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Present: Wood Renton C.J. and De Sampayo J.

ALUBHAY v. MOHIDEEN *et al.*

140—D. C. Colombo, 42,918.

Injunction—Courts Ordinance, 1889, s. 87 (3)—Claim to compensation under Riot Damages Ordinance, No. 28 of 1915.

Before granting an injunction under section 87, sub-section (3), of the Courts Ordinance, 1889, the Court should find on sufficient material not only that the defendant threatened or was about to dispose of the property, but that he had the intention to defraud the plaintiff thereby.

DE SAMPAYO J.—A specific debt due to the defendant from a third party may possibly come within that description of property, but I find it difficult to regard a claim for compensation payable under the Riot Damages Ordinance, No. 28 of 1915, as property in the nature of a debt.

THE facts are fully set out in the judgment of De Sampayo J.

Bawa, K.C. (with him *Weinman*), for first and second defendants, appellants.

A. St. V. Jayewardene (with him *F. M. de Saram*), for plaintiff, respondent.

Cur. adv. vult.

January 28, 1916. DE SAMPAYO J.—

This is a somewhat extraordinary case. The plaintiff has sued four defendants, who are alleged to be partners trading at Wategama, upon a number of promissory notes, which appear to have been signed by the fourth defendant with a certain *vilasam*. The total sum claimed is Rs. 4,608.98. The plaint, in addition to the ordinary allegations, states that the defendants are to be awarded by the Government Agent of the Central Province a sum of Rs. 12,000 as compensation for damages sustained by them during the recent disturbances, that the defendants are not possessed of any property, and that "if the said sum of Rs. 12,000 be paid to them, the plaintiff will not be able to obtain satisfaction of her said claim, and the plaintiff verily believes that the defendants will dispose of the said sum of Rs. 12,000, when so paid to them, with intent to defraud the plaintiff, and the same is an act in violation of the plaintiff's right, and will tend to render the judgment to be secured ineffectual." The plaint concludes with a prayer for an injunction restraining the defendants from receiving the said sum of money, and for an order on the Government Agent not to pay the same to them pending the

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hearing and determination of the action. With the plaint the plaintiff submitted an affidavit containing the same statements as I have just quoted, but no other facts or particulars. On presenting the plaint with the affidavit the plaintiff applied for an injunction in terms of the prayer of the plaint. The Court issued an interim injunction, and fixed a date for consideration of the application. The first and second defendants then appeared and submitted an affidavit, in which they denied the alleged partnership and the authority of the fourth defendant to sign the promissory notes on their behalf, and stated that the first defendant, who had an extensive business as a trader at Wattedgama, alone carried it on. They admitted that the damages due to the first defendant were assessed at Rs. 12,000, and stated that of this amount Rs. 6,000 had already been paid to the first defendant and had been invested by him in repairing and improving his boutique and residence at Wattedgama, which had been destroyed by the rioters, and in re-furnishing the place and entering into agreements with wholesale dealers for the supply of the stock in trade, and that the balance Rs. 6,000, when paid, would be applied to stocking the place fully. The affidavit further stated that the sums paid as compensation were intended to enable the recipients to establish themselves in their former locations and start business on the same lines, as the first defendant intended to do, and that at the discretion of the Government the compensation might be given, not in cash, but by means of orders on merchants for goods to be supplied to the traders. The plaintiff filed no affidavit in reply or furnished any other evidentiary material to the Court, but the Court allowed an injunction as applied for, and also an order on the Government Agent requiring him not to pay the money to the defendants. The first and second defendants have appealed.

The provision of the law applicable to the matter is sub-section (3) of section 87 of the Courts Ordinance, 1889, by which the Court is authorized to issue injunctions "where it appears that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff." It seems to me that the provision aims at the removal or disposal of property belonging to, and in the possession and control of, the defendant. A specific debt due to the defendants from a third party may possibly come within that description of property, but I find it difficult to regard a claim for compensation payable under the Riot Damages Ordinance, No. 23 of 1915, as property in the nature of a debt. In the Court below counsel for the plaintiff conceded that it was not a debt, but said that it was money which the Government had agreed to pay to the defendants. I do not quite know what species of property is created by such an agreement. It is said that as the Ordinance disallows all claims against the rioters, the Government is bound to pay compensation to those to whom the

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However this may be, the foundation laid for the injunction is deficient in one essential respect. The Court should find, on sufficient material, not only that the defendants threatened or were about to dispose of the property, but that they had the intention to defraud the plaintiff thereby. The District Judge does not record any express finding on either of these points, nor had he any proper evidence before him to enable him to do so. All that he says is that "it is not unreasonable for the plaintiff to ask that the defendants should be restrained from doing something which will, according to her, militate seriously against her chances of recovering the debt due to her by them," but this is not a ground which satisfies the requirements of section 87 (3) of the Courts Ordinance. Even if the contents of the plaintiff's affidavit are examined anew here, they will be found to be wholly insufficient and of no value as evidence. The person who swore the affidavit in support of the application for the injunction, beyond saying that he verily believes that the defendants will dispose of the said sum of Rs. 12,000 when paid to them, with intent to defraud the plaintiff, nowhere states any facts on which that belief is founded, and there is an absolute lack of any circumstances from which any such inference may reasonably be drawn. It appears to have been suggested in the District Court that the defendants might leave the Island with the money. But why or how such a suspicion has been formed does not appear. It is not even stated that the defendants are foreigners and not permanent residents of the Island. Mr. A. St. V. Jayewardene, for the plaintiff, strenuously contended that the point of insufficiency of the evidence was not taken in the District Court, and should not be pressed in appeal. I am not satisfied that it was not in substance taken, but even if otherwise, this Court is bound to consider the matter in all its bearings, and to interfere if it finds that the injunction, which is an extraordinary remedy, has been granted on insufficient evidence. In my opinion the point was before the Court in a very effective form, when the first and second defendants in their answering affidavit not only negatived the allegations in the plaintiff's affidavit, such as they were, but went on to state specific facts showing the substantial position of the first defendant as a trader, the manner in which the Rs. 6,000 already paid by the Government Agent had been applied, and the purpose for which the balance would be devoted when paid. Mr. Jayewardene sought to draw a distinction in procedure between an application under section 653 of the Civil Procedure Code for sequestration on the ground of fraudulent alienation and an application under section 87 of the Courts Ordinance for an injunction. The former requires that the applicant should by affidavit or by *vivá voce* evidence prove facts from which the Court may conclude that the defendant is fraudulently alienating

his property, but the latter does not lay down any special directions on that point. But I have not the slightest doubt that whenever the Court's interference is sought under circumstances which require the Court to form an opinion as to the existence of a sufficient cause, it is for the party to furnish evidence upon which to form that opinion. The suggested distinction, however, does not exist in fact. The Courts Ordinance only creates the jurisdiction of the Court to grant injunctions, and for the relevant procedure we must look to the Civil Procedure Code. Now, section 662 of the Civil Procedure Code, in regard to injunctions, provides that the application should be "accompanied by an affidavit of the applicant or some other person having knowledge of the facts, containing a statement of facts on which the application is based." In this case the plaintiff has stated no facts on which the application can reasonably be based. This being so, I need not make any comment on the order issued on the Government Agent, though he was no party to the proceedings. In my opinion the whole application is without any support, and the order appealed from is erroneous. I would set aside the order, with costs in both Courts.

WOOD RENTON C.J.—I entirely agree.

Set aside.

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