WALKER SONS & CO. LTD.,
v.
WIJAYASENA

COURT OF APPEAL.
ISMAIL J.,
C.A. 570/96 (REVISION)
D.C. COLOMBO 17455/T
SEPTEMBER 16,1996
OCTOBER 1,1996
NOVEMBER 5,19,28,1996

Interim Injunction – Suppression of material facts – Finding without considering the contents of documents – Is it liable to be set aside.

It is now settled that a person who makes an *ex parte* application is under an obligation to make the fullest possible disclosure of all the material facts and that if he does not make the fullest possible disclosure, then he cannot obtain any advantage which may have already have been obtained by him.

The plaintiff-respondent had wrongfully suppressed the material fact that he himself acted in breach of his undertaking. If the letters D3 and D6 were placed before court it would have been apparent that the plaintiff-respondents lack of finances was either an additional or even the sole reason for not paying the second installment. These two letters put a different complexion on the case of the plaintiff-respondent as presented by him, at the stage of the application for an enjoining order and contain material facts which would have reasonably affected the mind of the Judge. The finding that the plaintiff-respondent could not pay the agreed sum to the Bank because the defendant-petitioner failed to obtain the Notice of disclaimer has been arrived at without an adequate consideration of D3 and D6. The District Court had erred in finding that the plaintiff-respondent has disclosed all the facts at the stage of the enjoining order.

> "A party cannot plead that the misrepresentation was due to inadvertence or misinformation or that the Applicants was not aware of the importance of certain facts which he omitted to place before court."

APPLICATION in Revision from the order of the District Court of Colombo.

Cases referred to:

1. *Hotel Galaxy (Pvt) Ltd., and Others v. Mercantile Hotel Management Ltd.*, (1987) 1 SLR 5 at 36.
2. *R v. Kensington Income Tax Commissioners* – (1917) 1 KB 486.

S. A. Parathalingam P.C., with *Kushan de Alwis* and *M. Faizer Musthapha* for defendant-petitioner.

K. N. Choksy P.C., with *Nihal Jayamanne P.C.* and *Nihal Fernando* for plaintiff-respondent.

Cur. adv vult.

July 15, 1996

ISMAIL, J.

The defendant-petitioner Company has in this application for revision sought to have the order of the Additional District Judge of Colombo dated 22.8.96 set aside. By the said order an interim injunction has been issued restraining the defendant-petitioner from disposing of and/or transferring the properties the subject-matter of this action and/or dealing with the said properties or any part thereof in any manner.

The plaintiff-respondent and the defendant-petitioner initially entered into two Sale Agreements bearing Nos. 666 and 667 both dated 15th September 1995 attested by S.I. de Silva, NP whereby the defendant-petitioner as the vendor agreed to sell and the defendant-respondent as the purchaser agreed to purchase the following lands and premises which were mortgaged previously to the Bank of Ceylon, for a total consideration of Rs. 225 million and Rs. 100 million respectively.

1. Lots 1-14 depicted in Plan No. 2186 dated 18th April 1995 made by H. R. Samarasinghe, Licensed Surveyor, of the premises bearing assessment No. 250 (part) Srimath Ramanathan Mawatha, Colombo 15 – in extent 5A. 3R. 18.5 perches; and

2. Lot A1 depicted in Plan No. 2104 dated 7th September 1995 made by G. B. Dodanwela, Licensed Surveyor, of the premises bearing assessment Nos. 213 and 215 Kollupitiya Road, Colombo 3 – in extent 0A. 2R. 26.5 perches.

The parties agreed that payment would be effected in the following manner:

1. Rs. 10 million to be paid at the time of the execution of the two sale agreements.

2. Rs. 7.5 million to be paid on 18.10.96 upon the vendor obtaining confirmation from the Bank of Ceylon of the amount outstanding on Mortgage Bond No. 919 dated 21.7.90 attested by M. N. Jayawardena, NP to the satisfaction of the purchaser.

3. Rs. 15 million to be paid on 31.10.95 upon the vendor obtaining confirmation from the Bank of Ceylon of the amount outstanding on Mortgage Bonds bearing Nos. 839 and 918 dated 14th October 1988 and 27th July respectively both attested by M. N. Jayawardena, NP and said Mortgage Bond 919 to the satisfaction of the purchaser.

4. The balance sum of Rs. Two Hundred and Ninety Two million Five Hundred Thousand to be paid on or before 15.1.96 provided that the purchaser shall settle direct to the Bank of Ceylon the amount outstanding on the said Mortgage Bonds bearing Nos. 389, 918 and 919.

The plaintiff-respondent paid sum of Rs. Ten million at the time of the execution of the two separate agreements on 15.9.95 and a further sum of Rs. Seven Million Five Hundred Thousand on 16.10.95. The Bank of Ceylon, in the meanwhile, by its letter dated 2.10.95 called upon the defendant-petitioner, to settle the entirety of the outstanding amount of money due to it on the aforesaid mortgage bonds by 31st October '95. On receipt of this letter the defendant-petitioner made an appeal to the Bank in regard to the question of the repayment of the sums of money then outstanding but it appears from the reply dated 27.10.95 (XII) from the Bank that the appeal was not successful . The Bank retreated its position that a sum of Rs. 200 million is payable in full and final settlement of the liabilities of the defendant petitioner but stated that it was prepared to accept the payment of Rs. 50 million by 31.10.95, a further payment of Rs. 50 million by 31.12.95 and the payment of the balance sum of Rs. 100 million by 31.1.96.

Prior to the entering of the two sale agreements referred to above the defendant-petitioner entered into a Sale Agreement bearing No. 1308 dated 25.5.95 with a Company named Sea Consortium Lanka (Pvt) Ltd. to sell a part of its property at Mutwal, depicted as lots 9 and 10 in Plan No. 2186, and had accepted Rs. 3,199,750 as

an advance against the total consideration payable but the sale of the property did not take place. The plaintiff-respondent then negotiated with Sea Consortium Lanka (Pvt) Ltd. which indicated its willingness to purchase 61.45 perches, depicted as lot 1 in plan No. 2170 dated 19.10.95, made by G. B. Dodanwela, Licensed Surveyor for a consideration of Rs. 22,736,500. The land and premises at Mutwal referred to as lots 1-14 in Plan No. 2186 were amalgamated and shown as lots 1 and 2 in Plan No. 2170.

As the properties of the defendant petitioner were mortgaged to the Bank of Ceylon the defendant-petitioner authorised the plaintiff-respondent by its letter of 8th November '95 to negotiate with the Bank and to finalize the terms and conditions for the sale of the properties.

The plaintiff-respondent then by his letters dated 10.11.95 and 20.11.95 proposed the following schedule for payments to be made to the Bank; – payment of Rs. 50 million on or before 30.11.95 (upon which a deed of release was to be executed for 61 perches out of property at Mutwal), payment of second instalment of Rs. 50 million on or before 31st December 1995 and the final settlement of Rs. 156 million by the end of January 96.

The time schedule for payment proposed by the plaintiff-respondent was accepted by the Board of the Bank of Ceylon and he was informed that the Bank was prepared to accept a sum of Rs. 50 million on or before 30.11.95, a further payment of Rs. 50 million on or before 31.12.95 and the final payment of the balance sum of Rs. 256 million, (of which Rs. 56 million was due to Sampath Bank) on or before 31.1.96.

The plaintiff-respondent by his letter dated 30.11.1995 (D3) "agreed to abide by the schedule of payment as indicated in full settlement of the above liabilities" and stated that he has made arrangements to pay a sum of Rs. 50 million immediately, to pay a sum of Rs. 50 million on or before 31st December 1995 and to make the balance payment as indicated by the end of January 96.

The plaintiff-respondent made the first payment of Rs. 50 million in November 95 as agreed and the Bank thereupon released an extent of 61.45 perches of the Mutwal property for sale to Sea Consortium Lanka (Pvt.) Ltd.

In consequence the parties entered into a Supplemental Agreement bearing No. 684 dated 30.11.95 which provided that on the execution of the transfer of the said extent of 61.45 perches from and out of the land at Mutwal to Sea Consortium Lanka (Pvt) Ltd. that the said extent of land would be excluded from the original Agreement No 666 dated 15.9.95. It was also agreed by the parties that aggregate sum of money payable by the plaintiff-respondent on the earlier agreements for the purchase of the said properties shall be reduced from Rs. 325 million to Rs. 254,300,250/- giving the plaintiff-respondent credit for the various sums of money paid to the defendant-petitioner and on his behalf to the Bank and also by giving him credit for the advance previously received by the defendant petitioner from Sea Consortium Lanka (Pvt) Ltd.

The plaintiff-respondent and the defendant-petitioner had each failed to fulfil certain conditions and undertakings agreed upon by them in the two initial Agreements Nos. 666 and 667 both dated 15.9.95 and the supplemental Agreement No. 684 dated 20.11.95 and as such they agreed by further Supplemental Agreements bearing Nos. 61 and 62 both dated 12.1.96 to extend the date of the stipulated transactions from 15.1.96 to 31.3.96.

The plaintiff-respondent instituted action by plaint dated 4.6.96 in which it was averred that the defendant-petitioner has acted in breach of the terms and conditions of the said agreements in failing to obtain a letter of confirmation from the Ceylon Petroleum Corporation that a notice of disclaimer pertaining to the land referred to in the notice of claim published in the Government Gazette dated 27.1.92 will be Gazetted prior to 31.3.96. The Sale agreement No. 667 dated 15.9.95 relating to the sale of the property at Kollupitiya provided in paragraph (k) that the defendant-petitioner would make available to the purchaser within 60 days of the date of the execution of the agreement a letter from the Ceylon Petroleum Corporation stating that a notice of disclaimer will be gazetted prior to 15.1.96.

The position of the defendant-petitioner as set out in its letter dated 25.3.96 (X33) in regard to the said letter of confirmation to be obtained from the Ceylon Petroleum Corporation and referred to in paragraph 7(k) in each of the agreements Nos. 666 and 667 was that it was negotiating with the Corporation to obtain the same.

The plaintiff-respondent further alleged in his plaint that the defendant-petitioner without being in a position to handover vacant possession of the lands and premises sent two letters dated 25.3.96 to the plaintiff-respondent informing him that the Company was in a position to give vacant possession by 31.3.96 and requested the plaintiff-respondent to pay the balance sum of money due on the said agreements.

In regard to the giving of vacant possession of the land and premises at Mutwal, the defendant-petitioner confirmed the several verbal intimations to the plaintiff-respondent that it would be in a position to give vacant possession before 31.3.96. In regard to the handing over of vacant possession of the land and premises at Mutwal paragraph 9 of the Sale Agreement No. 666 dated 15.9.95 provided as follows:

> "9. Immediately after the execution of the Deed of Transfer as aforesaid the vendor shall hand over quiet, peaceful and vacant possession of the said property and premises to the Purchaser or his nominee as the case may be."

Similarly paragraph 9 of the Sale Agreement No. 667 dated 15.9.95 in regard to the property at Kollupitiya is as follows:

> "9. Immediately after the execution of the Deed of Transfer as aforesaid the vendor shall handover quiet and peaceful vacant possession of the said property and premises to the purchaser excluding the area now occupied by the petrol shed and operated and managed by the Sri Lanka Army. However, in the event the vendor is unable to hand over vacant possession as aforesaid to the purchaser, the purchaser shall withhold Rs.10 million of the said purchase price until the purchaser is placed in quiet and vacant possession."

Meanwhile it appears from the letter dated 29.3.96 (D8) sent by the Bank to the defendant-petitioner that the Bank had decided at the Board Meeting held a few days previously to proceed with the sale of the mortgaged properties by public auction if the entirety of the sums of monies due to it was not paid by the end of April 1996, thereby extending the time for payment of the outstanding sums of money by a further period of one month.

The defendant-petitioner did not pay the Bank the second instalment of Rs. 50 million which he agreed to pay on or before 31.12.95 nor did he pay any further sum thereafter.

The plaintiff-respondent averred in his plaint that he was ready and willing upto midnight of 31.3.96 to conclude the transaction by paying the balance sum of money if the defendant-petitioner had obtained the notice of disclaimer from the Petroleum Corporation and if the plant and machinery on the premises at Mutwal were removed and if the employees who were in occupation of the premises had left the premises so as to make it possible for him to get vacant possession of the premises. However, as seen from paragraph 9 of the agreement referred to above the defendant-petitioner was obliged to hand over quiet, peaceful and vacant possession immediately after the execution of the deed of transfer and the parties were nowhere near to signing the deed of transfer at this stage. It is also to be noted that in regard to the land vested with the Ceylon Petroleum Corporation that the plaintiff-respondent in his letter dated 22.2.96 (D6) to the Bank has appreciated the fact that it would take at least a further two months to obtain the notice of disclaimer.

The plaintiff-respondent relying on the alleged breach of the agreements as aforesaid by the defendant-petitioner has on the resulting cause of action sought to recover Rs. 68,300,000/- paid as advance and or part payment and to recover a further sum of Rs. 68,300,000/- as liquidated damages. He has also on an alternate cause of action sought to enforce specific performance of the agreements and in the event of his obtaining a transfer of the said premises to recover a sum of Rs. 50 million as damages from the defendant-petitioner.

The plaintiff-respondent also sought an enjoining order and an interim injunction as he feared that the defendant-petitioner could dispose of the properties and that he would in that event not be able to enforce his decree for specific performance and also that the defendant-petitioner would not be left with sufficient assets to satisfy the judgment if entered in his favour. He also alleged that the plaintiff-respondent was in dire financial straits and that he was unable to repay the advance and damages claimed by the plaintiff-respondent without disposing of the said properties.

The objection to the issue of the interim injunction was on the ground that the plaintiff-respondent has wrongfully suppressed the material fact that he himself acted in breach of his undertaking to make the specified payments of money and that he was unable to do so because he was admittedly in financial difficulties. Learned Counsel for the defendant-petitioner submitted that the plaintiff-respondent has deliberately suppressed the letters dated 30.11.95 and 22.2.96 marked D3 and D6 at the stage of the application for an enjoining order and that the plaintiff-respondent has not established a *prima facie* case for the issue of an enjoining order or an interim injunction. It was contended in reply by learned Counsel for the plaintiff-respondent that the contents of these two letters however have been referred to in the letters dated 10.11.95, 15.11.95 and 20.11.95 produced marked X14, X16 and X17 respectively and in the last of which it was stated that the breach of the conditions of the agreement by the defendant-petitioner was the reasons for seeking extension of time to pay the agreed instalments to the Bank. The parties have each written several letters in regard to the time schedule for making payments to the Bank and in this context the letters D3 and D6 are significant. The plaintiff-respondent himself made proposals for making the first payment of Rs. 50 million on 30.11.95, the next instalment of Rs. 50 million by 31.12.95 and the balance by the end of January 1996 by his letters X14 and X16 which proposals were accepted by the Bank by its letter of 20.11.95 (X17). The plaintiff-respondent then readily agreed to make the payments accordingly in his reply of 30.11.95 (D3) and paid the first instalment of Rs. 50 million immediately. The letter dated 22.2.96 (D6) assumes greater significance because the plaintiff-respondent having defaulted in paying the second instalment of Rs. 50 million by 31.12.95 as undertaken by him in his letter D3, informed the Bank that financial constraint also prevented him from making any further payment. He therefore suggested the following alternate methods of settling the outstanding liabilities as follows:

> "... we shall be glad if you could allow us to settle the outstanding liabilities in either of the following two alternate methods.
>
> a. Payment of Rs. 20 million of five monthly instalments commencing in March 1996 and the balance payment of Rs. 106 million at the end of the five instalments or,

b. Provision of Rs. 150 million of project loan for the above mentioned development project against the equivalent of the above liability and the payment of balance sum of Rs. 56 million at the end of the fifth month."

While the plaintiff respondent's position in his plaint was that he did not make any further payments to the Bank due to the failure of the defendant petitioner to obtain the said notice of disclaimer, these letters D3 and D6 show that he could not abide by his undertaking to the Bank to make the specified payments due to his financial difficulties. The failure of the defendant petitioner to obtain the notice of disclaimer as being the reason for his not making payments to the Bank has been given by him for the first time in the letter D6 written on 22.2.96 and after he defaulted in depositing a sum of Rs. 50 million as agreed by 31.12.95. The undertaking given by the plaintiff respondent to pay the agreed sums of money to the Bank was not conditional on the plaintiff respondent obtaining the notice of disclaimer. If the letters D3 and D6 were placed before the Additional District Judge at the stage of the plaintiff respondent's application for an enjoining order, it would have been apparent that the plaintiff respondent's lack of finances was either an additional or even the sole reasons for not paying the second instalment of Rs. 50 million by the end of December 95 or any sum thereafter.

Atukorale J. said in *Hotel Galaxy (Pvt) Ltd. and Others v. Mercantile Hotel Management Ltd.* [1] as follows;

"... a misstatment of the true facts by the plaintiff which put an entirely different complexion on the case as presented by him when the injunction was applied *ex parte* would amount to a misrepresentation or suppression of material facts warranting its dissolution without going into the merits."

It is now settled that a person who makes an *ex parte* application is under an obligation to make the fullest possible disclosure of all the material facts and that if he does not make the fullest possible disclosure, then he cannot obtain any advantage which may have already have been obtained by him. – *R. v. Kensington Income Tax Commissioners* [2]. A party cannot thereafter plead that the misrepresentation was due through inadvertence or misinformation or

that the applicant was not aware of the importance of certain facts which he omitted to place before court.

The two letters D3 and D6 put a different complexion on the case of the plaintiff-respondent as presented by him at the stage of the application for an enjoining order and contain material facts which would have reasonably affected the mind of the judge. The finding of the judge that the plaintiff-respondent could not pay the agreed sum of money to the Bank because the defendant-petitioner failed to obtain the notice of disclaimer has been arrived at without an adequate consideration of the two letters D3 and D6. The Additional District Judge has erred in finding that the plaintiff-respondent has disclosed all the facts at the stage of the application for the enjoining order. The judge also erred in finding that the defendant-petitioner has referred to the sale of 61.45 perches of the property at Mutwal as a fact that was suppressed, whereas the defendant-petitioner averred that the fact that a sum of Rs. 19,536,750/- realised on the sale of the said property was handed over to the plaintiff-respondent, has been suppressed. The Additional District Judge has also weighed the injury which would be caused to the plaintiff respondent against the injury which the defendant-petitioner will sustain if the injunction were refused and has held that the balance of convenience favoured the granting of the injunction as prayed for by the plaintiff respondent. This finding too has been arrived at without considering the contents of the two letters D3 and D6 and without considering, in the circumstances revealed therein, whether the plaintiff respondent would be entitled to specific performance or whether damages would be an adequate remedy.

For the reasons set above the order of the Additional District Judge dated 22.8.96 is set aside. The application for revision is allowed with costs fixed at Rs. 5,250/-

Application allowed.

Interim Injunction dissolved.