

CANADA / JUDGMENT

# Devathasan v. Devathasan

2020 BCCA 115

## COURT

British Columbia Court of Appeal

## DECIDED

2 April 2020

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2020 BCCA 115 Devathasan v. Devathasan COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Devathasan v. Devathasan, 2020 BCCA 115 Date: 20200402 Docket: CA46267 Between: Christie Kanti Devathasan previously known as Kanti Devi d/o Ramnath Rai Respondent (Claimant) And Gobinathan Devathasan also known as Devathasan s/o Gobinathan Nair Appellant (Respondent) Before: The Honourable Madam Justice Newbury The Honourable Madam Justice Saunders The Honourable Mr. Justice Grauer On an application to vary: An order of the Court of Appeal for British Columbia, dated November 27, 2019 (Devathasan v. Devathasan, 2019 BCCA 436, Vancouver Docket CA46267). Oral Reasons for Judgment Counsel for the Appellant (via teleconference): N. Nasser Counsel for the Respondent (via teleconference): L.N. MacLean, Q.C. Place and Date of Hearing: Vancouver, British Columbia April 2, 2020 Place and Date of Judgment: Vancouver, British Columbia April 2, 2020 Summary: The appellant applies under s. 9 of the Court of Appeal Act to vary the conditions established by a single justice in granting his application for an extension of time to commence his appeal. The conditions require the appellant to pay a minor portion of the sums owing to the respondent under the order appealed. Held: Application dismissed. The appellant did not meet the criteria for a variation established in Haldorson v. Coquitlam (City), 2000 BCCA 672.

- [1] SAUNDERS J.A.: Dr. Devathasan applies pursuant to s. 9 of the Court of Appeal Act, R.S.B.C. 1996, c. 77 to vary an order of Madam Justice Garson made November 27, 2019, by which she granted Dr. Devathasan's application to extend the time to appeal from the order of Justice Gomery following a trial in this family litigation, and seeks orders ancillary to an extension.
- [2] The order of Justice Gomery concerned, mainly, the division of assets, and spousal and child support. As Justice Garson described the trial judgment, Justice Gomery valued Dr. and Ms. Devathasan's combined assets at \$39,031,000. The order required Dr. Devathasan to pay Ms. Devathasan retroactive child support, \$579,000 as lump sum for child support for a period up to June 2022, \$1,185,344 in retroactive spousal support, and lump sum spousal support in excess of \$4 million. The order valued and divided the assets so that Ms. Devathasan would obtain assets of a value of \$16,388,000. It required Dr. Devathasan to pay a sum for dissipation of family property and to pay an equalization payment arising from the division of family assets. The order dealt with certain amounts respecting a credit card, made certain orders with respect to tax issues and arrangements for the sale of property, and ordered

special costs in favour of Ms. Devathasan for the entirety of the action. Those costs have been assessed at approximately \$1.5 million.

- [3] Justice Garson observed that "Ms. Devathasan deposed, and it is not disputed, that Dr. Devathasan has not complied with the order of Justice Gomery". She referred to Dr. Devathasan's non-compliance with the orders concerning: child support, the payment of the compensation order, execution of documents relating to a property and tax matters, and payment of the special costs.
- [4] Justice Garson referred to her discretion to impose terms and conditions provided by s. 10 of the Court of Appeal Act, which provides: 10 (2) In an appeal , a justice may do one or more of the following: . . .
- (f) when making an order, impose terms and conditions and give any directions as the justice thinks just.
- [5] Justice Garson referred to Dr. Devathasan's submission that he "does not have much in the way of liquid assets" and that "[i]n order to satisfy the \$10 million cash payment, he would have to sell sufficient real estate to recover the amount". I note, parenthetically, that the \$10 million cash payment referred to is the amount that was proposed by Ms. Devathasan as a condition for the extension of time and Justice Garson reduced that amount to the sums I have indicated.
- [6] Justice Garson noted that counsel for Dr. Devathasan advised that they intended to return to the trial judge to seek a stay of the judgment. Justice Garson referred to Dr. Devathasan's position that she ought not to deprive him of an appeal as punishment for past conduct and said:
- [26] In my view, there is ample evidence that Dr. Devathasan continues to disparage the judiciary and justice system, refuses to comply with or frustrates court orders, and declines to satisfy any part of the order made by Justice Gomery.
- [7] Justice Garson referred to the standard criteria for an extension of time and her obligation to balance the factors that play in determining the interest of justice. She noted that Dr. Devathasan's conduct warranting rebuke took place for the most part prior to judgment. She said that Ms. Devathasan continues to be prejudiced by Dr. Devathasan's conduct in refusing to comply with the order and in seeking an extension of time. In the result, she granted the extension of time on the following conditions:
- 1) that within seven business days Dr. Devathasan cooperate to remove certificates of pending litigation registered against certain properties;
  - 2) that within seven business days he transfer his title interest in certain property to Ms. Devathasan;

- 3) that within 30 days he pay to Ms. Devathasan \$500,000 towards the judgment for special costs;
  - 4) that within 30 days he pay into court \$12,000 as security for costs of the appeal; and
  - 5) that within 45 days he pay \$450,000 to Ms. Devathasan for non-resident taxes payable to accomplish the transfer of the property mentioned.
- [8] Justice Garson ordered Dr. Devathasan to pay \$2,500 in costs of the application in any event of the cause.
- [9] Dr. Devathasan contends he is unable to meet the financial conditions and says that they will prevent him from proceeding with a meritorious appeal. He says further that the payment of this sum would dispose of a meritorious appeal of the special costs order. Dr. Devathasan contends that Justice Garson erred in principle when she ordered \$450,000 to be paid on account of non-resident taxes because that amount was factored into the calculation of the equalization payment he is required to pay. He applies to vary the order so as to cancel the obligation to pay \$500,000 towards the special costs or alternatively he asks us to substitute for it the transfer of his interest in one of two properties offshore. He asks us to set aside the condition for payment of \$450,000 of non-resident taxes. He asks for an order that he be permitted to provide a Form A Transfer by February 27, 2020, being the date he eventually did provide it. He asks for an extension of time to file a tax clearance certificate - 30 days from obtaining an appraisal of the property it concerns. He asks for an extension of time to post security for costs of the appeal ordered by Justice Garson, \$12,000, and seeks an order setting aside the order she made for costs of the application, or seeks an extension of time to pay that amount.
- [10] An application under s. 9 of the Court of Appeal Act is not a fresh hearing of the original application. As set out in *Haldorson v. Coquitlam (City)*, 2000 BCCA 672, we ask whether the justice was wrong in law, or wrong in principle, or misconceived the facts.
- [11] I do not consider that Justice Garson erred in her appreciation of the evidence of Dr. Devathasan's inability to pay. She considered his submission with the evidence, and rejected it. I see no error in her approach.
- [12] As to the condition for payment of \$450,000, although that sum is reflected in the equalization payment calculation, that payment has not been made and \$450,000 would be a partial payment of the amount owing. I observe that the division of property, in the main, is not contested in the appeal.

- [13] Nor do I consider that any of the conditions established by Justice Garson, in any respect, effectively dispose of any issue on the appeal as Dr. Devathasan contends. As to the order of special costs, only a partial payment is ordered. Should Dr. Devathasan succeed on appeal, there can be an accounting back. I observe that there are considerable sums owing to Ms. Devathasan under the order that were not included in Justice Garson's conditions, which will facilitate a set off if needed.
- [14] Nor do I consider the date for providing a Form A should be altered to February 27, 2020. To do so would suggest, falsely, that Dr. Devathasan had complied with the term.
- [15] I would dismiss Dr. Devathasan's application to vary the conditions that Justice Garson imposed in extending the time to appeal with costs. I would order costs of this application to Ms. Devathasan in any event of the appeal.
- [16] There is however the question of compliance with the conditions still outstanding. Justice Garson provided a timeline for the payments, which timeline has long passed. Dr. Devathasan has been sheltered for several weeks from the consequences of non-compliance by his application to vary, and has had time to organize his affairs. Knowing now of the results of his application, I consider a short time should be provided to him to comply with the conditions. Setting aside the Form A condition, I would require Dr. Devathasan to comply with all the remaining conditions described in the order of Justice Garson by 4:00 p.m. on April 17, 2020. Failing such compliance with those conditions, Ms. Devathasan will be in a position to make whatever application she may consider appropriate.
- [17] On that basis, I would dismiss the application with the variation in the time I have indicated.
- [18] NEWBURY J.A.: I agree.
- [19] GRAUER J.A.: I agree.
- [20] NEWBURY J.A.: The application is dismissed. [Discussion with respondent's counsel re: special costs]
- [21] NEWBURY J.A.: We are not granting that order. It will be at the usual scale. "The Honourable Madam Justice Saunders"

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Prepared on 24 October 2026 · Esheria