RANJAN RAMANAYAKE
v
KALUARATCHI AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
CALA 448/2002.
DC MT. LAVINIA 684/02 SPL.
MARCH 3, 2003.
APRIL 28, 2003.
JULY 28, 29, 2003.

Civil Procedure Code – Sections 55 (1), 84, 91 (A) – Amendment Act No. 79 of 1998 – Section 666 – Enjoining order issued – Date to file answer – Not fixed by Court – Default by the defendant? – Has an application under section 666 to be made by petition and affidavit? – If enjoining order operates unfairly against the defendant, has the Court inherent power to vary same?

Held:

(1) If the Court has not fixed a date for the defendant's answer, in the absence of a date given for the answer no question of default arises and the Judge had the right and the power to give a date for the defendants to file answer.

(2) The summons (Form 16) under section 55 (1) indicated that the answer of the defendant has to be filed on or before the date to be specified in the summons..... (dates given) – but this is not a date fixed by Court for the answer.

(3) An enjoining order is in the nature of immediate prohibition made against a person at the discretion of the Court pending the hearing and the determination of the application. It is different to an injunction in the sense that normally an injunction may be granted only after the petitioner's application with the accompanying affidavit testifying to the truth of the averments is served on the opposite party. An exception is made only where the object of granting the injunction would be defeated by delay.

The exercise of the Court's discretionary powers give in a sense that Court a broad undefined jurisdiction to act fairly to prevent wrongs and its effect is immediate.

(4) This same broad undefined jurisdiction to act fairly is available to Court to vary the terms of an enjoining order when it is clear to Court that the enjoining order made by Court operates unfairly against one party. When it is brought to the notice of the Court that the enjoining order operates unfairly against the defendants, the Court has inherent power to vary the enjoining order.

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

Cases referred to:

(1) *A.B.N. Amro Bank NV* v *Conmix (Pvt.) Ltd. and others* – 1996 1 Sri LR 8.
(2) *Dharmasena and others* v *Ekanayake and others* – CALA 116/2003 – CAM 10.7.2003.
(3) *Finnegan* v *Galadari Hotels Lanka Ltd.* – 1989 – 2 SLR 272.

Faizer Musthapa for petitioner.
A.L.M. Hedayathulla with *N. Bahundeen* for 1 – 3 defendant-respondents.
Ajith Munasinghe for 4th defendant – respondent.

November 13, 2003.

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against the Order of the learned District Judge of Mount Lavinia, dated 21.10.2002 by which the learned Judge (i) permitted the 1st to 3rd defendants to file answer and (ii) varied the enjoining order first issued against the 1st to 3rd defendants by extending it to cover the plaintiff as well.

The plaintiff and the 1st to 3rd defendants have entered into a partnership agreement to produce the film titled "Parliament Jokes". The said partnership business was known as 'Lak Films'. The four partners of Lak Films entered into an agreement with the 4th defendants, a registered company, for granting the distribution rights of the said film to the 4th defendant company. After the said film was produced and exhibited a dispute has arisen among the partners about the manner in which the income/profits derived from the exhibition of the said film was to be apportioned. For the purposes of the present application it is not necessary to set out in detail the particulars relating to the dispute. It is sufficient to state that in paragraph 17 of his plaint the plaintiff himself has stated that

in view of this dispute, he by letter dated 25.4.2002, informed the Chairman of the 4th defendant that as there was a dispute not to make payments to any partner. The plaintiff filed action against the 1st to 4th defendants seeking the reliefs he has claimed in the prayer to the plaint. Among the reliefs, he sought interim injunctions;

(a) to restrain the 1st to 3rd defendants from managing the affairs of the partnership Lak films,

(b) to restrain the 1st to 3rd defendants from interfering with the plaintiff's management of the partnership business Lak Films.

(c) to restrain the 4th defendant from making payments to the 1st to 3rd defendants (other than to the plaintiff) of the amounts payable to the Lak Films by the 4th defendant in terms of the agreement signed with the partnership Lak Films.

The plaintiff has sought enjoining orders for the same purpose. The Court having considered the plaint and the documents submitted by the plaintiff, issued the enjoining orders, notice of interim injunction and summons returnable on 14.10.2002. After the summons were served the 1st to 3rd defendants filed their proxy and filed a motion dated 7.10.2002 to get the case called on 8.10.2002 in order to get the enjoining order varied. When the case was called on 8.10.2002 the parties agreed to go into the question of varying the enjoining order on the summons returnable date i.e. 14.10.2002. The plaintiff agreed not to draw monies from the 4th defendant till 14.10.2002. On the summons returnable date, both parties agreed to argue the matter relating to the proposed variation of the enjoining order on 16.10.2002 and the plaintiff undertook not to draw money from the 4th defendant till 16.10.2002. On the following day, i.e. 15.10.2002 the plaintiff filed a motion moving the Court to grant the interim injunctions and to fix the case for *ex parte* trial against the 1st to 3rd defendants as they have not sought further time on the summons returnable date to file answer and objections. On 16.10.2002 both parties have made submissions on the question of making an order for *ex parte* trial and both parties have agreed to file written submissions. It appears from the journal that on 16.10.2002 a motion has been filed by the

attorney-at-law for the 1st to 3rd defendants seeking further time to file objections and answer. This motion dated 15.10.2002 has been filed on 16.10.2002 and entered in the journal on 17.10.2002. It is significant to note that on 16.10.2002 when the learned Counsel for the 1st and 3rd defendants made his submissions, the motion of the 1st to 3rd defendants seeking further time to file objections has already been filed in Court. The learned Counsel for the 1st and 3rd defendants has referred to it in his submissions. Vide proceedings of 16.10.2002 as appearing at 31 of document 'Z3'. After considering the submissions made by parties, the learned Judge has made her order dated 21.10.2002 permitting the 1st to 4th defendants to file objections and answer. Another matter dealt with by Counsel in their submissions and the Judge in her order was the variation of the enjoining order issued on the 4th defendant restraining it from making any payments to the 1st to 3rd defendants. The 1st to 3rd defendants sought to have the said enjoining order extended to cover the payments to the plaintiff. This was done by way of a motion. It was the contention of the plaintiff that this application to vary the enjoining order to cover the plaintiff as well should be done by petition and affidavit and defendants' position was that after the amendment brought to section 666 of the Civil Procedure Code by Act No. 79 of 1988 a petition was not necessary and the application could be made by way of a motion in terms of Section 91 of the Code. The learned Judge by her order dated 21.10.2002 has varied the enjoining order, by restraining the 4th defendant from making payments to the plaintiff as well.

At the hearing before me both parties made oral submissions and later filed written submissions. Both parties, in their oral submissions and in their written submissions have referred to the decision of the Supreme Court in *A.B.N. Amro Bank N.V.* v *Conmix (Pvt) Ltd. and others*(1). In that case the Court held that there was default within the meaning of section 84 of the Civil Procedure Code in filing answer on the due date. In that case Fernando, J. has referred to the discretion available to a Judge under Section 91A of the Code to allow a party to file answer even if the party was in default. In the instant case the Judge has specifically stated that that case has no application to the case before her. In her order the learned Judge has stated that the task of fixing the date for the answer is a step to be taken by Court and that in this case the Court

has not fixed a date for the defendants' answer. In the absence of a date fixed by Court for the answer of the defendant, no question of deciding whether there was default by the defendant and whether the Court should exercise its discretion under Section 91 A could arise. The learned Judge has permitted the 1st to 4th defendants to file answer on the basis that up to that time the Court has not specified a date to file answer.

The order made by the learned Judge on 30.9.2002, was to issue the enjoining order, notice of interim injunction and summons returnable for 14.10.2002.

According to Section 55 (1) of the Civil Procedure Code "Upon the plaint being filed .... the Court shall order summons in the form No. 16 in the First Schedule to issue, signed by the registrar of the Court, requiring the defendant to answer the plaint on or before the day to be specified in the summons..." According to this section summons shall specify a date for the answer. Copies of summons served on the defendants have been produced by the petitioner as Z8. The summons sent indicate that 14.10.2002 was the date specified in the summons for the answer. However the learned Judge has specifically stated that the Court has not fixed a date for the answer. What is the correct position in this situation?

At this stage I refer to the case of *Dhanasena and others* v *Ekanayake and others*(2). In that case too an enjoining order and notice of injunction were issued. Before the summons returnable date the defendants filed their objections to the enjoining order. In their objections they have stated that they reserved their right to file answer later. On the summons returnable date the answer was not filed and no application was made to get a further date for the answer. The plaintiff moved to have the case fixed for *ex parte* trial. After the interim injunction inquiry was concluded and the order was delivered, the learned Judge granted permission to the defendants to file answer. That order was challenged in this Court. That case was from the same Court i.e. District Court of Mount Lavinia and the Judge who has made that order was the same Judge who has made the order canvassed in the present application. In my order refusing leave to appeal in that case I specifically referred to one of the reasons the learned Judge has given in that case for allowing the defendants to file answer. It was

as follows."The learned Judge has stated that it is the practice of that Court, in instances where there is an inquiry for an injunction in which the defendant has filed objections, to give a date for answer after the order relating to the interim injunction is given. If this is the practice followed by that Court there is nothing objectionable in that practice."

The statement made by the learned Judge in her order, dated 21.10.2002 in the instant case, to the effect that the Court has not given a date for the answer, has to be viewed in the light of the practice of that Court as specifically referred to in the order in the above case, *Dhanasena and others* v *Ekanayake and others. (supra).* Therefore I fully accept the learned Judge's reason that the Court has not fixed a date for the defendants' answer. In the absence of a date given for the answer no question of default could arise and the Judge had the right and the power to give a date for the defendants to file answer. Accordingly there is nothing wrong in the learned Judge's order granting a date to the defendants to file answer.

In view of the conclusion set out above, the questions whether there was an oral application by the defendants' Attorney-at-law for time to file answer; whether the Court has failed to record it and whether the Court should have fixed the case for *ex parte* trial upon the plaintiff's motion of 15.10.2002 which was prior in time do not arise for consideration.

The next question is whether the learned Judge's order extending the enjoining order issued against the 4th defendant, to restrain the 4th defendant from making any payments to the plaintiff was correct. The learned Counsel for the plaintiff argued that an application under Section 666 has to be made by petition and affidavit. The learned Counsel for the defendants on the other hand argued that after the amendment of 1988 there is no requirement to file petition and what is necessary is an application which can be made, in terms of Section 91 of the Code, by way of a motion.

Section 666 of the Code as it stood before the amendment was as follows.

> "An order for an injunction made under this chapter may be discharged or varied or set aside by the Court on application made thereto on petition by way of summary procedure...."

In *Finnegan* v *Galadari Hotels (Lanka) Ltd.*(3), it was stated that "An enjoining order in the first instance is in the nature of an immediate prohibition made against a person at the discretion of the Court pending the hearing and the determination of the application. It is different to an injunction in the sense that normally an injunction may be granted only after the petition of application with the accompanying affidavit testifying to the truth of the averments is served on the opposite party. An exception is made only where the object of granting the injunction would be defeated by delay. The exercise of the Court's discretionary powers gives in a sense the Court a broad undefined jurisdiction to act fairly to prevent wrongs and its effect is immediate." (at 282) This same 'broad undefined jurisdiction to act fairly' is available to Court to vary the terms of an enjoining order when it is clear to Court that the enjoining order issued by the Court operates unfairly against one party. It is an inherent power of the Court. In this case the learned Judge has exercised that inherent power to prevent the enjoining order unfairly operating against the 1st to 3rd defendants. The plaintiff's own material was sufficient to exercise that power. Accordingly I uphold the learned Judge's order varying the enjoining order issued against the 4th defendant. In view of this finding it is not necessary for me to decide the question of law raised relating to that order namely whether the application should have been made by petition and affidavit.

For the foregoing reasons, I uphold the order made by the learned Judge on 21.10.2002 and refuse leave to appeal and dismiss this application with costs in a sum of Rs. 7500/-.

Appeal dismissed.