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**RATNAPALA  
VS  
METRO HOUSING CONSTRUCTIONS (PVT) LTD**

COURT OF APPEAL.  
SOMAWANSA, J. (P/CA).  
WIMALACHANDRA, J.  
CALA 115/2005.  
DC MT LAVINIA 1974/05/01.  
April 25, 2005.  
May 13, 2005.

*Civil Procedure Code, sections 664 (1), 664(2) and 756(4) - Enjoining order sought - Interim injunction refused - Validity? - Application for leave to appeal- Interim order obtained ex parte? - Validity? - Should the same registered Attorney-at- Law file the leave to appeal application? Misstatement of the true facts - Does it warrant dissolution of an interim order without going into its merits? - Damages quantified - No injunction/ interim order should be granted? - Court of Appeal Rules 1990, Rule 2(1) - Interim Orders?*

The plaintiff –petitioner sought an enjoining order with notice to the defendant–respondent. Court after an interpartes inquiry dismissed the plaintiff's application for an interim injunction.

On leave being sought it was contended by the defendant–respondent that -

- (1) The petition for leave to appeal was signed by a different Attorney -at- Law and not by the registered Attorney - at - Law who filed proxy in the lower court, thus the application is bad in law.
- (2) The interim order granted ex-parte by the Court of Appeal is bad in law as no plausible explanation was given as to why it was supported ex parte.
- (3) As the plaintiff has quantified damages no injunction/interim order should be granted.

**HELD:**

1. A leave to Appeal application is a step in the proceedings of the original court but according to section 756 (4) it originates in the Court of Appeal. Hence the proxy in an application for leave to appeal can be filed either by the registered Attorney who filed proxy in the lower Court or by an other Attorney.

2. When the inquiry is held *inter partes* there is no necessity to support for an enjoining order. The court is free to make an order based on the material placed before it with regard to the application for an interim injunction.
3. The plaintiff petitioner supported for an interim stay order in the Court of Appeal fifteen days after the delivery of the impugned order without notice to the defendants. The plaintiff-petitioner had sufficient time to give notice to the defendant before supporting for an interim stay order.

The Rules make it compulsory to give notice to the party concerned before such an application is supported unless the petitioner comes with a plausible explanation that the matter is of such urgency that it is not possible to give such notice.

4. A misstatement of the true facts by the plaintiff which put an entirely different complexion on the case as presented by him when the interim stay order was applied *ex parte* would amount to a misrepresentation or suppression of material facts warranting its dissolution without going into its merits. The description of the building in the premises of the plaintiff as a residential house when it was not amounts to a misrepresentation of the true facts which give a different picture to his case as presented by him.
5. If the damage caused to the plaintiff has been quantified then no injunction or interim order will usually be granted.

**APPLICATION** for leave to appeal from an order of the District Court of Mt. Lavinia.

**Cases referred to :**

1. *Saravanapavan vs. Kandasamydurai* 1984 1 Sri LR 268
2. *Gilinona vs. Minister of Land Development and Mahaweli Development and two others* 1978 - 79 1 Sri. L. R. 10 at 13
3. *Duwearachchi and Another vs. Vincent Perera and Others* 1984 2 Sri LR 94
4. *Hotel Galaxy (Pvt) Ltd and Others vs. Mercantile Hotel Management* 1987 1 Sri LR 5 at 36
5. *Jinadasa vs. Weerasinghe* 31 NLR 33, 35
6. *American Cyanamid Co vs. Ethicon Ltd* (1975)1 ALL ER at 510

*Ikram Mohamed, PC with M. Lankatilaka for plaintiff-petitioner.*

*L. C. Seneviratne, PC with Anil Selvaratnam for defendant-respondent.*

*Cur. adv. vult.*

May 25, 2005.

**WIMALACHANDRA, J.**

This is an application for leave to appeal from the order of the learned Additional District Judge of Mount Lavinia dated 16.03.2005. By that order the learned judge refused to grant the interim injunction prayed for by the plaintiff-petitioner (plaintiff) in paragraph “g” of the prayer to the plaint. Briefly, the facts relevant to this application as set out in the petition are as follows :

The plaintiff is the owner of the premises bearing No.11, Pennyquick Road, Wellawatte, Colombo 6. The premises bearing assessment Nos. 49 and 51, 37th Lane, Colombo 6 are adjoining the aforesaid property of the plaintiff. The defendant-respondent (defendant) commenced construction of a multi storied building in the said premises and for that purpose excavation had been done to lay the foundation. The plaintiff states that the operation of the heavy machinery had caused heavy damage to his property. The plaintiff originally instituted action No. 1962/4/L on 16.12.2004 in the District Court of Mount-Lavinia and sought *inter-alia* an interim injunction restraining a company called Metro Construction Ltd. from excavating and/or doing any construction work in the premises Nos. 49 and 51 and obtained an enjoining order *ex-parte*. The said company filed a petition and affidavit dated 04.01.2005 pleading that the construction work was not done by that company but by a company called “Metro Housing Construction (Pvt.) Ltd, a B. O. I. approved company. The Court after an inquiry, held that the construction work in the said premises had been carried out by Metro Housing Construction (Pvt.) Ltd. and not by Metro Construction (Pvt.) Ltd. Accordingly, the Court set aside the enjoining order and refused to grant interim injunction on 25.03.2005.

The plaintiff thereafter instituted the present action No. 1974/095 on 20.01.2005 against Metro Housing Construction (Pvt.) Ltd. seeking the same relief. The plaintiff supported for an interim relief with notice to the

defendant. The Learned Additional District Judge after an inter - partes inquiry made order on 16.03.2005 dismissing the plaintiff's application for an interim injunction. It is against this order that the plaintiff has filed this leave to appeal application.

The plaintiff filed this application for leave to appeal on 31.03.2005 which was supported on 01.04.2005 without notice to the defendant - respondent (defendant) and obtained an interim order restraining the defendant, its agents and servants from carrying out any construction and/or excavation work in premises Nos : 49 and 51, 37th Lane, Colombo 06.

When the matter came up before this Court on 25.04.2005, both counsel made submissions with regard to the extension of the interim order granted by this Court on 01.04.2005 and on the question whether this is a fit case to grant leave to appeal against the aforesaid order of the learned Additional District Judge dated 16.03.2005.

The Learned President's Counsel for the defendant in his written submissions raised a preliminary question of law relating to the procedure. The learned President's Counsel submitted that the proxy in this application before this Court has been filed by Mr. S.B. Dissanayake, Attorney-at-Law. However the proxy granted to Mrs. Subashini De Costa still remains and the journal entries in the District Court record show that it has not been revoked. The learned counsel for the defendant contended that, petition for leave to appeal signed by another Attorney -at - Law is not valid and therefore the petition is bad in law for want of proper authority. This preliminary question of law has no merit in view of the decision in the case of *Saravanapavan vs. Kandasamydura*<sup>(1)</sup> where it was held that,

**“A leave to appeal application is a step in the proceedings of the original court but according to section 756(4) it originates in the Court of Appeal. Hence the proxy in an application for leave to appeal can be filed either by the registered attorney who filed proxy in the lower court or by any other attorney. Further, there is a long standing practice for an attorney not necessarily the registered attorney in the lower court to file proxy in the Court of Appeal.**

**There is a long standing and reasonable practice which has grown up since 1974 when the Administration of**

**Justice Law, No. 44 of 1973, came into force, in the interests of the diligent and expeditious conduct of proceedings. The practice causes no prejudice and involves no breach of the provisions of the Civil Procedure Code and it has now become a *cursus curiae*.”**

I shall first deal with the main ground of objection raised by the learned resident’s Counsel for the plaintiff with regard to the procedure adopted by the learned District judge at the inquiry into the plaintiff’s application for the enjoining order. The learned counsel submitted that the inquiry was held on the application made for an enjoining order and not on the application for an interim injunction but that the learned judge has made an order on the application for the interim injunction and not on the application made for the enjoining order, and further submitted that the learned judge has failed to realize that the inquiry was limited to the issue of the enjoining order sought by the plaintiff.

The Learned Judge in his order has stated that on 22.02.2005 both parties were represented by President’s Counsel and made submissions with regard to an interim injunction, and the order relates to the interim injunction.

The provisions relevant to the granting of enjoining orders and interim injunctions are found in section 664(1) and 664(2) of the Civil Procedure Code. It reads as follows :

664(1). The court shall before granting an injunction cause the petition of application for the same together with the accompanying affidavit to be served on the opposite party.

664(2) Where it appears to court that the object of granting an injunction would be defeated by delay, it may until the hearing and decision of the application for an injunction, enjoin the defendant for a period not exceeding fourteen days in the first instance, and the court may for good and sufficient reasons, which shall be recorded, extend for periods not exceeding fourteen days at a time, the operation of such order. An enjoining order made under these provisions, shall lapse upon the hearing and decision of the application for the grant of an injunction.

It appears from section 664 (2) that, where the object of granting an injunction will be defeated by delay, the Court may grant an enjoining order, until the hearing and decision of the application for an injunction, valid

for a period of not exceeding fourteen days, in the first instance. Accordingly, enjoining orders are granted after an ex-parte hearing, but when the matter is fully argued and exhaustive submissions are made by counsel appearing for both parties the Court need not consider granting an enjoining order. After notice to the opposite party, and the opposite party had filed objections with affidavits and after a full inquiry, as in the present case, the Court is free to make an order based on the material placed before it by the parties with regard to the application for an interim injunction. When the inquiry is held inter-partes, there is no necessity to support for an enjoining order. In the circumstances I am of the view that there is no merit in the submissions made by the learned President's Counsel for the plaintiff with regard to the objection that the impugned order should have been confined to the granting of the enjoining order.

The Learned President's Counsel for the plaintiff also contended that the said order of the learned Judge is erroneous and is based on the proposition that since the plaintiff has quantified the damage an injunction will not lie, without examining the plaintiff's averments in the plaint that further excavation would cause further damage which cannot be ascertained at the time of filing the plaint. The Learned Judge has come to the finding on the material placed before Court that the excavation work in the site was completed and the building has now reached the stage of the ground floor. The Learned Trial Judge in his order at page four has stated as follows :

“මෙම අකුරු තහනම් නියෝගය පිළිබඳ විමසීමේ ප්‍රධාන අරමුණ වන්නේ පැමිණිලිකරුගේ නිවසට තවදුරටත් හානි සිදුවීම වැළැක්වීමයි. ඉදිරිපත් කර ඇති කරුණු අනුව පැමිණිලිකරුගේ ගොඩනැගිල්ලට හානි සිදුවී ඇත්තේ වි ත්තිකරු විසින් පොළොව කැනීමේ හේතුව මතවේ. දැනටමත් කැණීම් කටයුතු අවසන් වී ඇති නිසා තවදුරටත් පැමිණිලිකරුගේ ගොඩනැගිල්ලට හානි සිදුවීමට ඉඩ නැති බව ඉතා පැහැදිලි වේ. දැනට පැමිණිලිකරුට සිදුවී ඇති අලාභ පිළිබඳව විභාගයේ දී සාක්ෂි ඉදිරිපත් කිරීමෙන් පසුව එම කරුණු ඔප්පු කිරීමට පැමිණිලිකරුට හැකි වේ.”

The Learned Judge has referred to the document marked “D3”. It is an affidavit filed by the Chief Engineer, Department of Buildings, According to “D3”, the excavation work has been completed, four retention walls have been constructed on all four sides and they cover the common boundary between the two premises. Accordingly, the possibility of any damage

being caused to the plaintiff's property and the building standing thereon is unlikely.

The possibility of further excavation and the use of heavy machinery are the main grounds upon which the plaintiff sought to restrain the defendant from further construction of the building. In this regard the consultant civil engineer Mr. Ernest has filed an affidavit, wherein, *inter-alia*, he has observed that since the construction of retaining walls on all sides are now being completed in premises Nos. 49 and 51, 37th Lane, Wellawatta, there is no possibility of any damage being caused to the wall and the building in premises No. 11, Pennyquick Lane, Colombo 06.

The Learned Counsel for the plaintiff submitted that even though the learned trial judge has relied on the report marked "D3" (also marked as "E25") of Mr. Jayachandran, Chief Engineer of the Buildings Department, produced by the defendant, it makes no reference to the damage caused to the plaintiff's building or steps taken by the defendant to prevent further damage. In the report marked "D3" it is clearly stated that excavation work has been completed and adequate precautionary measures have been taken by the defendant.

The Learned Judge has therefore observed that the excavation work has now been completed and that there is no possibility of causing further damage to the plaintiff's building. The affidavit filed by the Resident Engineer of the defendant, Mr. Atputhanathan dated 19.04.2005 marked as "X14" annexed to the statement of objections reveals that the construction of the foundation and the retaining walls up to ground level have been completed by the date of filing the affidavit marked "X14". The said Resident Engineer has also sworn the affidavit dated 19.04.2005 marked "X4" wherein he states that the following items of work have commenced and been completed:—

- (i) Laying of foundation
- (ii) Construction and completion of a retention wall right around the building site.
- (iii) Construction and completion of the ground - floor slab after erecting the necessary pillars
- (iv) Construction of 1/4 th of the floor.

The averments in the affidavits marked “X4” and “X14” are confirmed by the affidavit of T. A. Ernest, a chartered Civil Engineer, marked “X2” annexed to the statement of objections which describes the experience and qualifications of Mr. Ernest.

The Plaintiff produced an inspection report (marked “A(e)” annexed to the petition) prepared by the Chartered Engineer M. K. A. N. B. Alwis in respect of the premises No. 11, Pennyquick Road, Wellawatte, which belongs to the plaintiff. It speaks of the damage that has been caused as a result of the excavation work. However, from the affidavits of the Chief Engineer of the Buildings Department (vide- document marked ‘D3’) and from the affidavit of the Resident Engineer (vide document marked ‘D2b’), it can be seen that the excavation work was completed before the date of petition. This is confirmed by the photographs marked “X3” annexed to the statement of objection. The learned trial judge in his order at page four has observed that the photographs marked ‘D1(a)’ to ‘D1(b)’ show no further damage would be caused to the plaintiff’s building and the defendant has taken all possible steps to prevent any further damage to the building. This has been confirmed by the Chief Engineer, Department of Buildings in his affidavit marked ‘D3’.

In these circumstances, the question that arises is whether the petitioner is entitled to the extension of the interim order granted in terms of paragraph (d) of the prayer to the petition, and to an interim injunction.

As regard to the issue of an interim order, the Court must take into account certain principles. In the case of *Billimoria Vs. Minister of Land Development and Mahaweli Development and Two Others*<sup>(2)</sup> at 13 *Samarakoon, C. J.* observed :

**“In considering this question we must bear in mind that a stay order is an incidental order made in the exercise of inherent or implied powers of Court.”**



In the case of *Duwearachchi and Another Vs. Vincent Perera and Others Seneviratne, J.* laid down the following guidelines in granting a stay order:

- (i) Will the final order be rendered nugatory if the petitioner is successful?
- (ii) Where does the balance of convenience lie?
- (iii) Will irreparable and irremediable mischief or injury be caused to either party?

Before I proceed to discuss the applicability of the aforesaid principles to the facts of the present case, I consider it pertinent to consider the equitable considerations. The conduct and the dealings of the parties must be taken into account.

It is to be observed that the impugned order was delivered on 16.03.2005 and this application for leave to appeal was filed on 31.03.2005 and was supported on 01.04.2005 for an interim stay order on the last day before the commencement of the Court vacation, without notice to the defendant. The plaintiff obtained an interim stay order restraining the defendant, its servants and agents from effecting any construction and/or excavation operations in premises bearing assessment Nos.: 49 and 51, 37th Lane, Colombo 06. Thus it will be seen that the plaintiff supported for an interim stay order, 15 days after the delivery of the impugned order without notice to the defendant. It shows that the plaintiff had sufficient time to give notice to the defendant before supporting for an interim stay order.

Moreover the Rules of the Appellate Procedure make it compulsory to give notice to the party concerned before such an application is supported, unless the petitioner comes with a plausible explanation, that the matter is of such urgency that it was not possible to give such notice.

The Rule 2(1) of the Court of Appeal Rules 1990, reads as follows :

**2(1) Every application for a stay order, interim injunction or other interim relief (hereinafter referred to as "interim relief") shall be made with notice to the adverse parties or respondents (hereinafter in this rule referred to as 'the**

**respondents') that the applicant intends to apply for such interim relief ; such notice shall set out the date on which the applicant intends to support such applications, and shall be accompanied by a copy of the application and the documents annexed thereto :**

Provided that -

- (a) interim relief may be granted although such notice has not been given to some or all of the respondents if the Court is satisfied that there has been no unreasonable delay on the part of the applicant and that the matter is of such urgency that the applicant could not reasonably have given such notices ; and**
- (b) in such event the order for interim relief shall be for a limited period not exceeding two weeks sufficient to enable such respondents to be given notice of the applications and to be heard in opposition there to on a date to be then fixed.**

In these circumstances, the interim order is liable to be set aside. In the plaint, the plaintiff describes the premises which he sought to protect as his residential house (vide - paragraphs 3, 9, 13 and 16 of the plaint). In the petition filed in this Court, in paragraph one the Petitioner described the said premises as a residential premises. However, the assessment extracts, marked "X5" annexed to the statement of objection, show that the said building in the premises No. 11, Pennyquick Road, Wellawatte is a store house. This is confirmed by the Certificate issued by the Grama Niladari of Pamankada West Marked 'X7' annexed to the statement of objections filed by the defendant. The plaintiff has described the building in his premises as a residential house when in fact it is a store house. In granting interim injunctions and interim relief it is settled law that a person who makes an *ex-parte* application to court is under an obligation to make the fullest possible disclosure of all material facts within his knowledge and if he does not do so, then he cannot obtain any advantage which may have already been obtained by him. That is perfectly plain and requires

no authority to justify it. (Row's Law of Injunctions, 6th edition, Volume I page 123). In the instant case, the description of the building in the premises of the plaintiff as a residential house amounts to a misstatement of the true facts, which gives a different picture to his case as presented by him. When the plaintiff gave the impression in the plaint that a residential house has been damaged the Court's sympathy would have definitely tilted in his favour.

In the case of *Hotel Galaxy (Pvt.) Ltd. and Others Vs. Mercantile Hotel Management Ltd.*<sup>(4)</sup>? said at 36,

**“Thus a misstatement 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 its merits”.**

In the circumstances, on this ground as well, the interim stay order and injunctive relief should be set aside.

One of the grounds that the Court should address its mind to is the question, in whose favour does the balance of convenience lie? It is the duty of the Court to consider the inconvenience and damage that will result to the defendants as well as the benefit that will accrue to the plaintiff by granting an interim stay order. The burden lies upon the plaintiff, as the person applying for the interim order, and injunctive relief, of showing that his inconvenience exceeds that of the defendant.

The plaintiff has estimated the damage caused to his building in a sum of Rs. 10 million as a result of the excavation work of the defendant. For the reasons stated above it appears the excavation work has been completed and the construction of the building has now come up to the ground floor at the time of filing the plaint. The possibility of excavation and the use of heavy machinery are the grounds upon which the plaintiff sought to restrain the defendant from carrying out further construction. It is the defendant's position that the plaintiff is not entitled to the extension of the interim stay order and interim injunction as there is no danger to the plaintiff's property

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as the defendant has completed the excavation work and already laid the foundation. The construction and completion of the ground floor slab after erecting necessary pillars has been completed and a retaining wall has already been constructed right around the building site.

If the damage caused to the plaintiff is quantifiable, then no injunction or interim order will usually be granted (*vide - Jinadasa vs. Weerasinghe*<sup>5</sup>) Where the injury is capable of being estimated in money, generally an injunction may not be granted. This principle of law has been stated as follows in Snell's Principles of Equity, 38th edition , at page 640 :

"The 'governing principle' is that if the plaintiff would be adequately compensated by an award of damages if he succeeds at the trial, and the defendant would be able to pay them, no injunction should be granted, however strong the plaintiff's case"

The above principle was applied in the *America Cyanamid Co. vs. Ethicom Ltd.*<sup>6</sup> at 510, where Lord Diplock said ;

"If damages in the measure recoverable at common law would be adequate remedy and the defendant would be in a financial position to pay them, no interlocutory injunction should normally be granted, however, strong the plaintiff's claim appeared to be at that stage."

In the instant case the plaintiff has estimated damages in a sum of Rs. 10 million. Since the plaintiff has quantified the damages he is not entitled to an interim stay order or interim injunction. Moreover, the defendant has produced an Insurance Policy from Eagle Insurance Co. Ltd., which covers third party loss upto a sum of Rs.10 million. (*vide* document marked D2 (b) annexed to the defendant's statement of objections). Thus, the defendant has shown its financial capacity to pay such damages. Moreover, the mischief complained of can be fully and adequately compensated by a pecuniary sum. In these circumstances the plaintiff is not entitled to any interim stay order nor an interim injunction.

If the granting of an interim injunction or issue of an interim stay order would have the effect of inflicting serious damage upon the defendant, and especially when the mischief complained of can be adequately

compensated by a pecuniary sum, an injunction will not lie. In the instant case the defendant has established by documentary evidence that if an interim stay order or an interim injunction is granted, immense loss and damage would be caused to the defendant. The defendant states that many prospective buyers of the apartments that are to be constructed have made advance bookings in the proposed multi storey residential complex to be constructed by the defendant. Advance payments have already been made by the prospective buyers (vide 'X15' annexed to the statement of objections of the defendant). The defendant has already made payments for building materials worth millions of rupees as evident by document marked 'X16' annexed to the statement of objections. The defendant has spent large sums of money for excavation work, laying the foundation, building a retaining wall to protect the neighbouring properties, and already constructed the ground floor, apart from spending an equally large amount of money on architects, civil engineers, workers etc. If the stay order or interim injunction is granted a large quantity of building materials already at the work site will go waste and finally will be of no use to the defendant. If the stay order is extended or the interim injunction is granted, apart from the harm, loss, and damage that would be caused to the defendant, it's reputation as a construction company will be affected. In the circumstances if the stay order is extended or an interim injunction is granted irreparable injury would be caused to the defendant.

It seems to me that the learned judge has correctly applied the relevant principles of law to the facts of this case in making his order. The learned judge has correctly held that at the time the plaintiff made the application for injunctive relief, the excavation work had been completed and there was no possibility of causing further damage to the plaintiff's building as alleged by the plaintiff. The documents produced before Court show that the excavation work has been completed. As regards the balance of convenience, the learned judge has correctly assessed the situation. The learned Judge has also held that the plaintiff has quantified the damage caused to him and that it could be open to the plaintiff to lead evidence to prove the damage caused to him at the trial. In any event as the defendant has already taken a policy of insurance for Rs.10 million in respect of damages to third parties, the plaintiff could recover damages in the event he establishes at the trial of any damage being caused to his property. The Court has compared the damage that will be caused to the parties and

upon the evidentiary material placed before Court, the Court has held that a greater damage would be caused to the defendant than to the plaintiff if the interim injunction is granted.

For these reasons, we affirm the order of the learned District judge dated 16.03.2005 and dismiss the plaintiff's application for leave to appeal with costs. The question of the extension of the interim stay order will not arise as the Court has refused the plaintiff's application for leave to appeal.

**SOMAWANSA, J.** - *I agree.*

*Application dismissed.*

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