

**DENNISE PERERA  
VS  
BAUR & COMPANY LTD.**

COURT OF APPEAL,  
SOMAWANSA, J. (P/CA)  
WIMALACHANDRA J.  
C. A. L. A. 60/2005  
D. C. COLOMBO 7222/Spl.  
June, 17, 2005

*Civil Procedure Code - S. 217, S. 662, S. 664 - Mandatory Injunction - jurisdiction of trial Court to grant same ? - Judicature Act - S 54 - Constitution - Article 143.*

The Plaintiff-appellant instituted action to prevent the defendant-respondents from refusing to recommend to the authorities of the Sri Lanka Police and Sri Lanka Navy for the issue of entry passes required by the plaintiff-appellant and

for the vehicles to enter Baur's building situated at Upper Chatham Street Colombo, to obtain and provide such passes to the plaintiff-appellant. In the first instance the plaintiff-appellant sought an enjoining order which was refused by Court, and the plaintiff-petitioner sought leave to appeal.

**HELD:**

Per Somawansa, J. (P/CA)

"Though the District Judge refused an enjoining order to be issued ex-parte, he had issued notice of interim injunction and summons on the respondent, however, before the inquiry into the application for interim injunction could be taken up which in effect would have given the defendant-respondent an opportunity to be heard the plaintiff-appellant has thought it fit to canvass the District Judge's order -in the circumstances I would say that this is a premature application which should be rejected in limine."

- (1) The plaintiff-appellant's right to occupy the premises stands terminated and the defendant-respondent has not done any extraordinary act of recent origin to frustrate any rights of the plaintiff-appellant either before or after he instituted this action.
- (2) As the plaintiff-appellant in his plaint does not ask for a declaration that he be declared the tenant of premises, he has no legal basis to pray for the enjoining order;

Per Somawansa, J. (P/CA)

"I am not inclined to agree that either the decision in *Peiris vs. Perera*<sup>11</sup> or *Tudor vs. Anulawathie*<sup>12</sup> or the provisions contained in S 217, 662, 664, 54 of the Judicature Act or Article 143 of the Constitution would be of any help to the issue of mandatory injunctions for the reason that such an injunction of an aforementioned nature can be issued only at the final determination of the action."

Quarere

**Could the District Court grant a mandatory injunction ?**

Application for leave to appeal from an order of the District Court of Colombo.

**Cases referred to**

1. *Peiris vs. Perera* - 2002 - 2 Sri LR 128 - (distinguished)
2. *Tudor vs. Anulawathie* - 1999 - 3 Sri LR 235 (distinguished)
3. *Puranik vs. Travotal India Pvt. Ltd.* - CA 518/93- CAM 27.7.93 (followed), SC Special No. 54/2005

*P. Nagendran P. C. with Prof. H. M. Zafrullah, Anura Meddegoda and B. Jayasinghe* for plaintiff-appellant-appellant.

*K. N. Choksy, P. C., with V. K. Choksy* for defendant -respondent-respondent.

*Cur, adv, vult*

June 17, 2005

### **SOMAWANSA, J. (P/CA)**

This is a leave to appeal application filed against the order of the learned District Judge of Colombo dated 14.02.2005 refusing the application of the plaintiff-applicant-appellant for the issue of an enjoining order as prayed for and directing summons and notice of interim injunction to be issued on the defendant-respondent-respondent. The said order is marked 'c'. In pith and substance the plaintiff-applicant-appellant instituted the instant action to prevent the defendant-respondent-respondent from refusing to recommend to the Authorities of the Sri Lanka Police and Sri Lanka Navy for the issue of entry passes required by the plaintiff-applicant-appellant his servants, agents and for the vehicle to enter Baur's building situated at Upper Chatham Street, Fort, Colombo 01, to obtain and provide such passes to the plaintiff-applicant-appellant.

On the day on which this application was listed for support Mr. K. N. Choksy, P. C., appeared for the defendant-respondent-respondent and both parties agreed to resolve the matter of granting interim relief as well as the granting of leave to appeal by way of written submissions. Accordingly both parties have tendered their written submissions and also further submissions in reply.

It appears that the plaintiff-applicant-appellant had made an application for enjoining orders ex-parte and he had also moved for issue of interim injunctions and permanent injunctions claiming the same relief sought in the enjoining orders which are clearly mandatory orders which would compel the defendant-respondent-respondent to do certain acts which I would say could have far reaching consequences without the defendant-respondent-respondent being heard. The reliefs prayed for by the Plaintiff applicant appellant are as follows :

- a. grant and issue a declaration that the plaintiff is entitled-

(a) to be recommended by the Defendant to the Staff Security Officer of the Sri Lanka Navy for the issuance of entry pass required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01 and

(b) that the Defendant is obliged to obtain and provide such passes to the Plaintiff.

b. grant and issue a declaration that Plaintiff and his servants and agents are entitled-

(a) to be recommended by the Defendant to the Authorities of the Sri Lanka Police for the issuance of entry passes required by the Plaintiff, his servants and agents and

(b) That the Defendant is obliged to obtain / provide passes for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01,

c. issue an enjoining order restraining the Defendants from refusing to recommend to the Staff Security Officer of the Sri Lanka Navy for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

d. issue an enjoining order restraining the Defendant from refusing to recommend to the Authorities of the Sri Lanka Police for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

e. issue an interm injuction restraining the Defendant from refusing to recommend to the Staff Security Officer of the Sri Lanka Navy for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

f. issue an interim injuction restraining the Defendant from refusing to recommend to the authorities of the Sri Lanka Police for the issuance of

entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

g. issue a permanent injunction restraining the Defendant from refusing to recommend to Staff Security Officer of the Sri Lanka Navy for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper chatham Street, Fort Colombo 01, and refusing to obtain and provide such passes to the Plaintiff.

h. issue a permanent injunction restraining the Defendant from refusing to recommend to the Authorities of the Sri Lanka Police for the issuance of entry passes required by the Plaintiff, his servants and agents, and for his vehicle to enter Baur's building situated at Upper Chatham Street, Fort Colombo 01 and refusing to obtain and provide such passes to the Plaintiff.

i. for costs, and

j. such other and further relief that Your Honour's Court shall seem meet.

It is to be seen that the enjoining orders prayed for in paragraphs 'c' and 'd' to the prayer of the plaint are clearly not orders which are restrictive in nature but mandatory in nature and prayers 'c' and 'd' as prayed for in the petition for leave to appeal are in fact identical in nature and if granted would tantamount to the issuance of the final relief as prayed for by the plaintiff-applicant-appellant in the District Court.

It is contended by counsel for the plaintiff-applicant-appellant that the failure on the part of the defendant-respondent-respondent to renew and issue the Naval and Police security passes which should have enabled the plaintiff-applicant-appellant to enter the premises in suit and to park his vehicle is clearly an attempt by the defendant -respondent-respondent to compel the plaintiff-applicant-appellant to vacate the premises and to take up occupation under a new contract of tenancy of the alternative flat offered by the defendant-respondent-respondent and that if he vacates and takes up occupation of the new flat, he would be fully caught up in the trap of the defendant-respondent-respondent as the premises would have been let after 01.01.1980 and would be excepted premises in terms of the provisions of the amending Rent Act, No. 26 of 2002.

It is to be seen that the defendant-respondent-respondent by letter dated 21.09.2004 had given the plaintiff-applicant-appellant notice to quit and

vacate the premises in suit. The said notice marked X7 also terminated the right to occupy the staff quarters and garage. On the other hand, the plaintiff-applicant-appellant claims that the tenancy of the premises is governed by the Rent Act, No. 07 of 1972 and hence the notice to quit is invalid and his tenancy still continues. On this basis the plaintiff-applicant-appellant claims enjoining orders restraining the defendant-respondent-respondent from refusing to recommend to the Navy and the Police for the issue of passes to the plaintiff-applicant-appellant and further restraining the defendant-respondent-respondent from refusing to obtain and provide such passes to the plaintiff-applicant-appellant. In other words, the plaintiff-applicant-appellant is seeking enjoining orders from Court to compel the defendant-respondent-respondent to make recommendation to the Navy and Police and also to obtain and make available to the plaintiff-applicant-appellant the passes in question which are in effect orders of mandatory nature. It is the contention of counsel for the defendant-respondent-respondent that enjoining orders of such nature cannot be issued. In reply counsel for the plaintiff-applicant-appellant submits that the aforesaid argument is without any foundation whatsoever and that our Courts have repeatedly pointed out that they have the power to issue mandatory orders. For this proposition of law he cited the decision in *Peiris vs Perera*<sup>11)</sup> have no bone to pick with that decision. However on a perusal of the judgment of that case shows that the dispute in that case was in respect of ownership of land and the defendant had recently erected a wall with the object of preventing the plaintiff having access to the land pending final determination of the action. The learned District Judge had come to a finding that the plaintiff had established a *prima facie* case establishing the title to the land and therefore was entitled to have access to the land pending the final determination of the action. The only way in which this access could be granted pending the final determination of the case was by directing the demolition of the wall recently erected deliberately to prevent the plaintiff from entering the land. This was considered by Court as a peculiar circumstance and ordered the demolition of the obstructing wall. The Court also emphasized that it is only in very rare circumstances that such order would be made. In that case the plaintiff had established a *prima facie* right and that some peculiar circumstance had been brought about by the defendant's conduct.

In the instant action the defendant-respondent-respondent has not done any act of recent origin to frustrate any right of the plaintiff. The plaintiff-applicant-appellant instituted action in the District Court of Colombo on 26.01.2005. It is the plaintiff-applicant-appellant's own pleadings in his

plaint as per paragraph 15 of the plaint marked A that the defendant-respondent-respondent did not give any pass to the plaintiff-applicant-appellant as from 31.10.2004. In the circumstances, it is apparent when the plaintiff-applicant-appellant instituted his action 26.01.2005 he did not possess a pass from the Commander of the Navy. It is contended by counsel for the plaintiff-applicant-appellant that though requested the defendant-respondent-respondent has refused to obtain such passes thereafter on behalf of the plaintiff-applicant-appellant.

It is strange that the plaintiff-applicant-appellant in his plaint does not ask for a declaration that he be declared the tenant of the premises. In the circumstances, I would hold that the plaintiff-applicant-appellant has no legal basis to pray for the interim relief of an enjoining order. In paragraphs 17, 18 of the petition the plaintiff-applicant-appellant states that he forwarded letter dated 01.10.2004 together with Cheque No. 844404 for Rs. 25,875 being rent and charges for the flat in question for the months of October, November and December 2004 marked XII. The defendant-respondent-respondent had acknowledged the receipt of the said sum as damages payable without prejudice to the defendant-respondent-respondent's notice to quit. I am unable to accept the position of the counsel for the plaintiff-applicant-appellant that the said sum of money is the rent paid for the aforesaid months for in fact as alleged by the defendant-respondent-respondent the plaintiff-applicant-appellant's right to occupy had been terminated by notice dated 31.10.2004 marked X7. These matters are yet to be decided at the trial instituted by the defendant-respondent-respondent and not in the action instituted by the plaintiff-applicant-appellant.

It is to be noted that the plaintiff had in *Peiris vs. Perera (supra)* established a *prima facie* right or title to the land and that some extraordinary or peculiar circumstance had been brought into existence by the defendant's conduct. In the instant action plaintiff-applicant-appellant's right to occupy the premises stands terminated and the defendant-respondent-respondent has not done any extraordinary act of recent origin to frustrate any rights of the plaintiff-applicant-appellant either before or after he instituted this action. In this context, I would hold that the decision in *Peiris vs Perera (supra)* has no application or relevance to the instant action.

In further support of the contention of the plaintiff-applicant-appellant the decision in *Tudor vs. Anulawathie* <sup>(2)</sup> is cited which considered an application under section 662 of the Civil Procedure Code and a decision under Primary Courts Procedure Act which has no relevance to the issue

at hand. I am not impressed with the submission and the decisions and authorities cited by the plaintiff-applicant-appellant. I am also unable to agree with the submission that authorities cited by the plaintiff-applicant-appellant is buttressed by reliance on section 217 of the Civil Procedure Code which the counsel suggest should be read with sections 662 and 664 of the Civil Procedure Code together with section 54 of the Judicature Act which confers ample jurisdiction on Court to issue mandatory orders. Considering the facts and circumstances of this action, I am not inclined to agree that either the aforesaid decisions or provisions contained in Sections 217, 662, 664, section 54 of the Judicature Act or Article 143 of the Constitution would be of any help to the issue of mandatory injunctions for the reason that such an injunction of an affirmative nature can be issued only at the final determination of the action. In *Puranik vs. Travotaf India (Pvt) Ltd.*,<sup>(3)</sup> the plaintiff obtained an interim injunction directing the 2nd defendant to remit certain sums of money to the plaintiff in India. The Court of Appeal held that this was an interim injunction of a mandatory nature which should not be made before final judgment. The same principle should apply to the instant action filed by the plaintiff-applicant-appellant for the only relief sought by the plaintiff-applicant-appellant in the instant action by way of enjoining orders, interim injunctions and the permanent injunctions is the identical relief of orders directing the defendant-respondent-respondent to do an affirmative act of a mandatory nature viz. seeking Court orders compelling the defendant-respondent-respondent to make recommendations to the Navy and Police and to obtain and make available to the plaintiff-applicant-appellant the passes in question. Considering the circumstances of this case, I am unable to agree that enjoining orders of such nature could be issued ex-parte.

It is to be noted that though the learned District Judge refused an enjoining order to be issued ex-parte, he had issued notice of interim injunction and summons on the respondent. However, before the inquiry into the application for interim injunction could be taken up which in effect would have given the defendant-respondent-respondent an opportunity to be heard the plaintiff-applicant-appellant has thought it fit to canvass the learned District Judge's order refusing to issue an enjoining order ex-parte by way of leave to appeal. In the circumstances I would say this is a premature application which should be rejected in limine. If we are to entertain this type of application, it would be the opening of floodgates for parties to seek leave to appeal against orders of refusing to grant reliefs on applications made ex-parte in fact the Court in the instant action has



thought it fit to issue notice to the defendant-respondent-respondent and give him a hearing before an order for interim injunction either preventive or mandatory is issued.

In any event, the learned District Judge has carefully considered the facts placed before him and refused the application on the basis that the plaintiff-applicant-appellant has failed to establish a *prima facie* case and no irreparable loss would be caused to the plaintiff-applicant-appellant. In this respect, I would refer to the two documents considered by the learned District Judge viz : documents marked X3 and X6. It is to be noted in paragraph 3(u) of the petition dated 01.03.2005 the plaintiff-applicant-appellant says that he frequently has urgent business in Colombo and for this purpose he resides in the flat but *vide* his letter dated 17.05.2004 marked X3 wherein he informs the defendant-respondent-respondent that he rarely comes down to Colombo. Again in document marked X6 dated 06.08.2004 wherein he says : " I have also had to consider the fact that I hardly come down to Colombo now".

It is to be noted that there is no other document which shows the converse. In any event there was no material placed before the learned District Judge or before us to establish that the plaintiff-applicant-appellant would suffer irreparable loss in the event the enjoining order is not granted.

For the foregoing reasons, I have no hesitation in refusing leave to appeal. Accordingly the leave to appeal application of the plaintiff-applicant-appellant will stand dismissed with costs fixed at Rs. 15,000.

Wimalachandra, J. - I agree.

Application dismissed.