

SINGHAPUTRA FINANCE LTD.,
vs
APPUHAMY AND OTHERS

COURT OF APPEAL,
WIMALACHANDRA J.,
C. A. NO. 449/03,
D. C. KANDY 26017/MR,
AUGUST 24, 2004

Civil Procedure Code, sections 181 and 653 - Sequestration before judgement - Ex parte order - Vacation of same - Averment in the affidavit that defendant would alienate the property - Is it sufficient ? - Validity of the affidavit.

The Court issued a writ of sequestration to sequester a vehicle belonging to the 3rd respondent, The 3rd respondent moved to vacate the order made ex parte by Court, on the affidavit of the petitioner, The District Court vacated the order on the basis that a mere averment in the affidavit is not sufficient

Held

- (i) The affidavit filed to seek relief incidental to the final relief is not in conformity with section 181. The Court cannot rely on the affidavit filed by the petitioner for the reason that the grounds of belief are not stated in the affidavit to enable Court to come to a conclusion.

- (ii) The affidavit is solely based on belief; reasonable grounds for such belief have not been stated.

APPLICATION for leave to appeal from an order of the District Court of Kandy.

Cases referred to :

1. *David and Co. v. Albert Silva* 31NLR 316
2. *Samarakoon v. Ponniah* 32 NLR 257
3. *Simon Fernando v. Gunasekera* 47 NLR 512

Kuvera De Zoysa with Senake de Saram for plaintiff - petitioner - petitioner

Reza Muzni for 3rd defendant/respondent

Cur. adv. vult.

September 24, 2004

WIMALACHANDRA, J.

The plaintiff-petitioner-petitioner (hereinafter referred to as the petitioner) instituted the action bearing No. MR/26017 in the District of Court of Kandy against the defendant-respondent-respondents (hereinafter referred to as the respondents) to recover a sum of money from the respondents on a Hire Purchase Contract entered into between the petitioner and the respondents.

Briefly, the facts relevant to this application are as follows :

The petitioner, whilst the case was pending made an application in terms of Section 653 of the Civil Procedure Code by way of petition and affidavit for a mandate of sequestration before judgment. The Court issued a writ of sequestration to sequester the vehicle bearing No. 58-2156 belonging to the 3rd respondent upon the petitioner's application being supported before the learned District Judge.

Thereafter the 3rd respondent filed an application to vacate the order of sequestration made by the Court, *ex-parte* on the affidavit of the petitioner. The Court fixed the matter for inquiry and at the inquiry both parties agreed that the matter could be disposed of by way of written submissions. Accordingly, both parties filed written submissions. Thereupon the Court made order on 04.11.2002 releasing the property, the said vehicle, from seizure and the writ be returned. It is against this order the petitioner has filed this application for leave to appeal.

The learned District Judge in his order expressed, that a mere averment in the affidavit of the petitioner that the applicant verily believes that the defendant is about to alienate the vehicle is not sufficient, and the learned Judge cited the cases of *David & Co. Vs. Albert Silva*⁽¹¹⁾ and *Samarakoon Vs. Ponniah*⁽¹²⁾ in support of his opinion.

Upon a consideration of the affidavit filed by the petitioner, it appears that he had merely set out that the 3rd respondent was making arrangements to alienate the vehicle No. 58-2156 and that unless an order for sequestration was issued he would be unable to recover the monies due to him. It is to be observed that the petitioner's affidavit is solely based on belief, but reasonable grounds for such belief has not been stated. The petitioner has not not stated in his affidavit the grounds for his belief that the 3rd defendant was making arrangements to alienate the vehicle No. 58-2156 with the intention of avoding payments to the petitioner.

Admittedly, the petitioner's applicatoin is an interlocutory application incidental to the final relief sought in this case. Accordingly in terms of Section 181 of the Civil Procedure Code, with regard to interlocutory applications, the affidavit containing statements regarding its belief may be admitted provided reasonable grounds for such belief is set out in the affidavit (see-*Simon Fernando Vs. Goonasekera* ⁽³⁾)

The interlocutory applications referred to in Section 181 of the Civil Procedure Code are those in which relief is sought in the course of a proceeding and incidental to the final relief sought in the case.

Chetaley and Rao in their *AIR Commentaries on the Indian Code of Civil Procedure*, 6th edition (1957), volume II, at page 2683 have this observation to make on the Indian section on "matters to which affidavits shall be confined" which is identical to our Section 181 ;

The ground of belief must be stated with sufficient clearness to enable a Court to judge whether it would be safe to act on the deponent's belief. Unless the affidavits are properly verified and are in conformity with the rule, they will be rejected by the Court. Thus where in an interlocutory application for injunction to restrain the publication of a libel the affidavit in support of the application stated that the documents complained of were to the best of his knowledge, information and belief, utterly untrue but no grounds for his belief were shown, it was held insufficient. an affidavit is defective if

the deponent does not say which part is based on information and which on belief or if he does not state the grounds of his belief.

In the circumstances it is my considered view that the affidavit filed by the petitioner to seek relief incidental to the final relief is not in conformity with Section 181 of the Civil Procedure Code. The Court cannot rely on the affidavit filed by the petitioner for the reason that the grounds of belief are not stated in the affidavit to enable the Court to come to a conclusion whether it would be safe to act on the petitioner's affidavit to grant the relief sought by the petitioner in its petition. The petitioner's affidavit is not an affidavit prepared in accordance with Section 181 of the Civil Procedure Code.

For these reasons the application for leave to appeal is refused. In all the circumstance of this case, there will be no order for costs.

Application refused.
