GORDON FRAZER & CO. LTD.

v.

JEAN MARIE LOSIO AND MARTIN WENZEL

COURT OF APPEAL.
L. H. DE ALWIS, J. AND G. P. S. DE SILVA, J.
C.A. 1379/83.
D.C. COLOMBO 2325/SPL.
MAY 2 AND 3 1984.

Injunction as substantive relief – Can such injunction be sought without declaratory relief? – Section 217(F) of the Civil Procedure Code – interim injunction granted ex parte – Can it be suspended? – Service of process on a company – Sections 471, 662, 666 of the Civil Procedure Code – Proxy of a Company – Arbitration – Scott v. Avery clause – Institution of suit without recourse to arbitration – Section 7 of the Arbitration Ordinance.

The plaintiff-petitioner instituted this action on 22.9.83 against three French Companies La Societe Nouvelle Des Establissements Foret, La S e Maury, and Klockner Ina as defendants to restrain them from repudiating their contract with the petitioner. The petitioner also sought an interim injunction restraining them and their servants and agents from interfering with the petitioner's rights under the contract until the determination of the contract. On 23.9.83 an interim injunction was granted *ex parte* as prayed for. On 30.9.83 the proxy of Jean Marie Losio and Martin Wenzel was filed by an Attorney-at-Law as persons on whom the injunction addressed to the three defendants had been served and also a motion seeking to have the injunction recalled or suspended until the disposal of a preliminary objection to the jurisdiction of the court to hear and determine the action as a clause in the contract required all disputes between the parties to be referred to arbitration. On 3.10.83 the court made order suspending the operation of the interim injunction without any notice to the plaintiff-petitioner. On 3.10.83 the Attorney-at-Law for Losio and Wenzel also filed a petition and affidavit praying for an order nisi in terms of section 377 (*a*) of the Civil Procedure Code setting aside the interim injunction. On 6.10.83 order nisi was entered and served on the plaintiff-petitioner who filed its objections on 19.10.83. As Losio and Wenzel were in the meantime attempting to encash the Performance Guarantee for Rs. 1,630,631.80 which plaintiff-petitioner had tendered in favour of the three defendants under the contract, the plaintiff-petitioner on 26.10.83 applied for a second interim injunction restraining the defendants from doing so either by themselves or through Losio and Wenzel until the final determination of the action and for an enjoining order in the same terms until the hearing and determination of the application. After hearing submissions the Court made order on 15.11.83 holding that its suspension order and order nisi were to be effective and that it would hold an inquiry into the objections to the order nisi.

The plaintiff-petitioner then filed papers in the Court of Appeal for Revision.

Held –

(1) The notice of interim injunction and summons had been validly served on the three defendant companies in terms of section 471 of the Civil Procedure Code. The defendants could then have appeared in court through an Attorney-at-Law if they had given him a proxy under their seal. But in the proxy filed by the Attorney-at-Law granted to him by Losio (an employee of the first defendant company) and Wenzel (a Director of the third defendant company) the signatures of Losio and Wenzel had been superscribed over a rubber frank of the defendant-companies. Losio and Wenzel have signed the proxy in their personal capacities and therefore have no status in law to participate in the proceedings. The proxy signed by them does not authorise the Attorney-at-Law to appear for the companies.

(2) There is no provision in section 666 of the Civil Procedure Code to suspend an interim injunction.

(3) The provision in the contract for reference to arbitration is not a *Scott v. Avery* clause and is not a condition precedent to the institution of an action. The jurisdiction of the court is not ousted by the failure to refer the dispute to arbitration. An agreement to oust the jurisdiction of the courts altogether is illegal and void as being contrary to public policy. Where there is an agreement between the parties to refer their differences to arbitration and one of the parties commences a suit without prior recourse to arbitration, the court can on application made to it stay the proceedings and refer the matter to arbitration under section 7 of the Arbitration Ordinance. But only the parties to a contract containing an arbitration clause can have recourse to section 7 of the Arbitration Ordinance.

(4) Where the defendants are trying to repudiate the contract entered into by them with the plaintiff-petitioner, such a dispute constitutes a dispute "relative to" the contract and falls within the arbitration clause set out in the contract.

(5) In the plaint itself the plaintiff can, as it has done, seek an injunction to restrain the defendants from committing an act, the commission or continuance of which would produce injury to the plaintiff, as a substantive relief. A decree granting such substantive relief is permissible in terms of section 217(F) of the Civil Procedure Code without a prayer for declaratory relief. It is relief of this type that plaintiff prays for in paragraph (*a*) of the prayer to the plaint. The reliefs in paragraphs (*b*) and (*c*) of the prayer to the plaint can be granted during the pendency of the action while the relief in prayer (*a*) will be granted if the plaintiff succeeds in establishing his right to it.

(6) The orders of 15.11.83 and 3.10.83 have been made per incuriam and are null and void.

Cases referred to :

(1) *Stassen Exports Ltd. v. Hebtulabhoy & Co. Ltd. [1984] 1 SLR 129.*

(2) *Jinadasa v. Weerasinghe (1928) 30 NLR 283.*

(3) *Scott v. Avery (1856) H. L. Cases 811.*

(4) *Thomson v. Charnock 1798 Term Reports 139.*

(5) *Wijeyanarayana v. General Insurance Co. Ltd. (1946) 47 NLR 289.*

(6) *Weerakoon v. Hewamallika [1978 – 79] 2 SLR 97, 103.*

(7) *Heyman v. Darwins Ltd. [1942] AC 356, 366.*

H. W. Jayewardene, Q.C., with *K. Kanag-Iswaran* and *Dinal Phillips* for the plaintiff-petitioner.

Herman J. C. Perera with *Tony Wickremasinghe* for the respondents.

Cur. adv. vult.

June 15, 1984.

L. H. DE ALWIS, J.,

The plaintiff-petitioner instituted action No. 2325/Spl. in the District Court of Colombo on 22.9.83 against three defendants, seeking, *inter alia,* an interim injunction in terms of paragraphs (*b*) and (*c*) of the prayer to the plaint, restraining them and their servants and agents from in any manner interfering with its rights under the contract annexed as A6 until the final determination of the action, and restraining them, their servants and workers howsoever from entering into any contract, bargain, agreement or arrangement or doing any act whatsoever with any third parties which will interfere with its rights under the said contract A6 until the final determination of this action. The plaintiff is a company incorporated under the provisions of the Companies Ordinance and the defendants are bodies corporate incorporated under the laws of the Republic of France. They are–

1. La Societe Nouvelle Des Establissements Foret, No. 30, Rue des trois Bornes, 75011, Paris, France and also of No. 113/1, 5th Lane, Colombo 3.
2. La Societe Maury, No. 30, Rue des trois Bornes, 75011, Paris, France, and also of No. 113/1, 5th Lane, Colombo 3.
3. Klockner Ina, No. 31, Rue Marbeuf, 75008, Paris, France, and also of No. 9, Abdul Gaffoor Mawatha, Colombo 3.

I shall refer only to the matters that are relevant to the present application. On 23.9.83 the application for the injunction in the plaint was supported and an interim injunction in terms of paragraphs (*b*) and (*c*) of the prayer to the plaint was issued and served with the summons on the three defendants. On 30.9.83, Herman J. C. Perera, Attorney-at-Law filed the proxy of one Jean Marie Losio and Martin Wenzel, the 1st and 2nd respondents, respectively, as the persons on whom the injunction addressed to the three defendants had been served, and also a motion seeking to have the injunction recalled or suspended until the hearing of the preliminary objection taken by him to the jurisdiction of the court to hear and determine the action, in view of a clause in the contract which required all disputes between the parties to be referred to arbitration. Order was made to call the case on 3.10.83. On 3.10.83 the motion was supported by Counsel and court made order suspending the operation of the interim injunction. No notice of the motion or of the calling date was given to the plaintiff. No appearance was also made on behalf of the 1 – 3

defendants. On the same day Mr. Herman Perera filed the petition and affidavit of Losio and Wenzel praying that the interim injunction issued by court be cancelled, set aside or recalled and that Order Nisi in terms of section 377 (*a*) of the Civil Procedure Code be entered, to take effect in the event of the plaintiff not showing cause against it on a date appointed for the purpose. It was supported by Counsel on 6.10.83 and Order Nisi was entered and served on the plaintiff who filed objections on 19.10.83 and moved court to vacate the suspension order made on 3.10.83. Inquiry was fixed for 20.10.83 and eventually came up for hearing on 8.11.83. In the meantime the plaintiff became aware that Losio and Wenzel who had obtained a suspension of the interim injunction had fraudulently made an application to the Indosuez Bank for the encashment of the Performance Guarantee that the plaintiff had tendered in favour of the defendants under the contract for the sum of Rs. 1,630,631.80. The plaintiff therefore made an application to the District Court under section 662 of the Civil Procedure Code on 26.10.83 praying for an interim injunction restraining the three defendants acting by themselves or through Losio or Wenzel from encashing the said Performance Guarantee until the final determination of the action and for an enjoining order in the same terms until the hearing and determination of the said application. After hearing submissions, the Judge reserved his order for 4.11.83, which happened to be a public holiday.

On 8.11.83 the Petitioner stated its objections to the Order Nisi and court reserved Order for 15.11.83. There has been some confusion over the nature of the inquiry because the court by its Order of 15.11.83 held that its suspension Order and the Order Nisi issued by it were effective and in force and then said that it would hold an inquiry into the objections filed against the Order Nisi. It is this order that the plaintiff-petitioner now seeks to have set aside by way of revision.

It is contended for the petitioner that the proxy filed by Mr. Herman Perera on behalf of Losio and Wenzel is in their personal capacities and not on behalf of the three defendants, who are bodies corporate. They therefore had no status in law to participate in the action which is against the three defendants, and obtain an order from court to suspend the operation of the Interim Injunction entered in favour of the plaintiff and an order nisi to set it aside. The proxy filed in the District Court by Mr. Perera has been signed by Losio and Wenzel. Above

Losio's signature is a rubber frank bearing the name "groupement Foret-Maury", while above that of Wenzel's, appears written in block letters, the name "Klockner Ina". The three defendants against whom the plaintiff filed action, are La Societe Nouvelle Des Establissements Foret, La Societe Maury and Klockner Ina. They are admittedly bodies corporate and their proxy should have been evidenced by their corporate seal.

In the affidavit filed in this court in objection to the petitioner's application, Losio describes himself as an Architect and an employee of the 1st defendant company, and Wenzel as a Director of the 3rd defendant company. The notice of the interim injunction and summons issued by the District Court have been served on them at their respective addresses, as principal officers of the defendant companies. That is a valid service on the defendants, in terms of section 471 of the Civil Procedure Code. The defendants could then have appeared in court through an Attorney-at-Law, if they had given him a proxy, under their seal, which they have failed to do. What has been affixed to the signatures of Losio and Wenzel, who have given their proxy to Mr. Perera, is a rubber frank of the defendant companies. The defendants are companies incorporated outside Sri Lanka and if they wish to carry on business within this country, they have to comply with the provisions of sections 394 et seq. of the Companies Act No. 17 of 1982.

The proxy purports to be one given by the three defendant companies to Mr. Herman J. C. Perera, to appear on their behalf in case No. 2325/Spl, filed by Gordon Frazer & Co. Ltd., and to act for and defend them in the action. But as pointed out earlier it is signed by Losio and Wenzel in their personal capacities. The learned District Judge has misdirected himself when he stated in his judgment that there is a "seal" too placed on the proxy. It is not the 'corporate seal' of the defendant companies that has been placed on the proxy but a rubber frank. The learned Judge thus erred in arriving at the conclusion that the proxy "appears" to be filed on behalf of the defendants. The learned Judge also held that proxy has been filed on behalf of the defendants because the Attorney-at-Law who filed it has stated in his motion that he is appearing on behalf of the parties on whom summons was served. That is the method of service of summons provided for on bodies corporate, by the Civil Procedure Code. But, if they wish to appear in court through an Attorney-at-Law, their seal must be affixed to the proxy.

I am of the view that in the absence of the corporate seal, the proxy granted to Mr. Herman J. C. Perera does not authorise him to appear for the defendants, but only for Losio and Wenzel in their personal capacities. But Losio and Wenzel are no parties to the action filed against the three defendant companies and have no status in law to participate in the proceedings. It was therefore not open to them to have appeared in the action and have had the interim injunction issued against the defendants, suspended, or to have taken steps for the issue of the Order Nisi on the plaintiff. The orders made by the learned Judge in this respect are consequently made per incuriam and are null and void.

In any event, as was held by this court in the recent case of *Stassen Exports Ltd.*, v. *Hebtulabhoy & Co. Ltd. (1)* in which I agreed with Moonamalle J., who wrote the judgment, there is no provision in section 666 of the Civil Procedure Code to suspend an interim injunction issued under that Chapter of the Civil Procedure Code. Vide also *Jinadasa v. Weerasinghe* (2). The order made by the Judge suspending the operation of the Interim Injunction is therefore invalid.

It was submitted by the learned Attorney-at-Law for the respondents, that arbitration provided for in clause 24 of the contract A 6, precludes recourse to a court of law. Indeed, what appears to have induced the learned Judge to make the order suspending the operation of the interim injunction issued by him ex parte at the instance of the plaintiff, is that there was clause 24 in the contract A 6, which required parties to settle any disputes relating to the contract by reference to arbitration by the International Chamber of Commerce in Paris. The learned Judge was of the view that the plaintiff was lacking in "uberrimae fides" in omitting to refer to this arbitration clause in its plaint and, as it had failed to give reasons why arbitration was not possible in terms of section 7 of the Arbitration Ordinance, Cap. 98, the Court had no jurisdiction to proceed with the action. Consequently he held that the order made by him suspending the operation of the interim injunction, was correct. The learned Judge has overlooked the fact that the plaintiff had in fact annexed a copy of the contract A 6 to the plaint, and a perusal of clause 24 would have disclosed the existence of the arbitration clause. His comment therefore that there was a suppression of material facts is without foundation. Clause 24 is not what is commonly termed a *Scott v. Avery* (3) clause which makes reference to arbitration, a condition

precedent to the institution of an action, so that the jurisdiction of the court is not ousted by a failure to refer a dispute to arbitration first. In *Thompson v. Charnock,* (4) it was held that if the contract between the parties simply contains a clause or covenant to refer to arbitration and goes no further, then an action may be brought in spite of that clause, although there has been no arbitration. Vide also *Wijeyanarayana v. General Insurance Co. Ltd.,* (5) and *Weerakoon v. Hewamallika,* (6) An agreement however which purports to oust the jurisdiction of the courts altogether is illegal and void as being contrary to public policy, but an arbitration agreement not expressly purporting to oust the jurisdiction is not to be read as doing so. *Halsbury Laws of England,* 4th Ed. p. 277 para 543, *Russel on Arbitration,* 17th Ed. p. 65, Clause 24.2 of the contract A 6 merely provides that :

> "If an amicable settlement is not reached, the disputes relative to this contract or to the execution thereof will be settled according to the Rules of conciliation and arbitration of the International Chamber of Commerce in Paris by three arbitrators chosen in conformity with these Rules."

Nowhere in the sub-clauses 3 to 5 is the right to institute an action taken away. On the contrary clause 24.5 appears to countenance recourse to litigation. It states–

> "The aforementioned arbitrators (24.2 above) shall be bound by any possible decision arrived at in a litigation between Klockner Ina and Foret Maury provided Gordon Frazer have been invited to participate in such proceedings to the extent Gordon Frazer is concerned."

Where there has been agreement between parties that any differences between them should be referred to arbitration, but any one of the parties shall nevertheless commence any action against the other party, section 7 of the Arbitration Ordinance (Cap. 98) enables the court, on application made to it, to make order staying all proceedings in such action and compelling reference to arbitration. Learned Attorney-at-Law for the respondents filed a motion along with the affidavit of Losio and Wenzel to this application and submitted that order be made staying all proceedings in the above application and in the District Court of Colombo case, in terms of section 7 of the Arbitration Ordinance. Learned Queen's Counsel for the plaintiff on the other hand contended that it was only the "parties" to a contract

containing an arbitration clause who could resort to section 7 of the Arbitration Ordinance. In the present case the parties to the contract A 6 are the plaintiff and the three defendants, and not the respondents. I agree with this submission. Indeed as was stated earlier, the two respondents have no legal status at all to participate in this action.

Learned Queen's Counsel for the plaintiff also contended that the attempt of the defendants to break the contract with the plaintiff by reason of which the plaintiff came into court and obtained an interim injunction restraining them from doing so, is not a dispute that falls within the ambit of the contract, and is therefore not referable to arbitration. I do not agree. In *Heyman v. Darwins Ltd.* (7) Viscount Simon L.C. at pg. 366 said–

> "But, in a situation where the parties are at one in asserting that they entered into a binding contract, but a difference has arisen between them whether there has been a breach by one side or the other, or whether circumstances have arisen which have discharged one or both parties from further performance, such difference should be regarded as differences which have arisen in respect of or with regard to or under the contract, and an arbitration clause which uses these or similar expressions should be construed accordingly."

In the present case, clause 24 which speaks of disputes "relative to" the contract would, in my view, catch up a situation where the defendants are seeking to repudiate the contract. For, attempts made in that direction if not restrained, might well result in the repudiation of the contract. Repudiation referred to in *Heyman's* case would also, in my view, include attempts or efforts at repudiation. They constitute disputes "relative to" the contract, and fall within the terms of the arbitration clause.

Learned Attorney-at-Law for the respondents submitted that an injunction cannot be granted by the District Court unless a plaint has been filed setting out a cause of action and a declaratory relief prayed for. But section 54(1) (*a*) of the Judicature Act No. 2 of 1972, provides that the plaintiff is entitled to an injunction against the defendant restraining the commission of an act, the commission or continuance of which would produce injury to the plaintiff. This is in itself a substantive relief which can be made the subject of a decree in terms of section 217 (*F*) of the Civil Procedure Code, without a prayer for a declaratory relief. The procedure for making the application is set

out in section 662 of the Civil Procedure Code. The case relied on by learned Attorney-at-Law for the respondents, reported in *Weerakoon's Reports* Vol. IV p. 19 is not applicable to this case. That was a case where no plaint was filed and proceedings commenced with a petition and affidavit in which an application was made for an injunction against the defendant. In the present case a plaint has been filed praying for an injunction against the defendants. All that Grenier, J., said in that case is that according to section 662 of the Civil Procedure Code–

> "It is absolutely necessary under our law and procedure that the plaintiff should first file plaint setting out his cause of action against the defendants."

His Lordship then went on to say in reference to section 662 that–

> "The action unmistakably contemplates two distinct cases : one where an injunction is prayed for in a plaint, and the other where after a plaint has been filed the plaintiff applies for an injunction there being no prayer in the plaint for this remedy. In the latter case the application is required to be by petition and affidavit containing a statement of the facts on which the application is based."

In the present case, the injunction has been prayed for in the plaint itself.

A "cause of action" is defined in section 5 of the Civil Procedure Code as "the wrong for the prevention or redress of which an action may be brought and includes the denial of a right, the refusal to fulfil an obligation, the neglect to perform a duty, and the infliction of an affirmative injury." In the instant case the plaintiff's complaint, as set out in paragraph 21 of the plaint, is that the three defendants have been secretly negotiating with other parties, both abroad and in Sri Lanka to do the work that the plaintiff was to do (under the contract A 6). In short it alleged that the defendants were seeking to repudiate the contract, which would cause it irremediable mischief and irreparable damage. It is the wrongful and unlawful conduct of the defendants that has given rise to a cause of action to the plaintiff to sue them for the reliefs set out in sub-paragraphs (*a*), (*b*) and (*c*) of paragraph 24 of the plaint. The reliefs in paragraphs (*b*) & (*c*) of the prayer to the plaint can be granted during the pendency of the action

while decree will be entered in terms of paragraph (*a*), if the plaintiff succeeds in establishing his right to it. The submission of learned Attorney-at-Law for the respondents must therefore fail.

The action has been instituted against the three defendant companies and the two respondents who have filed proxy in their personal capacity had no right to participate in the proceedings and obtain the orders that they have obtained in their favour. In the result the orders made by the District Judge in their favour have been made per incuriam and are null and void.

I accordingly set aside the order of the learned District Judge dated 15.11.83 and vacate the order of the Judge dated 3.10.83 suspending the operation of the Interim Injunction entered by him on 23.9.83.

The proxy of Losio and Wenzel filed by Mr. Herman Perera on 30.9.83 must be rejected. The District Judge will now proceed with the action as from the stage where notice of the Interim Injunction and summons were served on the three defendants. Notice should be given to the defendants before proceedings are continued.

The plaintiff-petitioner will be entitled to costs from the respondents in the District Court and in this Court.

G. P. S. DE SILVA, J. – I agree.

Orders set aside.