(2) to dismiss the appeal as abandoned.

[31] Mr. Bhimani has provided no acceptable explanation for why he has not posted security for costs of the appeal, nor any assurance that he will be able to post the security in the near future. He asserts he is unemployed, but has not provided evidence of efforts to gain employment to permit him to post the amount required. He also suggests that the current COVID-19 pandemic has affected his ability to post the amount ordered. However, he does not explain how his financial situation is different from his situation before the pandemic. As noted by Ms. Beninteso, the evidence before Saunders J.A. suggested Mr. Bhimani had limited income even then.

[32] Given Mr. Bhimani's history of failing to pay child support, fines, and costs ordered in the court below, I have no confidence that he will pay the security for costs ordered by Saunders J.A. in a timely manner or at all, even if I were to accede to his implicit application for an adjournment in order to make an application to extend the time for the posting of security for costs. There remains a very legitimate concern that if Ms. Beninteso were successful on appeal, it would be very difficult for her to recover her costs from Mr. Bhimani.

[33] I am satisfied that Ms. Beninteso would be prejudiced if a further extension or adjournment were granted to Mr. Bhimani because of the CPL registered against her property. She has demonstrated that she has reasons to sell the property in the near future, which the CPL would prevent. I also accept she has experienced considerable stress and added financial burden as a result of repeated delays due to Mr. Bhimani's repeated requests for adjournments and failure to move the appeal along as required by the Rules.

- [34] As Saunders J.A. noted, Mr. Bhimani has not identified any legal errors in his notice of appeal. Rather, he presumably takes issue with Myers J.'s factual findings regarding when the parties separated. This is a high burden and I agree that the merits of Mr. Bhimani's appeal appear very weak.
- [35] Given Mr. Bhimani's demonstrated disregard for court orders and the delays incurred in these proceedings to date, I find it in the interests of justice to dismiss the appeal as abandoned under s. 24(2) of the Act.

Conclusion

- [36] The appeal is dismissed as abandoned with costs to Ms. Beninteso.

"The Honourable Madam Justice MacKenzie"

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/ca/20/01/2020BCCA0174cor1.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/bhimani-v-beninteso-2020>

Prepared on 26 October 2026 · Esheria