

KRISHNAMOORTHY
v
GANESHAN

COURT OF APPEAL
AMERATUNGA, J.,
C.A.L.A. 24/2002 (LG)
D.C. KANDY 20715/L
FEBRUARY 21, 2003

Civil Procedure Code, sections 34 (2) and 217 (f) – Judicature Act, No. 2 of 1978, section 54(1) – Enjoining order – Interim injunction sought – Court issued notice of interim injunction without a hearing

The plaintiff-petitioner sought an enjoining order and an interim injunction and a permanent injunction against the defendant. The petitioner moved court by

way of a motion to call the case in open court to support this application. The court without hearing the plaintiff issued notice of interim injunction on the basis that the plaintiff has not sought any main relief.

Held:

1. When a litigant seeks a hearing from court, he is entitled to be heard before an order is made in his suit.
2. Failure of court to give a hearing to the plaintiff deprived the plaintiff an opportunity to make submissions in support of the enjoining order and this has resulted in grave prejudice to the plaintiff.

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

Cases referred to:

1. *Gorden Frazer & Co. v Jean Marie Losio and Martin Venzel* – (1984) 2 Sri LR 85.
2. *Ittepana v Hemawathie* – (1981) 1 Sri LR 476 at 479

P. Nagedra, P.C., with *A. R. Surendran* for plaintiff-appellant.

C. Vivekanandan with *P. N. Joseph* and *I.L.M. Answer* for defendant - respondent.

Cur.adv.vult

March 7, 2003

GAMINI AMARATUNGA, J.

This is an application for leave to appeal against the order of the learned District Judge dated 17/1/2002 made in the above action. The plaintiff filed his plaint, proxy and affidavit on 15/1/2002 and moved court, by way of a motion bearing the same date to call the case in open court on 18/1/2001 to enable Counsel to support the application contained in the plaint. In the prayer of the plaint, the plaintiff has prayed for an enjoining order and an interim injunction and a permanent injunction against the defendant. The learned Judge has made an order on 17/1/2002 to the following effect.

"According to prayer of the plaint. the plaintiff has not sought any main relief. He has merely sought permission under section 34(2) of the Civil Procedure Code to institute action after 31/3/2002 to enforce remedies available to him under the law. Issue notice of

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interim injunction to the defendant in respect of the relief prayed for in paragraph "B" of the prayer in relation to the property set out in the schedule."

The complaint of the learned President's Counsel for the petitioner is that the learned Judge should have given an opportunity for the plaintiff's Counsel to support the application for an enjoining order and if such opportunity had been given the plaintiff's Counsel would have placed his submissions before the learned Judge to persuade him to grant the enjoining order prayed for by the plaintiff. It was the contention of the learned President's Counsel that the failure of the Court to give a hearing to the plaintiff's Counsel before the learned Judge made order directing notices to be issued in respect of the application for interim injunction deprived the plaintiff of the opportunity to make submissions in support of the enjoining order and this resulted in grave prejudice to the plaintiff. The learned President's Counsel therefore sought leave to appeal on the basis that the learned Judge's order gives rise to a question of law fit to be adjudicated by this Court by way of an interlocutory appeal. 20 30

The facts relevant to the institution of proceedings by the plaintiff against the defendant are as follows. The plaintiff claims that at one time he was the Administrative Manager of the Sri Selvavinayagar Kovil also known as Pulleyar Kovil situated at No 71, Colombo Street, Kandy. In that capacity, by agreement marked P1 he let premises No 36 Peradeniya Road, Katukele, Kandy, property belonging to the Temple to the defendant. Subsequently the hereditary trustees of the said Temple gave Powers of Attorney to the plaintiff and in view of these Powers of Attorney the tenancy agreement P1 entered into between the plaintiff in his capacity as the Administrative Manager continued to subsist. The Plaintiff alleges that he became aware around 24/11/2001 that the defendant was making unauthorised alterations to an unauthorised erections of the property let to him and in consequence of this he instructed the defendant to stop all such activities. But when he did not respond to such requests/instructions a notice to quit dated 29.12.2001 was sent informing the defendant that his tenancy has been terminated and requesting him to leave the premises let to him on or before 31/3/2002. The notice to quit has been marked 40 50

p14. The grounds upon which the said notice to quit has been sent are set out in that letter. However since the defendant did not stop his acts relating to the alterations and the construction of new buildings in the premises let to him, the plaintiff filed the present action to obtain injunctive relief preventing the defendant from going ahead with the buiding operations. However since the action has been instituted before the date set out in the quit notice for the defendant to hand over vacant possession of the premises the plaintiff was unable to seek a decree for the ejectment of the defendant. The learned President's Counsel submitted that the plaintiff out of abundance of caution sought permission of Court, under section 34(2) of the Civil Procedure Code, to file action against the defendant after 31/3/2002 to enforce remedies available to him under the law. The learned Judge's order made in respect of the prayers contained in the plaint of the plaintiff is the subject matter of this application. 60

At the hearing of this application it was agreed that if the Court is inclined to grant leave to appeal, the Court may in the same order deal with the appeal as well. Mr. Vivekanandan who appeared for the defendant-respondent raised certain matters relating to the action of the plaintiff. He submitted that whether the plaintiff is the proper holder of the Power of Attorney of the Hereditary Trustees is a question which is in dispute. He further raised the question whether the plaintiff's act of seeking permission of Court under section 34(2) of the Civil Procedure Code is correct and tenable in law. At the very outset I wish to state that all those matters raised by Mr. Vivekanandan are not matters to be considered by this Court at this stage and all those are matters to be raised before the District Court at the appropriate stage. The Court's present task is to see whether the District Court should have given a hearing to the plaintiff before making the order dated 17/1/2002. 70 80

On that point, Mr. Vivekanandan very graciously agreed that when a litigant seeks a hearing from Court he is entitled to be heard before an order is made in his suit. The point to be decided here is whether the failure to give a hearing to the plaintiff has caused any prejudice to him. It appears that basis for the learned Judge's order was the learned Judge's view that the plaintiff has not claimed any substantive relief. In connection with this the learned President's Counsel cited the decision of this Court in *Gordon Frazer and Co.* 90

v *Jean Marie Losio and Martin Venze*(¹). He brought to the notice of Court the following passage from the judgment.

"Section 54(1) (a) of the Judicature Act, No. 2 of 1978 provides that the plaintiff is entitled to an injunction against the defendant restraining the commission of an act, the commission or continuance of which would produce injury to the plaintiff. This in itself is a substantive relief which can be made the subject of a decree in terms of sections 217(f) of the Civil Procedure Code, without a prayer for declamatory relief". P92 (emphasis added).

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The learned President's Counsel submitted that if the plaintiff's Counsel had an opportunity to make submissions before the learned Judge to explain the legal position as set out in the passage cited above that would have been a vital factor to be considered in deciding whether an enjoining order should be issued to prevent the defendant from carrying out further construction operations. After considering the legal position set out above, a Judge is entitled to make his own decision but Mr. Nagendran's submissions was that the failure of the Court to give a hearing to the plaintiff's counsel deprived the plaintiff's chance to attempt to persuade the Court to issue an enjoining order as prayed for. I am in agreement with this submission. When a litigant seeks a hearing it is the duty of Court to grant it. As was stated by Sharvananda, J. (as he then was) in *Ittavana v Hemawathie*(²) at 479 principles of natural justice are the basis of our laws of procedure. For the reasons set out above I grant leave to appeal and allow the appeal and set aside the order of the learned District Judge dated 17/1/2002 and direct the learned judge to give a hearing to the Counsel for the plaintiff to support his application for the relief prayed for in the plaint and make an appropriate order thereafter. In the circumstances of this case I make no order for cost.

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Appeal allowed.

Trial judge directed to give hearing to the counsel for plaintiff to support his application for reliefs prayed for.