TROPICAL HERBS (PVT) LTD., AND TWO OTHERS

v.

LINK NATURAL PRODUCTS (PVT) LTD

(Case No. 02)

COURT OF APPEAL
UDALAGAMA, J.
NANAYAKKARA, J.
C.A.L.A. 218/2001
D.C. COLOMBO 5859/SPL
JUNE 25TH, 2001
JULY 4TH, 2001
JULY 17TH, 2001

Companies Act No. 17 of 1982 - Board of Investment of Sri Lanka Law No. 4 of 1978 - amended by No. 4 of 1992 S. 17(2), S. 27A - Enjoining Orders issued against Companies registered under Law No. 4 of 1978 - Validity - Latent Jurisdiction - Rules of Natural Justice.

The Petitioner Company is a limited liability Company registered under the Companies Act and is a Company registered in terms of the Board of Investment of Sri Lanka (BOI) Law. The Plaintiff Respondent obtained an enjoining order ex parte, as prayed for in the Petition.

On leave being sought, it was contended that, in view of S. 27A of the BOI Law as the Petitioner Company is a Company registered under the BOI Law, District Court was obliged to comply with the provisions of S. 27A and give the Petitioner a hearing before making an enjoining order against the Petitioner.

The position of the Plaintiff Respondent was that, S. 27A only requires the issue of Notice on the party against whom an enjoining order is sought and any violation, if any, affects only the latent jurisdiction of the Court. The latent lack of jurisdiction can be cured by the conduct, waiver, inaction or by the subsequent acquiescence of the parties.

Held :

(i) S. 27A clearly spells out this condition precedent which should have been complied with before an enjoining order is issued by Court against a BOI registered Company, therefore before an enjoining order is issued, the party against whom it is sought should be noticed and heard.

Per Nanayakkara, J.

> "It is clear on a perusal of the relevant section that the incorporation of this statutory requirement by noticing and giving a hearing to a company registered in terms of the BOI Law has been influenced by considerations of principles of natural justice, *audi alteram partem*, in the interest of Companies which have been established by making

colossal investments, indisputably, it was to mitigate the risk of injustice and damage to a Company under BOI Law by the issuance of enjoining orders, that special statutory provisions governing interim relief by way of enjoining orders have been made."

APPLICATION by way of leave to appeal from the order of the District Court of Colombo.

Cases referred to :

1. *Tropical Herbs (pvt) Ltd v. Link Natural Products (pvt) Ltd* - 2001 - 3 SALR 141 (Case No 01)
2. *Perera v. Commissioner of National Housing* - 77 NLR 361
3. *Fernando v. Roland* - 75 NLR 231

Gamini Marapana, P.C., with *Navin Marapana* for the Petitioners.

K. Kanag Iswaran, P.C., with *G. Alagaratnam, P. Jayawardena* and *Buddhika Illangatilaka* for the respondent.

Cur. adv. vult.

September 13, 2001.

NANAYAKKARA, J.

The plaintiff - respondent (respondent) instituted action against the defendants - petitioners seeking, inter alia, injunctive relief and enjoining order as prayed for in the plaint. Of the defendants - petitioners the 1st defendant - petitioner is a limited liability Company incorporated under the Companies Act No. 17 of 1982 and it is also a Company registered in terms of the Board of Investment of Sri Lanka Law No. 4 of 1978.

After the institution of the action , the plaintiff -respondent, on an ex - parte application made to court, obtained an enjoining order against the defendants - petitioners as prayed for in the plaint.

Thereafter the defendants filed their statement of objections, by way of petition affidavit challenging the jurisdiction of the Court to entertain, hear and determine the plaintiff - respondent's action and praying for the suspension of the enjoining order issued against them.

The learned District Judge who held an inquiry into the objections taken by the defendants, delivered his order on 30. 04. 2001 rejecting the objections of the defendants against the enjoining order.

Against that order the defendant sought relief in *another application*[1] by way of leave and this Court has already determined that matter in favour of the defendants - petitioners holding that the District Court has no jurisdiction, to entertain, hear and determining the action of the respondent.

After the learned District Judge rejected the objections in regard to the enjoining order, Counsel for the defendant once again on 08. 06. 2001 had made further oral submissions, basing his argument on the provisions of section 26A of the Board of Investment of the Sri Lanka Law No. 4 of 1978 as amended by Act No. 49 of 1992.

The learned District Judge again on 15. 06. 2001 made an order rejecting the submission and the application of the learned Counsel for the defendants - petitioners for the suspension of the enjoining order issued by him on 30. 04. 2001.

It is against this order, that the Defendants - petitioners have now sought relief by way of leave to appeal in this application.

Learned Counsel's main contention in this Court was that in terms of the provisions of section 26A of the Board of Investment of Sri Lanka Law No. 4 of 1978 as amended by Act No. 49 of 1992 an interim relief by way of an enjoining order could not have been validly issued on an ex-parte application of a party against a Company registered under the Board of Investment of Sri Lanka Law. Learned Counsel contended that the learned District Judge was obliged to comply with the provisions of section 27A of the Board of Investment of Sri Lanka Law and issued notice on the petitioner and given him a hearing before making an enjoining order against the defendants - petitioners. Therefore the enjoining order issued against the defendants - petitioners in disregard of the provisions of this section has rendered it invalid, and it should have been suspended when its invalidity was brought to the notice of Court subsequently.

Learned Counsel for the plaintiff - respondent responding to the submission of Counsel for the defendants - petitioners

argued that section 27A of the Act No. 47 of 1992 only requires the issue of notice on the party against whom an enjoining order is sought and violation of the provision of the section, if at all, affects only the latent jurisdiction of the Court. The latent lack of jurisdiction can be cured by the conduct of the parties and the petitioners are now estopped form agitating the question of lack of jurisdiction by their subsequent acquiescence, waiver and inaction. Counsel also referred this court to the following authorities in support of this argument:

Perera v. Commissioner of National Housing[2] *Lily Fernando v. Roland*[3].

Therefore Counsel submitted that the learned District Judge's order was not made per incuriam and the question of applicability of section 27A of the Board of Investment of Sri Lanka Law Act, does not arise in this matter.

At this stage it has become necessary to examine the question of validity and correctness of the impugned order made by the learned District Judge. In this case, what is at issue is the validity of the procedure adopted in issuing the enjoining order. To determine the question of validity of the order and the correctness of the procedure adopted, a careful examination of section 27A of the Board of Investment Law will be necessary.

The relevant section 27A of the Board of Investment Law No. 4 of 1978 as amended by section 8 of the Act No. 49 of 1992 reads thus: "No enjoining order may be issued under section 664 of the Civil Procedure Code against a Board of Investment registered Company, except after notice to and hearing the Board of Investment Company. When this particular section is carefully analyzed it becomes evident that the legislature has clearly imposed a restraint on the court to issue an enjoining order against a company registered under the Board of Investment Act unless certain procedural requirements are met. This section clearly spells out the condition precedent which should have been complied with before an enjoining order is issued by court against a Board of Investment registered Company. The section clearly states that before an enjoining

order is issued, the party against whom it is sought should be noticed and heard.

Therefore it is incumbent and obligatory on the Court to issue notice to the registered Company against whom an enjoining order is sought and give it a fair hearing before any order by way of an interim relief is issued against it. When a statutory provision has imposed an obligation on the court to issue notice and vie a hearing to a Company registered in terms of section 17(2) of the Board of Investment Law it will require the court to follow the procedure prescribed by statute for the purpose. If it has failed to act in compliance with the procedural requirements, it may inevitably render any order made in contravention of the procedure laid down by statute, void and liable to suspension and recession.

In this case, it is an admitted fact that an enjoining order was issued against the defendants - petitioners, on an ex - parte application made by the respondent. It is also an admitted fact that no notice and hearing was given to the defendants - petitioners. Therefore it is obvious that the Court has acted in contravention of the procedure laid down by the statutory provisions in issuing the enjoining order against which the defendants - petitioners have now sought relief by this application.

Even if it is admitted that this is a matter which affects only the latent jurisdiction of the Court, and the defendant - petitioners have not taken any objection at the earliest possible opportunity, as argued by Counsel for the respondent, it cannot be said that the respondent was unaware of the fact that the 1st defendant - petitioner Company is registered under the Board of Investment Law, as some of the documents marked by the respondent himself clearly establish this fact. It was the duty of the respondent to produce all the relevant and material evidence which would have had a bearing on the decision of the learned District Judge whether to issue an enjoining order or not. By his failure to do so, the respondent can also be guilty of wilful suppression of material facts to court. In this case, the defendants - petitioners had been denied the opportunity of being heard before the enjoining order was issued. Perhaps, had the Court known that the petitioner was a Company

registered in terms of the Board of Investment Law, it would have influenced the judicial mind and the learned District Judge would have come to a different conclusion. It is clear on a perusal of the relevant section, that the incorporation of this statutory requirement of noticing and giving a hearing to a Company registered in terms of the Board of Investment Law, has been influenced by considerations of principles of natural justice, Audi Alteram Partem, in the interests of Companies which have been established by making colossal investments.

Indisputably, it was to mitigate the risk of injustice and damage to a Company registered under the Board of Investment Law by the issuance of enjoining orders, that Special Statutory Provisions governing interim reliefs by way of enjoining orders have been made.

Therefore, I find myself unable to agree with the argument advanced by Counsel for the respondent and that in view of the above mentioned reasons, I am of the opinion that the impugned enjoining order had been issued in contravention of the procedural requirements of the Law and it should not have been issued without notice and hearing the defendant - petitioner.

As indicated earlier, this court has already made a determination in *regard to an earlier order (Supra)* made by the learned District Judge in this very case, holding that the District Court lacks jurisdiction to entertain, hear and determine the case. Therefore this Court now determines that the District Court not only lacks jurisdiction to entertain, hear and determine this case, the particular enjoining order against which relief has been sought, had been made in contravention of the procedural requirements of the Board of Investment Law. Therefore the impugned order made on 15. 06. 2001 is hereby set aside.

The petitioner is entitled to taxed costs.

UDALAGAMA, J. - I agree.

Application allowed.