MANOHARAN
v
PAYOE AND OTHERS

COURT OF APPEAL
CHANDRA EKANAYAKE, J.
SARATH DE ABREW, J.
CA (REV.) 2256/2002
DC HATTON 258/1
JULY 7, 2006

Civil Procedure Code, Section 664, Section 665, Section 753, Section 754(2) – Interim injunction granted – Vacation of same under Section 666 – Revisionary jurisdiction invoked – Alternative remedy not availed of – Does Revision lie? – Exceptional circumstances – Prima facie *case not made out – Is it necessary to examine the other ingredients? – If injunction is granted after* inter partes *inquiry – Can an application under Section 666 be sought? – Land acquired by State?*

The plaintiff-respondent sought and obtained an interim injunction after inquiry restraining the defendant from using the land – the defendant was engaged in the business of a metal crusher in the subject matter.

The defendant thereafter moved under Section 666 seeking to dissolve/set aside the interim injunction by which he was compelled to stop the business of a metal crusher carried on in the subject matter and thereby he and his employees suffered irreparable and irremediable loss and damage. The trial Judge after inquiry dismissed the application. The defendant-petitioner moved in Revision.

Held:

(1) The State has already acquired the subject matter. In such circumstances, it cannot be said that, the plaintiff has made out a *prima facie* case. As the plaintiff has not made out a *prima facie* case the existence of other requirements to grant the interim injunction need not be examined.

(2) The trend of authority amply indicates that when revisionary power is invoked same will be exercised only if exceptional circumstances are urged which necessitate the indulgence of Court to exercise revisionary powers. The existence of exceptional circumstances is

the process by which the Court selects the cases in respect of which this extraordinary method of rectification should be adopted.

(3) The order granting the injunction has occasioned miscarriage of justice, and this Court is compelled to invoke the powers of revision.

Held further:

(4) As regards the 2nd order refusing the application made under Section 666, the trial Judge has erred in stating that when an injunction is granted interpartes an aggrieved party cannot seek relief under Section 666.

AN APPLICATION in Revision from an order of the District Court of Hatton.

Cases referred to:

(1) *Rustom* v *Hapangama and Co.* (1978-79-80) 1 Sri LR 352.
(2) *Jinadasa* v *Weerasinghe* 31 NLR 33.
(3) *Preston* v *Luck* 1884 27 Ch. D497. (CA)
(4) *F.D. Bandaranayake* v *State Film Corporation* 1981 2 Sri LR 287.
(5) *Gulam Hussain* v *Cohen* 1995 2 Sri LR 370.
(6) *Mariam Beebee* v *S. Mohamed* 1965 68 NLR 36.
(7) *Caderamanpulle* v *Ceylon Paper Sacks Ltd.* 2001 3 Sri LR 112.
(8) *Dharmaratne and another* v *Palm Paradise Cabanas Ltd. and others* 2003 3 Sri LR 25.

J.C. Weliamuna with *Shantha Jayawardane* for defendant-petitioner-petitioner.

S. Mandaleshwaran with *P. Peramunagama* for plaintiff-respondent-respondent.

Cur.adv.vult.

May 30, 2007

CHANDRA EKANAYAKE, J.

The defendant-petitioner-petitioner (hereinafter sometimes referred to as the defendant) by petition dated 18.12.2002 has sought an order reversing/setting aside the order of the learned District Judge of Hatton dated 08.11.2002 and to set aside the orders dated 13.12.2001 and 08.11.2002. The plaintiff-

respondent-respondent (hereinafter sometimes referred to as the plaintiff) had instituted the above styled action in the District Court of Hatton seeking a declaration of title to the land morefully described in the 2nd schedule to the plaint, ejectment of the defendant and all those holding under him from the same and a permanent injunction restraining the defendant from using the same and interim injunction and an enjoining order against the defendant to the same effect as prayed in subparagraphs (කැ) and (ඉ) of the prayer to the plaint (X1). The Court having issued notice of interim injunction in the first instance, the defendant had opposed the said application and had moved for a dismissal of the same. After an inquiry into the said application the learned trial Judge by his order dated 13.12.2001 (X5) had issued an interim injunction as prayed for in the prayer to the plaint. It is common ground that the defendant was engaged in the business of a metal crusher in the subject matter.

The defendant thereafter had filed a petition dated 07.06.2002 (supported by an affidavit) in the District Court seeking to dissolve and / or to set aside the said interim injunction in terms of Section 666 of the Civil Procedure Code. The main basis of the said application had been that as a result of the said interim injunction he was compelled to stop the business of a metal crusher carried on in the subject matter and thereby he and his employees suffered irreparable and irremediable loss and damages. The above application was objected to by the plaintiff by his statement of objections dated 03.03.2003 and had moved *inter alia* to dismiss and/or reject the application of the defendant and to restore the interim injunction issued in the case against the defendant. The learned trial Judge after an inquiry by the 2nd impugned order dated 08.11.2002 had dismissed the same. This is the 2nd order the defendant has moved to set aside by this revision application.

The main grounds on which the defendant is now seeking to invoke the revisionary jurisdiction of this Court (vide paragraph 14 of the present petition) are that –

(a) The learned District Judge has failed to consider the submission made on behalf of the defendant and the material placed by way of an application dated 07.06.2002.

(b) The learned District Judge has erred in law in failing to apply Section 666 of the Civil Procedure Code.

(c) The learned District Judge has erred in law and in fact by not considering the important factors that compelled the defendant to make the application to set aside or vary the Interim Injunction.

(d) In any event the learned district Judge has failed to consider the grave hardships and injustice caused to the defendant and the exceptional circumstances that existed in the case.

It is to be observed that the defendant having failed to avail himself of the alternative remedy to appeal in terms of Section 754(2) of the Civil Procedure Code as amended by Act No. 78 of 1988, has invoked the revisionary jurisdiction of this Court. When an applicant has failed to avail himself of the alternative remedy available, it is settled law that revisionary powers would be invoked only if the existence of exceptional circumstances are urged necessitating the indulgence of this Court to exercise its powers of revision. In this regard necessity would arise to consider the decision of the Supreme Court in the case of *Rustom* v *Happangama & Co.*[1] *Per* Ismail, J. at p 356: *"the powers of revision vested in the Supreme Court is discretionary as is quite apparent when one considers the working of Section 753. Numerous authorities have indicated that this power will only be exercised when there is no other remedy available to a party and such remedy has not been availed of by such authority. It is only in very rare instances where exceptional circumstances are present that the Courts would exercise powers of revision in cases where an alternative remedy has been availed to the applicant".*

Further it was held in that case to the following effect *"the trend of authority clearly indicates that where the revisionary powers of the Court of Appeal are invoked the practice has been that these powers will be exercised if there is an alternative remedy available, only if the existence of special circumstances are urged necessitating the indulgence of this Court to exercise its powers in revision."*

It appears that though an alternative remedy was available to the defendant with regard to the first impugned order – (under Section 754(2) of the Civil Procedure Code) as he has not availed himself of that remedy, necessity has arisen to examine whether he has established the existence of exceptional circumstances that would warrant the invocation of the revisionary jurisdiction of this Court.

The learned trial Judge's basis to issue the interim injunctions that a prime *facie case* has been made out by the plaintiff by his plaint and the balance of evidence also favours the granting of interim injunction. It is to be noted that in the course of the said order the learned Judge having analysed the facts and circumstances of the case had arrived upon the finding that there is a serious question to be tried at the hearing and thus plaintiff had ben successful in making out a prima facie case. In the case of *Jinadasa* v *Weerasinghe*(2) Dalton J. too adopted the language of Cotton L.J. in *Preston* v *Luck*(3) when he laid down the requirements for an interim injunction in the following words at page 34:

> ".... the Court must be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that plaintiff is entitled to relief."

By the 1st impugned order the learned Judge had arrived upon the finding that the plaintiff had established a *prima facie* case. At page 6 of the said order he has stated as follows:

"මේ අනුව මා විසින් ඉහත දක්වන ලද සියලුම හේතු මත පැමිණිලිකරුගේ ඉඩමට සහ වගාවන්ට හානි සිදු කරමින් විත්තිකරු ගල් කැඩීමේ ක්‍රියාව කරන්නේ නම් එය ඔහුගේ නීත්‍යානුකූල අයිතිවාසිකම් උල්ලංඝනය කිරීමේ බරපතලවූත් අත්‍යාසන්නවූත් අවධානමක් බවත් මම සලකමි."

It appears that the above finding had been arrived upon after considering the following:

(a) that the defendant who does not have any lawful rights in the subject matter continues to blast the rock causing damage to the plantation thereon.

(b) there by the defendant has violated the plaintiff rights

(c) the documents submitted by the defendant marked V2, and the licenses obtained by him for the said business marked Vs and V4.

(d) the merits of the relief sought by sub paragraph (අ) of the prayer to the plaint to wit – a declaration of title in possession of the plaintiff to the property morefully described in the 2nd schedule to the plaint.

It has to be noted that it is common ground that the defendant had come into possession of the subject matter on a formal lease agreement dated 16.10.1990 (V1) entered into between the defendant and the plaintiff's father M.P. Nallatamby for the period of 24 calendar months from the date of taking possession of the metal quarry site. This had been for the lease of metal quarry site and not for the lease of the property and the said lease having ended with the death of the plaintiff's father on 04.10.1991, the defendant had continued to be in possession thereof as a licensee of the plaintiff (who subsequently became the owner of the subject matter by deed bearing No. 1054 dated 19.11.1998 (P1) marked with the plaint.

Further vide sub paragraph 5(c) of the present petition the defendant has contended that as the plaintiff also has admitted that the land in question has been gazetted for the purpose of

acquisition by the State, the plaintiff has no legal right to the same. This position has been conceded in the written submissions filed on behalf of the plaintiff. What need consideration now is when the State has already acquired the subject matter, in such circumstances whether it would be correct to say that the plaintiff has made out a prima facie case. The main reliefs sought by sub paragraphs (a) and (b) of the prayer to the plaint (X1) are for declaration of title to the subject matter and for ejectment of the defendant therefrom. This position is further established by the document of the plaintiff himself marked as P3 (gazette notification bearing No. 1117/21 dated 3rd February 2000). The government has already taken steps to acquire a portion of land inclusive of the subject matter in suit morefully described in the 2nd schedule to the plaint. By paragraph 9 of the plaint it has been contended that the Divisional Secretary of Ambagamuwa by letter dated 06.04 2000 (annexed to the plaint marked as P4) had informed the brother-in-law of the plaintiff to hand over quiet possession of the subject matter to the Divisional Secretary on 20.04.2000. Both the above documents (P3 & P4) are not denied by the defendant. This action has been instituted on 14.06.2001 after the aforesaid acquisition by the State.

Examination of the 1st impugned order reveals that the learned Judge has failed to consider the aspect of acquisition of the subject matter by the State. Further he has taken the view that the defendant is a licensee causing damages to the land in suit and therefore the plaintiff is entitled to an interim injunction notwithstanding the acquisition by the State . Since the main relief sought by the action is the relief of declaration of title what has to be considered now is whether the plaintiff could seek declaration of title to a State land in this manner by way of a *rei-vindicatio* action. Neither the State not its representatives/the Attorney-General have been made parties to the action. In the circumstances enumerated as above the plaintiff is not entitled to obtain any relief sought in the plaint in respect of a land which has been acquired by State. In other words there is nothing to show that any legal right of the plaintiff has been or likely to be

violated by the acts of the defendant. In this regard it would be pertinent to consider the decision in *F.D. Bandaranaike* v *State Film Corporation*[4] whereby the principle of law was offered with regard to the sequential tests that should be applied in deciding whether or not to grant an interim injunction, namely:

(1) 'has the plaintiff made out a strong *prima facie* case of infringement or imminent infringement of a legal right to which he has title, that is, that there is a question to be tried in relation to his legal rights and that the probabilities are that he will win'.

(2) in whose favour is the balance of convenience,

(3) as the injunction is an equitable relief granted in the discretion of the Court do the conduct and dealings of the parties justify grant of the injunction.'

If the applicant passes the test of a prima *facie case* then only balance of convenience has to be considered. In the said case per Soza, J., at 303:

> "If a prima facie case has been made out, we go on and consider where the balance of convenience lies."

Further in the case of *Gulam Hussain* v *Cohen*[5] per S.N. Silva J. (P.CA), (as then he was) at 370,

> "The matters to be considered in granting an interim, injunction have been crystallized in several judgments of this Court and or Supreme Court. In the case of *Bandaranaike* v *State Film Corporation* Soza J., summarized these matters as follows:
>
> *"In Sri Lanka we start off with a prima facie case that is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the plaintiff should be certain to win. It is sufficient of the probabilities are he will win."*

When the circumstances of this case are considered it has to be concluded that the plaintiff has failed to establish a prima facie case. Therefore I am inclined to hold the view that the learned Judge has grossly erred at page 6 of the 1st impugned order when he stated that plaintiff's rights are violated due to the continuance of business of a metal crusher by the defendant.

For the above reasons I have already concluded that the plaintiff had failed to establish a *prima facie* case. Therefore in view of the above decisions the existence of other requirements to grant interim injunction need not be examined. In the light of the above it has to be concluded that the 1st impugned order (dated 13.12.2001) is erroneous and thus a miscarriage of justice has been occasioned by the same.

Now what needs consideration is whether the 1st impugned order could be allowed to stand. This Court has to be mindful of the fact that the present application of the defendant is an application by which revisionary jurisdiction has been invoked. When it has been already concluded that miscarriage of justice has been occasioned by the 1st impugned order would this become a fit instance to invoke revisionary jurisdiction of this Court.

Assistance could be derived in this regard from the decision of Sansoni C.J., in *Mariam Beebee* v *S. Mohamed*(6).

Per Sansoni C.J. at 38.

> *"The power of revision is an extraordinary power which is quite independent of and distinct from the average jurisdiction of this Court. Its object is the due administration of justice and the correction of errors sometimes committed by this Court itself, in order to avoid miscarriage of justice. It is exercised in some cases by a Judge of his own motion, when an aggrieved person who may not be a party to the action brings to his notice the fact that, unless the power is exercised injustice will result."*

When applying the above principle of law an aggrieved person who may not even be a party to the action brings to the notice of Court that unless the revisionary power is exercised injustice would result, that becomes a fit instance for the Court to invoke revisionary jurisdiction. In the present case the defendant who was a party right along has made the present application for revision.

The trend of authority amply indicates that when revisionary powers of the Court of Appeal are invoked, same will be exercised only if exceptional circumstances are urged which necessitate the indulgence of the Court to exercise its revisionary powers. This principle was further strengthened by the decision in *Caderamanpulle* v *Ceylon Paper Sacks Ltd.*(7). In the above case this Court held as follows:

> *"The existence of exceptional circumstance is a pre-condition for the exercise of the powers of revision."*

Per Nanayakkara, J. at 116.

> *"..... when the decided cases cited before us are carefully examined, it becomes evident in almost all the cases cited that powers of revision had been exercised only in a limited category of situations. The existence of exceptional circumstances is a pre-condition for the exercise of the powers of revision and absence of exceptional circumstances in any given situation results in refusal of remedies."*

In this regard further assistance could be derived from the decision of this Court in *Dharmaratne and another* v *Palm Paradise Cabanas Ltd. and others*(8). In the above case *per* Amaratunga, J. at 30,

> *"Thus the existence of exceptional circumstances is the process by which the Court selects the cases in respect of which this extra-ordinary method of rectification should be adopted."*

For the reasons stated above when the 1st impugned order has occasioned miscarriage of justice, this Court is compelled to invoke the powers of revision and thus I hold the view that said order should be set aside.

By the present petition 2nd relief sought is to set aside the order of the learned Trial Judge dated 08.11.2002. What has given rise to this order was the application made by the defendant to set aside the interim injunction already issued by the 1st order dated 13.12.2001. By the 2nd impugned order the learned Trial Judge has dismissed the application of the defendant. Perusal of the 2nd order reveals that the main contention of the defendant submitted in this regard to wit – once an interim injunction has been granted *inter-parte* an aggrieved party cannot seek the reliefs under Section 666 of the Civil Procedure Code, has been rejected. This conclusion of the learned Trial Judge is also not correct.

When the 1st impugned order has been already set aside no necessity arises to consider the merits of the 2nd impugned order since the application of the defendant which had given rise to the making of the 2nd order is to set aside or vary the 1st order to wit: granting of the interim injunction.

Viewed in the above context I conclude that the defendant in this case has been successful in establishing the existence of exceptional circumstances that would warrant the invocation of revisionary jurisdiction of this Court. Accordingly both the above impugned orders are hereby set aside. This application is allowed with costs fixed at Rs. 15,000/-.

SARATH DE ABREW, J. – I agree.

Application allowed.