Fernando v. Dias and Others

COURT OF APPEAL.
RAJAWATTE, J. AND RODRIGO, J.
C.A. APPLICATION NO. *130/80.*
AUGUST 15, 1980.

Injunction—Interim injunction issued under section 54 of Judicature Act—Application to the Court of Appeal for the exercise of its powers in revision in respect of such order—Requirement that such application be made to original Court in first instance—Civil Procedure Code, section 666.

The plaintiff had instituted an action in the District Court for a declaration that the 1st defendant had ceased to be the manager of a tile factory and for an injunction seeking to restrain the 1st defendant from having any hand in the business and from removing machinery and parts from the factory.

The application for an interim injunction was allowed by the District Judge who issued the injunction as prayed for. The said defendant thereupon, without moving the District Court to vacate its *ex parte* order, filed this application invoking the revisionary powers of the Court of Appeal.

Held

It is not open to the petitioner to invoke the jurisdiction of the Appellate Court in the exercise of its revisionary powers without firs. naying recourse to the original Court which issued the injunction to have it set aside in terms of section 666 of the Civil Procedure Code. It was not a sufficient excuse to plead that delay will be involved in filing papers and waiting for the District Court to fix a date of hearing and eventually dispose of the application.

Cases referred to

(1) *Gargial et al. v. Somasunderam Chetty, (1905) 9 N.L.R. 26.*
(2) *Habibu Lebbe v. Punchi Ettena, (1894) 3 C.L. Reps. 84.*
(3) *Perera v. The Commissioner of National Housing, (1974) 77 N.L.R. 361.*
(4) *Ceylon Hotels Corporation Ltd. v. Jayatunga, (1969) 77 C.L.W. 5.*
(5) *Hendrick Appuhamy v. John Appuhamy, (1966) 69 N.L.R. 29; 71 C.L.W. 97.*

APPLICATION to revise an order of the District Court, Chilaw.

H. W. Jayewardene, Q.C., with *Nimal Senanayake* and *K. C. Gunaratne*, for the petitioner.
H. L. de Silva, with *Daya Pelpola*, for the 1st to 3rd respondents.
Mark Fernando, for the 4th respondent.
Ben Eliyathamby, for the 5th respondent.

Cur. adv. vult.

September 16, 1980.

RODRIGO, J.

The five plaintiffs are sisters of the two defendants. Their father had in May 1976 gifted to them and another daughter of his, two contiguous allotments of land with a tile factory and its appurtenant buildings thereon in equal shares. Thereafter by a deed of agreement entered into on the same day as when the deed of gift was executed, the plaintiffs and the two defendants entered into a partnership to run the business of the tile factory with each of them contributing specified sums of money. In early 1979 and in early 1980 the 1st defendant had bought the undivided shares of the 2nd defendant and a sister of his, in the lands and business respectively. The 1st defendant thus became the owner of a 3/8 share as against the 5/8 shares owned by the five plaintiffs in the land and in the business.

In the early part of 1980 the plaintiffs had expressed disapproval of the management of the business by the 1st defendant who, I must mention, had been by the deed of agreement entrusted with the management of the said business by his brothers and sisters. By a resolution made on the 7th of July, 1980, the plaintiffs

who held a majority of the shares terminated the appointment of the 1st defendant as managing partner of the business in terms of the partnership deed and he was notified accordingly. The plaintiffs had instituted an action in the District Court for a declaration that the 1st defendant had ceased to be the managing partner of the said business and for an injunction seeking to restrain the 1st defendant from having any hand in the business whatsoever and from removing machinery and parts thereof from the factory.

The application for the interim injunction pending the hearing of the action was supported in open Court ex parte. The father of these brothers and sisters gave evidence in support of the application. The learned trial Judge in a brief order had stated that he was satisfied on the oral and documentary evidence led that prima facie a case had been made out by the plaintiffs for the issue of an interim injunction and he accordingly issued an injunction in terms of paragraph 'B' of the prayer restraining the 1st defendant from, as I had said earlier, seeking to enter upon or otherwise interfere with the management of the business and from disposing of the machinery or its parts.

The 1st defendant is now seeking in these proceedings to have that order revised. It is urged by his counsel that the injunction had been issued illegally in that,

(*a*) there was no formal order accepting the plaint,
(*b*) that there was no order to issue the summons, and,
(*c*) an injunction does not lie to remove a person in possession of any property from such possession.

Counsel presses his contention that it is imperative that there should be a formal order for the issue of summons to accompany the injunction and as there was no such formal order in this case the issue of the injunction was illegal. He referred us to section 54 (3) of the Judicature Act No. 2 of 1978. He followed it up by arguing further that the injunction moreover had the effect of removing the 1st defendant from possession of the land and the factory and such a course is not permitted by the law governing the grant of injunctions.

Counsel for the plaintiffs-respondents sought to meet this contention by arguing that assuming, and assuming only without conceding, the submissions for the 1st defendant-petitioner to be tenable, still, it is not open to the petitioner to invoke the jurisdiction of this Court to exercise its revisionary powers or otherwise without first having recourse to the original Court which issued the injunction to have it varied, or set aside in terms of section 666 of the Civil Procedure Code.

In the case of *Gargial et al v. Somasunderam Chetty* (1), a Bench of three Judges had to consider the position arising on an appeal from a judgement given ex parte for default of appearance, either by the defendant or his pleader. The point was taken that there was no appeal from such an order in the first instance without recourse first had to the Court which entered such judgement to have it set aside. I am mindful of the fact that in that case the Bench was considering an appeal from the ex parte judgment and not an application in revision. Even so the considerations which govern this Court in deciding and disposing of an application to have a judgment entered ex parte set aside appear to be no different from those that govern it if the matter had come up by way of revision. For, it had been said therein by Layard, C.J. that :

> "The ordinary principle is that, where parties are affected by an order of which they have had no notice, and which had been made behind their back, they must apply in the first instance to the Court which made the ex parte order to rescind the order, on the ground that it was improperly passed against them."

He then referred to the case of *Habibu Lebbe v. Punchi Ettena* (2) which was a case dealing with an ex parte judgment and continued :

> "He (Bonser, C.J.) there recognized the power of a judge of first instance to open up a judgment given in the absence of one of the parties, and he stated that it had long been the practice—and a practice which had been expressly approved by this court—that in cases of that sort application should be made in the first instance to the court which pronounced the judgment, and that there should be an appeal to this court only if the judge of the court of first instance refused to set it aside. There is no doubt in my mind that that had been the practice of this Court for the last thirty years at least, and I believe that it existed prior to that date."

Then he continued :

> "I agree with Bonser, C.J. in thinking that that is the most convenient course to pursue and that this court should always insist upon its adoption, particularly because the Court of Appeal in England in the case of *Vint v. Hudspith* (1885) 29 Ch. D. 322, lays down, that although the Court of Appeal in England may possibly have jurisdiction to hear an appeal from a judgment given by default, yet that it is not desirable

that the Court of Appeal should encourage such appeals to be brought before the application has been made to the court of original jurisdiction."

In *Perera v. The Commissioner of National Housing* (3), Tennekoon, C.J. had this to say in respect of a judgment that had been obtained by a party without the service of summons on the defendants, namely,

> "A judgment delivered under such circumstances is void and can be challenged both in the very Court and in the proceedings in which it was had and also collaterally....."

In *Ceylon Hotels Corporation v. Jayatunga* (4), Sirimane, J. had this to say in respect of interim injunctions granted ex parte :

> "Section 666 of the Civil Procedure Code would apply in cases where the Court grants an interim injunction in the first instance before the other party is heard ; or where there are subsequent supervening circumstances which could not have been foreseen, at the time the interim order was made".

So that even where no specific provision has been made to have an ex parte order set aside still, going on the pronouncements that have been made in weighty judgements referred to earlier, this Court had not granted relief to parties who invoked the jurisdiction of this Court without first seeking to have it set aside by the original Court which made the order. *A fortiori* the principle would apply where specific provision has been made to have an ex parte order set aside by the statute itself which had given the right to obtain an ex parte injunction. On principle and on authority the position would appear to be the same. In *Hendrick Appuhamy v. John Appuhamy* (5) Sansoni, C.J., has quoted the following passage :—

> "In *Wilkinson v. Barking Corporation* (1948) 1 K.B. 721, Asquith, L. J. said, 'It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others'."

He continued :—

> "As the House of Lords ruled in *Pasmore v. Oswaldtwistle U.D.C.* (1898) A.C. 387, per Lord Halsbury 'The principle that where a specific remedy is given by a statute, it thereby deprives the person who insists upon a remedy of any other form of remedy than that given by the statute, is one which

is very familiar and which runs through the law'. Lord Watson in *Barraclough v. Brown* (1897) A.C. 615, said: 'The right and the remedy are given *uno flatu,* and the one cannot be dissociated from the other .....'."

The case of *Pasmore* referred to earlier was one in which one Peebles brought an action against an Urban District Council in which he sought and obtained a Mandamus to compel the local authority to provide effective drainage for his factory in terms of the Public Health Act of 1875. The Public Health Act itself provided a remedy for complainants like Peebles in the event of neglect or failure by the local authority to provide adequate sewers for drainage by providing for a complaint to be made to the Local Government Board under section 299 of the Public Health Act of 1875. The Court of Appeal set aside the Mandamus and the House of Lords in concurring in the judgment of the Court of Appeal said (per Lord Halsbury) that where a statute itself provides a remedy the general rule applies that that statutory remedy is the only remedy. He added, however, even if it were not, the Court has a discretion and ought not to issue a Mandamus where there is another effective remedy.

In the instant case the Judicature Act, No. 2 of 1978, creates the right for a plaintiff to obtain an injunction in specified circumstances—section 54. The Civil Procedure Code makes provision for a remedy in situations in which the injunction had been improperly obtained. Where an injunction had been issued illegally, if that were the case, it is all the more reason why a Court of first instance will grant relief to an aggrieved party when it is so moved in pursuance of a remedy provided. The petitioner in this instance had not moved the Court of first instance at all to have the injunction set aside. His counsel submits that the reason was the delay that will be involved in filing papers and waiting for the Court to fix a date of hearing and eventually disposing of the application. We do not think that if the urgency for the need for relief to the petitioner had been brought to the notice of the Court, the Court would have failed to expeditiously dispose of the application and grant the reliefs sought if the petitioner merited it. In any event, if the petitioner had first moved the Court of first instance and was confronted with the delay and consequential loss and damage complained of, it might have provided some plausible reason to have invoked the jurisdiction of this Court without waiting for the disposal of the application. But this is not an instance of that nature. In the result it is not right, as we see it, for this Court to emasculate the provisions of the Civil Procedure Code relating to the matter in question

in considering applications in revision when the party had not pursued the remedy provided and to dilute the stand point that this Court had inherited from the ancestry of legal authority in refusing such application. Viewed in this manner, we think it is a wrong exercise of our discretion, in any event, to allow this application.

We accordingly dismiss this application with costs.

RATWATTE, J.—*I agree.*

Application dismissed.

K. Thevarajah,
Attorney-at-Law.