

**IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

Court of Appeal No: CALA 348/2004
District Court of Tangalle No: 3672/P

In the matter of an
application for leave to
appeal

G.A.M.D. Ematiyagoda

Plaintiff-Petitioner

Vs.

5. Peoples' Bank and Ten
other Defendant-Respondents

Defendant-Respondents

Before: **Eric Basnayake J**
K.T. Chitrasiri J

Counsel: W. Dayaratne P.C. with Ms. R. Jayawardene for Plaintiff-Petitioner
Rasika Dissanayake for the 5th, 9th, 10th & 11th Defendant-Respondents.

Argued On: 25.8.2009

Written Submissions Tendered On: 7.1.2003

Decided On: 19.05.2011

Eric Basnayake J

The plaintiff-petitioner (plaintiff) filed this application to have the order dated 20.8.2002 of the learned District Judge of Tangalle set aside. By this order the learned Judge had refused to grant an interim injunction. Leave to appeal was granted by this court on 27.1.2004.

The plaintiff filed this action in the District Court of Tangalle to partition a land called "Mahawatte alias Ennapitiyahena" with an extent of 2 acres 3 roods and 20 perches. The plaintiff states that he is entitled to 6 perches while the 3rd defendant is entitled to 8 perches. The 3rd and 4th defendants who are husband and wife had mortgaged to the

Peoples' Bank (5th defendant) 15 perches of the undivided land although they were entitled to 8 perches. The defendants (3rd and 4th) having defaulted payment, the 5th defendant took steps to auction the 15 perches that was mortgaged. The plaintiff states that this being an undivided land, irreparable loss would be caused to the plaintiff and the other co-owners, if this auction is allowed. The court had issued a notice of injunction and an enjoining order at the 1st instance. After inquiry the court had refused to issue an interim injunction. It is this order the plaintiff is seeking to set aside.

When one seeks an interim injunction, such person must show that "there is a serious matter in relation to his legal rights to be tried at the hearing and that he has a good chance of winning or probabilities are that he will win (Justice Soza in Felix Dias Bandaranaike v. The State Film Corporation (1981) 2 Sri L.R. 287). It is not only to establish that there is a serious question to be tried but also that the plaintiff has a prima facie claim and a reasonable prospect of success even in the light of the defences raised in the pleadings, objections and submissions of the defendants (Amerasinghe J in Amarasekere v. Mitsui Co. Ltd. (1993) 1 Sri L.R.22). "In considering whether to grant an interlocutory injunction the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence and then decide what is best to be done (Lord Denning MR in Hubbard v. Vosper (1972) 1 All E.R.84 at 96, Jinadasa v. Weerasinghe 30 N.L.R. 283 & 31 N.L.R. 33, Ceylon Cold Stores v. Whittal Boustead (1980) 2 Sri L.R. 120, People's Bank v. Hewawasam(2000) (2) Sri L.R. 29, Mallawa vs. Kerthiratne (1982) 1 Sri L.R. 384).

The learned counsel for the 5th defendant submitted that the plaintiff had filed this case only to obtain an interim injunction and prevent the bank from realizing the debt the 3rd and 4th defendants owed (to the 5th defendant bank). The learned counsel submitted that this is a collusive action filed by the plaintiff to save the land of the 3rd and 4th defendants. The learned counsel submitted that the plaintiff cannot have and maintain this action for several reasons namely:-

1. The plaintiff had failed to deposit the estimated costs of the preliminary survey. On perusal of the record it appears that the plaintiff had failed to deposit the costs of the estimated surveyor's fees for a preliminary survey in a sum of Rs.5000.
2. The plaintiff had not submitted a plan or a sketch along with the plaint as required by section 4 of the Partition Law.
3. The plaint is vague as to the allotment of shares.
4. The 3rd defendant had bought 15 perches of land on 22.5.1985 and was in exclusive possession for over a period of ten years and had prescribed to the land.

The 3rd and 4th defendants had mortgaged 15 perches of land to the 5th defendant on 30.6.1997 for a sum of Rs.500000. The defendants having defaulted payment, the 5th defendant had taken steps to sell this 15 perches of land by way of public auction to be held on 20.11.2001. The sale was advertised in the newspapers on 2.11.2001. This case was filed in the District Court on 12.11.2001.

This action was originally filed against six defendants. Amongst the parties the plaintiff had allotted the following extents in respect of 1/3rd share:

Plaintiff: 6 perches

1st defendant: 1 rood 36.5 perches

2nd defendant: 19.9 perches

3rd defendant: 8 perches

Heirs of Sugathadasa: 1 rood 6 perches

The extent of the 1/3rd area allotted is 3 roods 36.5 perches. The plaintiff stated that the owners of the balance 2/3rd have divided the land amongst themselves by deed No. 4381 of 6.7.1972. A day later, namely, on 13.11.2001 the plaintiff filed an amended plaint. It appears that leave of court had not been obtained to file an amended plaint. The amended plaint was filed against eleven defendants. The original 6th defendant (the auctioneer) had

been made the eleventh defendant by the plaintiff in his amended plaint. Permission of court had not been obtained to add five more parties.

In the amended plaint the plaintiff had given 1/9, 4/9 and 1/9 shares to the 6th, 7th and 8th defendants respectively. The plaintiff submitted a pedigree in the amended plaint in respect of the 6th, 7th and 8th defendants. The plaintiff had also drawn a pedigree giving several deed numbers through which the plaintiff claims that the 6th to 8th defendants became entitled to their shares. This contradicts the position the plaintiff took in the plaint with regard to the 2/3rd share and the plaintiff does not explain the contradiction.

Although the plaintiff suddenly gave dates and numbers of a large amount of deeds, the learned President's Counsel for the plaintiff admitted while making submissions that the plaintiff does not have in his possession a single deed. The plaintiff supported for an interim injunction on the basis that he is a co-owner and that the 3rd defendant is entitled to a lesser share, without any documentary evidence. The learned counsel for the 5th defendant submitted that this is a collusive action filed by the plaintiff to defeat the interests of the 5th defendant.

“As the injunction is an equitable relief granted in the discretion of the Court, the conduct and dealings of the parties and the circumstances of the case are relevant.” This exemplifies the maxim “*he who comes into equity must come with clean hands*”. Thus, when a plaintiff whose conduct has been improper in a transaction seeks relief in equity, such relief will be refused (Soza J. in *Felix Dias Bandaranaike v. The State Film Corporation* (supra), *Yasodha Holdings Pvt. Ltd. Vs. People's Bank* (1998) 3 Sri L.R. 382).

The plaintiff in this case sought an interim injunction without any support with regard to title and interest in the land. The plaintiff has no possession and for the same reason is not

entitled to improvements. Thus I am of the view that the plaintiff had failed to establish a prima facie case considering the fact that the 3rd defendant had been in possession for well over a period of 10 years in this premises. The 3rd defendant had constructed a parapet wall along the 15 perches of the land and constructed a house without any protest a claim. The 3rd defendant had also tendered to the 5th defendant a certificate of disclaimer to establish his rights and obtained Rs.500000. Against all this material the plaintiff has come to court without any lawful grounds to claim an interim injunction. After obtaining an enjoining order the plaintiff had not even taken the necessary step to deposit the surveyor's fees to prosecute the action.

In the above circumstances I am of the view that the plaintiff should fail. Thus the appeal is dismissed with costs.

Judge of the Court of Appeal

K.T. Chithrasiri J

I agree

Judge of the Court of Appeal