

**SUGATHAANANDA THERA
VS.
AJITH BODINAGODA AND OTHERS**

COURT OF APPEAL,
IMAM. J,
SRISKANDARAJAH. J,
CALA 472/2002,
DC 1658/02/L
OCTOBER 18, 2004,
JUNE 6, 2005.

*Civil Procedure Code section 16- Injunctive relief sought - Maintainability
- Plaintiff not a juristic person - Can an unregistered/unincorporated society
sue?—Trust Ordinance - Section 5(1) - Instrument to be notarially executed
- Is YMBA Wellawatta a juristic person?—Locus.*

The Plaintiff - respondents all describing themselves as officials of the Wellawatta YMBA filed action alleging that the defendant was unlawfully constructing buildings protruding on to the land belonging to the plaintiff and sought an interim injunction and for a declaration that they are entitled to use the said land without any hindrance. Enjoining order was issued.

The defendant petitioner sought leave to appeal from the said order.

It was contended by the defendant petitioner that –

- (1) the plaintiffs cannot maintain the action without complying with section 16 of the Code.
- (2) that there is a valid trust existing as set out in the plaint.

HELD:

- (i) Where there are numerous parties having a common interest in bringing or defending an action, one or more of such parties may with the permission of Court sue or be sued or may defend in such an action on behalf of all parties so interested. The Court shall in such case give at the expense of the party applying so to sue or defend, notice of the institution of the action to all such parties either by personal service or by public advertisement as the Court may direct.
- (2) There has been absolute non compliance with the provisions of section 16 by the plaintiff respondent.
- (3) YMBA (Wellawatta) is not a juristic person. There is no certification or registration under the Societies Ordinance. In such a situation the persons named as the officials of the Wellawatta YMBA is legally non existent and would have no *locus standi*.

- (4) Even an unregistered/incorporated society can sue/be sued provided that the procedure set out in section 16 is followed.
- (5) There is no trust instrument. If there is a trust, in accordance with section 5(1) of the Trust Ordinance, the instrument has to be notarially executed, which requirement has not been fulfilled.
- (6) The plaintiff - respondents are neither - trustees nor a juristic persons.

APPLICATION for leave to appeal from an order of the District Court of Mt. Lavinia with leave being granted.

D. P. Mendis PC with Nadeera Gunawardena for defendant - petitioner.
Ranjan Suwandaradne with Ranjith Perera for plaintiff - respondent.

Cur. adv. vult.

June 21, 2006.

IMAM, J.

The Defendant - Appellant (hereinafter referred to as "the Appellant") has tendered this leave to Appeal application seeking leave to appeal against the order of the learned Additional District Judge of Mount Lavinia dated 31.10.2001 and *inter - alia* other reliefs as sought for in the prayer to the Petition. The facts of the case are briefly as follows : The Plaintiff - Respondents (hereinafter referred to as "the Respondents") all describing themselves as officials of the Wellawatte Y. M. B. A. filed action in the District Court of Mt. Lavinia alleging that the defendant namely the Venerable U. M. Sugathananda Thero (Appellant) a Buddhist Priest was unlawfully constructing buildings protruding on to the land belonging to the 'Plaintiffs' and disturbing the Plaintiffs (Respondents) of their quiet possession of their land and

prayed for an Interim injunction and/or Enjoining Order restraining the Defendant, and for a declaration that they are entitled to use the aforesaid land without any hindrance.

The learned Additional District judge issued an Enjoining order as prayed for against which the Defendant (Petitioner) filed objections and sought that it be dissolved. The Defendant's (Petitioner's) Application was refused with regard to which the defendant - Petitioner has tendered this application before this Court. On 13.12.2004 this Court granted leave to Appeal on the following questions of law :

- (1) Whether the Plaintiffs in DC Mt., Lavinia Case No. 1658/02/L can maintain this action without complying with the provisions of Section 16 of the Civil Procedure Code.
- (2) Whether there is a Valid Trust existing in respect of the property set out in the schedule to the plaint.

The present Office - Bearers are the successors to the Original Trustees or their Assigns. Under these circumstances the following further questions arise for consideration in this Appeal :

- (1) Whether the Plaintiff - Respondents have a Legal right to seek Declaratory relief sought in the prayer to the plaint in respect of the property described in the schedule to the plaint.
- (2) If the above question is answered in the negative whether the Plaintiffs have any prospect of succeeding at the end of the action.
- (3) If question No.2 is answered in the negative whether they have the right to get an Enjoining order as a first step to the injunctive relief sought by them.

The position of the Defendant - Petitioner is that the land was given as a Crown Grant to the Trustees of the Y. M. B. A. who were named.

The Petitioner avers that the Defendant - Petitioner in accordance with paragraph 6 of the plaint commenced construction work on a land belonging to some one else. The plaint states that the construction is made to be jutting out to the land described in the schedule to the plaint. The Petitioner submits that as a preliminary matter the plaint should have been rejected *in limine* as although the plaint states that the Wellawatta YMBA is a registered Society and is incorporated, no certificate of incorporation was produced with the plaint, nor was any evidence of Registration produced. It is further contended on behalf of the Petitioner that an un-incorporated society like the Plaintiff - Respondents in this case can bring an action or defend an action only if it comes to Court or is brought into Court after following the procedure laid down in Section 16 of the Civil Procedure Code, for otherwise a group of persons such as the Plaintiffs - Respondents have no *locus standi*. The Petitioner avers that the Plaint is not in order and hence has to be rejected. Thus the Petitioner contends that the Plaintiff - Respondents should never be granted an injunctive relief.

The Plaintiffs - Respondents contend that the Defendant - Petitioner priest has no right, title or interest to the leased property which is possessed by the YMBA Wellawatte and has wrongfully and unlawfully commenced construction work in the adjoining property where the buildings have been built encroaching upon the property possessed by the YMBA Wellawatta. The Respondent further disclosed in the plaint that the Defendant - Petitioner - Priest had forcibly entered the said property and went into the extent of cutting down certain trees and also caused damage to the boundary wall which have been illustrated in the photographs produced by the Respondents. I have examined the Appeal of the Defendant - Petitioner, and the position of the Plaintiffs - Respondents.

In accordance with the plaint and on examination of the Documents, document E (Gazette dated 09.12.1966) signed by C. J. Serasinghe, Land Commissioner is a Notification under Crown Lands regulation 2192) and refers to the Notice regarding the 5 trustees nominated on behalf of the Y. M. B. A. Wellawatte with regard to the premises the

subject matter of this case. By Special Lease under section 6 of the Crown Lands Ordinance, the land grant was received by 5 Trustees on behalf of the Wellawatte YMBA on 17.08.1966 from His Excellency The Governor General Mr. William Gopallawa. However the Constitution of the YMBA annexed as B has no provision for Trustees. In such a situation when the Crown Grant is given to certain trustees for a specific purpose, with the demise of the trustees and with no continuation of the trust, the trust fails, and the Crown Grant ceases to be operative for the purpose for which it was granted and must hence return to the Crown. Among the 26 Plaintiffs - Respondents none of the original Trustees are present, no new Trustees have been appointed, and there is no provision for Trustees in the Constitution of the YMBA, Wellawatte, and hence there is no Locus Standi.

Section 16 of the Civil Procedure Code states that, "Where there are numerous parties having a common interest in bringing or defending an action, one or more of such parties may, with the permission of the Court sue or be sued, or may defend in such an action on behalf of all parties so interested. But the Court shall in such case give, at the expense of the party applying so to sue or defend, notice of the institution of the action to all such parties, either by personal service or (if from the number of parties or any other cause such service is not reasonably practicable, then) by public advertisement as the Court in each case may direct". There has been absolute non compliance with the aforesaid provisions of section 16 by the Plaintiff - Respondents.

The Plaintiffs - Respondents styled themselves as officials of the Wellawatte YMBA, the document marked as "A" with the plaint is only signed by 3 persons calling themselves as President, Secretary and joint Secretary, and there are no proper proceedings of a valid meeting where a decision had been taken. In my view there is no certificate of registration or incorporation of the Wellawatte Y. M. B. A. if the YMBA was registered under the Societies Ordinance, such certificate would have been issued by the Registrar of Societies. As such certificate is not produced, my conclusion is that the YMBA Wellawatte is not a Juristic person. In such a situation the 26 persons who referred to

themselves as Officials of the Wellawatte YMBA which is legally non existent would have no *locus standi*.

Even an unregistered or unincorporated Society can sue and be sued provided that the procedure as set out in section 16 of the Civil Procedure Code is followed. However as the procedure in Section 16 has not been followed by the Plaintiff - Respondents, one could conclude that the Wellawatte YMBA is unregistered and unincorporated.

The title to the land claimed by the Plaintiffs in terms of the plaint is based on an alleged trust. There is no trust instrument that has been produced. For the sake of argument assuming that a trust is admitted, then in accordance with section 5(1) of the Trust Ordinance, the instrument has to be notarially executed, which requirements has not been fulfilled. These plaintiffs are neither trustees nor a juristic person.

On a perusal of the complaint of the plaintiff - respondents against the defendant, although they have no legal status to complain, the Plaintiffs are guilty of laches and misrepresentation. On examination of the police complaints they commence on 07.07.2001 and end on 01.08.2001, but the plaint (X3) is dated 15.10.2002 which is more than one year later. It is pertinent to note that the document illustrating that the respondents are officials of the Y. M. B. A. originated on 25.08.2002, although in accordance with the complaints J1 to J5 and K1 which range from 07.07.2001 to 01.08.2001 are irrelevant as they relate to compliants made before 25.08.2002.

With regard to the questions of law raised in the interim order dated 13.12.2004, I supply the following Answers.

- (1) No. The provisions of section 16 of the Civil Procedure Code have to be complied with.
- (2) It had not been proved that a valid trust existed in respect of the property set out in the schedule to the plaint.

In the aforesaid interim order dated 13.12.2004, 03 more questions were framed, the answers to which are "No" Hence for the aforesaid reasons, I set aside the order of the learned Additional District Judge of Mt. Lavinia dated 31.10.2002 and dismiss the Enjoining order entered. No costs.

SRISKANDARAJAH, J.—I agree.

*V. Enjoining order Vacated.
Matter set down for argument.*
