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## Prasad v Prasad [2000] FJLawRp 28; [2000] 1 FLR 54 (20 April 2000)

[\[2000\] 1 FLR 54](#)

IN THE HIGH COURT OF FIJI

VIJAY PRASAD

v

SATISH PRASAD

High Court Civil Jurisdiction  
Shameem, J  
20 April, 2000  
HBC 307/96

*Trust - Whether consent order can be set aside or varied where validly obtained.*

This is an application by the Plaintiff to set aside an order made by another judge of the High Court. The order was for the release of money held on trust by a third party (firm of solicitors which previously acted for the Plaintiff) for the benefit of the Defendant. The newly appointed solicitors had consented to the release of trust money to the Defendant and a consent order was made accordingly. Failure of the 3<sup>rd</sup> party to pay the money led to contempt proceedings issued at the behest of the Defendant. The Plaintiff subsequently made this application to set aside/vary the consent order made.

**Held** - The circumstances of the case clearly show that the previous order made should not be varied or set aside even if such powers existed.

Order of Pathik J ordering Messrs Sherani & Co to pay out sum confirmed until varied by superior court.

*Prem Narayan for the applicant*  
*Defendant in person*

20 April 2000.

**DECISION**

**Shameem, J**

This is an application by the Applicant to set aside an order made by Pathik J on 7<sup>th</sup> August 1998 ordering Messrs. Sherani & Co. to pay out the sum of \$16,000 held in its trust account, purportedly for the Defendant.

The basis of the substantive action was an application by the Plaintiff to evict the Defendant from the Plaintiff's property under section 169 of the [Land Transfer Act](#). The Plaintiff and the Defendant are brothers. The property had been part of the estate of their deceased father. Both Plaintiff and Defendant had been beneficiaries to the estate. Annexed to the Plaintiff's original affidavit, in support of the section 169 application, was a letter from Messrs. Sherani & Co., dated 20<sup>th</sup> March 1996 to the Defendant. That letter read, inter alia, as follows:

"We act on instructions from the Administratrix of the Estate of Ram Prasad. We advise that the property in CT 9758 has been sold and your share of the purchase price is held on trust. Upon your vacating the premises we shall release the monies to you. Kindly ensure that all amounts owed by you for electricity, water and rates are paid at the date vacant possession is delivered.

At present we are holding the sum of \$16,000 on trust for you ....

In the event that you do not vacate the premises by 30<sup>th</sup> April 1996 or damage the premises in any way then all repairs and legal costs will be deducted from your share of the proceeds ...."

Pathik J ordered vacant possession on 12<sup>th</sup> December 1996. The Defendant appealed against this decision, and execution of the judgment was stayed pending appeal. The Fiji Court of Appeal upheld Pathik J's decision. Writ of Possession was then issued against the Defendant. The Defendant vacated the premises.

On 7<sup>th</sup> April 1998 the Defendant filed a motion in the High Court seeking the following order:

"That the Plaintiff or his counsel be ordered to pay the defendant his share of the proceeds of sale of the estate property of Ram Prasad in the sum of \$16,000.00 in CT 9758 Lot 32 DP No. 2320 forthwith."

The motion was supported by the Defendant's affidavit sworn on 7<sup>th</sup> April 1998. In that affidavit he said that despite several requests to the Plaintiff's solicitors for the release of \$16,000, that sum was never paid to him.

On 28<sup>th</sup> May 1998 the Plaintiff filed notice of change of solicitors. Messrs. R. Patel & Co. were now to act for the Plaintiff in place of Messrs. Sherani & Co.

In an affidavit in reply, the Plaintiff said that he opposed the release of the \$16,000, but said that the costs of litigation and of repair to the premises as a result of damage caused by the Defendant should be accounted for. He said that repair costs were \$9,700, water bills \$1,268.53 and legal costs were \$4,541.72.

The application was heard on 7<sup>th</sup> August 1998, after Mr D. Sharma for the Plaintiff was given time to take instructions. On that day Mr Sharma consented to the release of the money held by Sherani & Co., to the Defendant. That consent was unconditional. An order was made accordingly. That order, sealed on 11<sup>th</sup> August 1998 reads:

"It is hereby ordered that the money held by Messrs. Sherani & Co in the trust fund for the applicant to be paid to him."

The order contains a Penal Notice addressed to Counsel for the Plaintiff, and to Messrs. Sherani & Co.

The money was not paid to the Defendant. The Defendant then issued contempt proceedings against Mr Hamendra Nagin, of Messrs. Sherani & Co. While those proceedings were still pending, the Plaintiff made this application to set aside the "consent order" of 7<sup>th</sup> August.

The contempt application was listed before Pathik J on 9<sup>th</sup> February 1999. Pathik J ordered Mr Nagin to supply details of a claim for legal costs totalling \$4500. In the meantime the balance of \$11,000 odd had been paid to the Defendant.

The summons to set aside Pathik J's order is supported by the affidavit of Vijay Prasad sworn on 2<sup>nd</sup> September 1999. The affidavit is silent on why Vijay Prasad (the Plaintiff) had instructed Messrs. R. Patel & Co. to consent to Pathik J's order to pay out the money to the Defendant. The instructions to Sherani and Co. to deduct legal costs of \$4,041.70 from the \$16,000 held in trust, is in direct contradiction to the instructions he presumably gave Mr D. Sharma on 7<sup>th</sup> August 1998, and is in defiance of Pathik J's order. The instructions to Sherani & Co., are dated 2<sup>nd</sup> September 1999.

At the hearing of this application, Ms P. Narayan for Messrs. Sherani & Co. argued that the court order made by Pathik J was void for lack of jurisdiction. She said that Sherani & Co. were not parties to the action, and could not be ordered to pay the Defendant the sum held in trust for the Plaintiff. She argued that Messrs. Sherani & Co. has a lien over the \$4,041.72. She did not explain why the Bill of Costs had not been submitted to the Court for taxation as ordered by Pathik J, but said that Messrs. Sherani & Co. had no obligation to obey a court order which was invalid, in its view.

The Defendant, in person, said that during the substantive section 169 application, Mr H. Nagin had told the Court that the \$16,000 held on trust would be released to the Defendant when he was ready to accept it. This was included in Pathik J's judgment of 12<sup>th</sup> December 1996. He opposed the setting aside or variation of the order.

Ms Narayan was unable to give me any authority to support the proposition that the High Court could set aside or vary a properly sealed order made by a Judge. She said that Messrs. Sherani & Co. had no right of appeal against Pathik J's order because it was not a party to the order.

In this regard, I can find no procedure that allows me to set aside a consent order regularly made. The High Court Rules 1988 make specific provision for the setting aside of certain types of orders. For instance Order 32 rule 6 allows a judge to set aside an order made ex parte. Order 19 rule 9 allows a judge to set aside judgments made in default of pleadings. The principle behind such powers is to allow a party, who has not been heard on the merits of his/her case, to be heard.

However, those powers, and that principle are clearly inapplicable here. The Plaintiff was heard on the application. He was given time to instruct his counsel, who then consented to the order on his behalf. Furthermore, the money which was the subject of the order was either his money, or the defendant's money kept in trust by Messrs. Sherani & Company. The Plaintiff himself clearly abandoned his application to have legal costs deducted from the \$16,000, by 7<sup>th</sup> August 1998.

The circumstances of the case clearly show that the order of Pathik J should not be varied or set aside even if such powers existed.

The Plaintiff agreed to the paying out of the \$16,000 to the Defendant, and instructed his solicitor to consent to the order. This position had been communicated to the Court, during the section 169 proceedings by his former counsel Mr Nagin. The issue of deducting legal costs from the \$16,000 was clearly abandoned before Pathik J before the consent order was made. No explanation has been given as to why the Plaintiff changed his mind a year later.

In instructing Messrs. Sherani & Co. to retain a portion of the money, in direct defiance of Pathik J's order, the Plaintiff's position is surprising. Furthermore, in deciding to abide by the Plaintiff's instructions rather than the court order, Messrs. Sherani & Co.'s position is similarly surprising. These entire proceedings appear to be dominated by persons who appear to put no weight at all on court orders. The Plaintiff and Messrs. Sherani & Co. may disagree with the court order. They may consider it invalid. However until it is set aside by a superior tribunal, they must abide by it. Even if Messrs. Sherani & Co. consider themselves powerless to appeal,

the Plaintiff is clearly not afflicted by a similar incapacity.

However, that is a matter for the contempt proceedings.

For the purpose of this application, I refuse to set aside Pathik J's order of 11<sup>th</sup> August 1998. The Applicant must pay the Defendant's costs which I set at \$50.00.

*Application dismissed with costs set at \$50.00.*

Mereseini R Vuniwaqa

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