

FREE LANKA TRADING COMPANY LTD.  
V.  
BANK OF CEYLON

COURT OF APPEAL.  
JAYASURIYA, J.  
REV. APPLICATION No. 468/95.  
with CA-LA 130/95.  
D. C. COLOMBO 4225/SPL.  
21 AND 28 JULY, 1995.

*Enjoining Order – Refusal of extension – Principles applicable.*

A Performance Bond had been entered into between Free Lanka Trading Company Ltd. (plaintiff) and the Bank of Ceylon on the one hand and between the Ceylon Electricity Board as the other party. The contract itself for the supply of pre-stressed concrete poles had been entered into between the Ceylon Electricity Board and FLAPEC (Private) Ltd. It was FLAPEC (Private) Ltd. that had to enter into the Performance Bond and not the plaintiff.

The plaintiff had failed to aver and plead in its plaint that the plaintiff is entitled to substantive rights and the future prospects and likelihood of the violation of such substantive rights of the plaintiff. The plaint does not disclose that the plaintiff had acquired any rights under the contract or that a cause of action has accrued to the plaintiff to institute legal proceedings under the contract.

**Held:**

Plaintiff was not entitled to an enjoining order and extension was rightly refused.

**Cases referred to:**

1. *Richard Perera v. Albert Perera* 67 NLR 445
2. *Dissanayake v. AICC* 64 NLR 283
3. *Murugesu v. North Divisional Agriculture Products Union* 54 NLR 517
4. *Gordon Fraser & Co. Ltd. v. Jean Marie Losio and Martin Wenzel*  
1984 2 Sri L.R. 85 at 91

**APPLICATION** for revision of and leave to appeal from order of District Judge.

*L.C. Seneviratne P.C. with Jayantha de Almeida Gunaratne and D.F.H. Gunawardena* for Plaintiff.

*Kumar Paul S.C. with Ghazzali Hussein S.C.* for Defendant-Respondent.

*Cur. adv. vult.*

04 August, 1995.

**JAYASURIYA, J.**

1. The Plaintiff-Petitioner has preferred an application in revision and an application for leave to appeal in respect of the order delivered by the District Judge of Colombo on 21.6.95 in this case. The learned District Judge, on the preferring of the Plaint and an affidavit in support, had issued an Enjoining Order on 16.12.94 enjoining the Defendant bank from making any payment whatever upon the Performance Bond which has been annexed to this application marked P2. Although certain dates have been specified by the learned District Judge for the Defendant to file its objection to the application for an interim injunction and for the filing of the answer, the Defendant-Bank has not filed its statement of objections or the answer, but, by a motion sought to reserve its right to file a statement of objections and answer at a later date.

2. Thereafter, the issue of the extension of the Enjoining Order already granted by the District Judge came up for inquiry and both parties filed written submissions in regard to that matter. The learned District Judge, after reserving his order on the issue of the extension of the Enjoining Order, later delivered his order on 21.6.95 dissolving and setting aside the Enjoining Order entered by him on 16.12.94.

3. Being aggrieved by the order of the learned District Judge delivered on 21.6.95 dissolving and setting aside the Enjoining Order and refusing to extend it any further, the Plaintiff-Petitioner has filed this revision application and the application for leave to appeal.

4. The learned District Judge, by his order dated 26.5.95 has stated that the Performance Bond bearing No. 86257 marked P2 had been entered into between Free Lanka Trading Company Ltd., the Plaintiff and the Bank of Ceylon on the one hand and between Ceylon Electricity Board as the other party. He has also emphasized that the contract

for the supply of pre-stressed concrete poles, which document has been annexed to the petition marked P1, has been entered into between Ceylon Electricity Board and FLAPEC (Private) Ltd. Thus, the rights and duties flowing from the contract marked P1 would be established only between the two contracting parties to that agreement, namely, Ceylon Electricity Board and FLAPEC (Private) Ltd. The preamble to this contract marked P1 says that the Ceylon Electricity Board has accepted the offer of Messrs. Free Lanka Trading Company Ltd. in collaboration with Messrs. Projects and Equipment Corporation of India Ltd. and Messrs. Adarsh Cement Products (Pvt) Ltd. for the establishment of plant and machinery to manufacture and supply 250,000 concrete poles per year over a period of five consecutive years to the Ceylon Electricity Board. The preamble also sets out that the Contractor, Messrs. FLAPEC (Private) Ltd. is the joint venture company formed and registered in accordance with the terms of the offer of Messrs. Free Lanka Trading Company Ltd. However, the contract P1 sets up contractual relations, rights and obligations as between the Ceylon Electricity Board and the Contractor, Messrs. FLAPEC (Private) Ltd. The learned District Judge, when he refers to the fact that the plaintiff fails to disclose the relationship between Free Lanka Trading Company Ltd. and FLAPEC (Private) Ltd. in his order, is, in effect, referring to the fact that there is no reference in the plaint to any contractual relationship between these two incorporated entities.

5. Article 7 of the contract marked P1 provides that within 14 days of the signing of the contract, the contractor (FLAPEC (Private) Ltd.) shall furnish a Performance Bond in favour of the General Manager, Ceylon Electricity Board, in the form of a bank guarantee from a bank operating in Sri Lanka. Thus, the contract envisages the Performance Bond to be furnished by FLAPEC (Private) Ltd., the Contractor, one of the parties to the contract P1. However, Free Lanka Trading Company Ltd. has entered into the Performance Bond P2 instead of the party expressly specified in Article 7 of P1, the contract. Thus, Free Lanka Trading Company Ltd. has taken the role of an imposter and an intermeddler by becoming a party to the Performance Bond marked P2. Rights and obligations on the contract P1 flow between the Ceylon Electricity Board and FLAPEC (Private) Ltd. The Plaintiff Free Lanka Trading Company Ltd., derives no rights and is subject to no obligations and duties under the contract P1. This fact has been emphasized by the District Judge in his order.

6. Besides the reasons expressly spelt out by the learned District Judge in his order for refusing to extend and for discharging the Enjoining Order, a substantial and important issue attracts the attention of this Court. That is, whether the Plaintiff in its plaint and in its applications for an enjoining order and an interim injunction has averred the substantive rights of the Plaintiff in respect of the aforesaid relief claimed by way of an enjoining order and an interim injunction and disclosed a future and impending violation of such substantive rights. On a perusal of the plaint, it is crystal clear that the Plaintiff has failed to aver and plead in its plaint that the Plaintiff is entitled to substantive rights under the documents P1 and P2 and the future prospect and likelihood of the violation of such substantive rights of the Plaintiff. In the absence of such necessary averments and pleadings in the Plaint, the question arises whether the Plaintiff is entitled at all to the issue of an enjoining order or an interim injunction in its favour as prayed for.

7. When this matter was raised by this Court at the stage of argument, learned President's Counsel submitted that the question of the substantive rights of the Plaintiff to the relief claimed ought to engage the attention of court at a later point of time and, inasmuch as the District Judge had already issued an enjoining order on 16.12.94, that order had been made on the assumption that the Plaintiff has established a *prima facie* case for the issue of an enjoining order and, therefore, the question of the substantive rights of the Plaintiff to relief claimed ought not to engage the attention of this court. I venture to strongly dissent from this expression of view couched in learned President Counsel's submission. Although, generally speaking, a trial judge or a judge sitting in appeal should not generally decide the substantive question in considering an application for an enjoining order or an interim injunction, yet, the consideration of that substantive question at an early stage is not necessarily irrelevant, particularly where the material relevant to the determination of the substantial dispute is also wholly or mainly pertinent to the issue of the grant of an application for an enjoining order or an interim injunction.

8. In *Richard Perera v. Albert Perera*,<sup>(1)</sup> Justice H. N. G. Fernando remarked: "In an application for an interim injunction" where the material placed before the court at the inquiry reveals information which justify the *prima facie* view that the Plaintiff is not entitled to the sub-

stantive relief claimed in the plaint, it would be erroneous for a court to ignore such information and issue an interim injunction . . . A basic condition for the grant of an injunction under the law is that it must appear on the plaint that the Plaintiff is entitled to the judgment he seeks and there must be some apparent violation of the substantive right to which the Plaintiff appears to be entitled.”

9. In this case, not only is the present Plaintiff not entitled to any substantive rights under the contract, but also there is a total failure in the averments of the plaint to even set out such a claim that he is entitled to such substantive rights and that there would be a future violation of such substantive rights under the contract. In the circumstances, where there is no averment, pleading or a claim that the Plaintiff is entitled to substantive rights under the contract, this court, in the determination of the preliminary application for an enjoining order or an extension of the enjoining order, is entitled to hold that issues arising on such an inquiry cannot be decided except after consideration of the material relevant to the substantial case of the Plaintiff. In such a situation, the ideal course would be to proceed straightaway to consider whether there is sufficient averment in the plaint disclosing such substantive rights of the Plaintiff and the prospect of a future violation of such rights on the part of the Defendant.

10. In delivering the aforesaid judgment, the Supreme Court in the case of *Richard Perera and Albert Perera (supra)* distinguished the decision in *Dissanayake v. AICC*,<sup>(2)</sup> wherein the view had been expressed earlier that an injunction inquiry must not be a full-scale trial of the substantive dispute in the action. I am inclined to follow the principles laid down by the Supreme Court in *Richard Perera v. Albert Perera*,<sup>(supra)</sup> and the principles laid down in the decision reported in *Murugesu v. North Divisional Agriculture Products Union*<sup>(3)</sup> and hold that where there is no material on the plaint itself of a claim or averment in regard to the substantive right of the Plaintiff which can be violated, it would be unreasonable to issue an enjoining order or grant an extension of the enjoining order already issued or to issue an interim injunction.

11. These principles seem to have influenced the District Judge in making his order although he has not spelt out these principles ex-

pressly; he has failed to articulate these principles in precise terms though they are implicit in his order. For the reasons spelt out in my judgment, I hold that the District judge was right and correct in refusing to extend the enjoining order by his order dated 26th May 1995. In the circumstances, the application for leave to appeal and the application in revision are dismissed with costs in a sum of Rs. 1050 payable by the Plaintiff-Petitioner to the Defendant-Respondent.

12. Since the Order of the learned District Judge was very closely analysed and impugned, I wish to emphasize the following facts which are stressed by the learned District Judge:

Firstly, he has emphasized that the contract, from which rights and duties flow marked P1, is entered into between Ceylon Electricity Board and FLAPEC (Private) Ltd. as the two contracting parties;

Secondly, he has emphasized that in violation of the terms of the contract marked P1, the Plaintiff as opposed to FLAPEC (Private) Ltd. has entered into the Performance Bond marked P2;

Thirdly, that the Plaintiff does not disclose the grounds for this dichotomy;

Fourthly, the Plaintiff does not disclose the contractual relation, if any, between Free Lanka Trading Company Ltd. and FLAPEC (Private) Ltd.;

Fifthly, the Plaintiff in its averments, does not disclose the contractual relationship between the Plaintiff and the Defendant in this action and the reasons why the Plaintiff entered into the Performance Bond marked P2;

Sixthly, under the terms of the Performance Bond P2, the contracting parties are the Plaintiff and the Defendant but under the all important contract marked P1, the contractual relations are established between FLAPEC (Private) Ltd. and Ceylon Electricity Board and FLAPEC (Private) Ltd. is not a party to the action bearing No. D. C. Colombo 4225/Sp;

Seventhly, the Plaintiff does not disclose that the Plaintiff had ac-

quired any rights under the contract marked P1 or that a cause of action has accrued to the Plaintiff to institute legal proceedings under the contract marked P1.

13. For the matters spotlighted in the District Judge's Order and for the additional reasons spelt out by me relying on the principles laid down in *Richard Perera v. Albert Perera*, (*supra*) I hold that the District Judge had made a correct order in refusing to extend the enjoining order granted by him earlier on 16.12.94.

14. Learned counsel for the Plaintiff- Petitioner in drafting the petitions and the affidavits, relied upon in this application, has expressly referred to the Arbitration clause in the contract marked P1 and has submitted that as disputes have arisen under the said contract, the parties were obliged and under a duty to refer such disputes to arbitration in the first instance without calling upon the defendant bank to make payments in terms of the Performance Bond P2. Neither the Plaintiff nor the defendant bank were contracting parties to the contract marked P1. Hence the plaintiff is not entitled to raise and advance any exceptions and defences based on the Arbitration clause contained in the contract marked P1 as the plaintiff was not a party to the said contract. In the decision in *Gordon Fraser & Co. Ltd. v. Jean Marie Losio and Martin Wenzel*<sup>(4)</sup> it was laid down affirmatively that such an exception and plea in bar could with success be raised and advanced by one of the parties to the contract only. In the result, the exception and plea in bar raised by learned counsel for the plaintiff petitioner is without substance and merit in law.

15. Leave to appeal Application is dismissed with costs; application in revision is also dismissed with costs.

*Application for revision and for leave to appeal refused.*