MOHINUDEEN AND OTHERS

v.

BANK OF CEYLON

COURT OF APPEAL
EDUSSURIYA, J.
C.A. NO. 896/85
D.C. COLOMBO 16939/L
SEPTEMBER 9, 1997

Civil Procedure Code - S.247 Application - Interim Injunction - Fraudulent Conveyance - balance of convenience - Serious question of law - laches.

The Defendant - Respondent instituted action 8865/M for the recovery of a certain sum of money and obtained an exparte decree on 22. 11. 1991. On 14. 07. 94 the Fiscal seized the property described in the schedule to the plaint in the instant case 16939/L in execution of the Decree in 8865/M. The claim of the petitioners that they are the owners of the seized property was dismissed after Inquiry. On 26. 11. 1995 the Petitioners filed the instant case 16939/L - under S. 247 of the Code and sought to have the property released, from seizure. Their claim was rejected. On 02. 05. 1995 the Petitioners instituted another action 4357/SR seeking an injunction restraining the Respondent from taking steps to execute the Writ in case 8865/M. The application was refused. Thereafter on 21.07.1995 the present application for an interim injunction was made in case No. 16939/L, which was refused after inquiry. The Petitioner seeks to revise the Order, refusing the interim injunction. The Petitioners are the children of the Judgment - Debtor in 8865/M.

Held :

(i) 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 to not only to the strength of the claim but also the strength of the defence and then decide what is best to be done. The court must be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief.

(ii) In this instance when considering the whole case it is seen that there is no probability that the petitioner will succeed in obtaining the reliefs prayed for. It is seen that the Petitioners are the children of the judgment debtor and the deed of conveyance to them by the judgment

debtor was on 24. 08. 1993 after the exparte decree was entered against him on 22. 11. 92. Further for 10 months the judgment debtor in 8865/M, the donor on the Deed of Gift did not take any steps to have the exparte decree set aside within a reasonable time. The application for interim injunction had been made one year after the property was seized. This delay stands against the petitioners. All this leads one to the irresistible inference that the judgment debtor and the petitioners (father and sons) were hand in glove on this.

AN APPLICATION in Revision from the order of the Distrct Court of Colombo.

Cases referred to :

1. *Hubbard v. Vosper* - (1972) 2 QB 84, 1972 1 All.E.R. 1023.
2. *Jinadasa v. Weerasinghe* - (1929) 31 NLR 33.
3. *Preston v. Luck* - (1884) 27 at 497.
4. *Silva v. Mack* - 1 NLR 131.
5. *Silva v. Mendis* - 5 NLR 252.
6. *Mukthar v. Ismail* - 64 NLR 293.
7. *Silva v. Ibrahim Rowter* - 10 NLR 56.
8. *Atukorale v. Atukorale* - 71 NLR 369.

Romesh de Silva, P.C., with *Palitha Kumarasinghe* for Petitioner.

N. S. A. Goonetillake, P.C., with *M.E. Wickremasinghe* for Defendant Respondent.

Cur. adv. vult.

June 19, 1997.
EDUSSURIYA, J.

This is an application to revise the order of the learned Additional District Judge refusing an application for an interim injunction preventing the Defendant judgment-creditor in D.C. Colombo Case No. 8865/M from taking any steps to sell the property described in the schedule to the plaint in the execution of the writ issued in case No. 8865/M.

The Defendant-Respondent instituted action No. 8865/M for the recovery of a sum of Rs. 19,811,503/92 from the Petitioner and obtained an ex-parte decree on 22nd November

1991. Then on 14th July 1994 the Fiscal seized the property described in the schedule to the plaint in this case 16939/L in execution of the decree in case No. 8865/M. Thereafter the claim made by the Petitioners on 14th July 1994 on the ground that they are the owners of the seized property was dismissed after due inquiry. It was disclosed at that inquiry that the claimants who are the present Petitioners are the issues ("children") of the Defendants in D.C. Colombo Case No. 8865/M in which writ was issued. Then on 26th January 1995 the Petitioner filed this action No. 16939/L under Section 247 of the Civil Procedure Code seeking a declaration that the seized property is not liable to be seized in execution of the judgment in D.C. Colombo Case No. 8865/M and to have the property released from seizure. On 14th March 1995 the Petitioners made an application to revise the dismissal of their claim and it was dismissed by the Court of Appeal. Then on 02nd May 1995 the Petitioners instituted another action, namely, case No. 4357/SR seeking an injunction restraining the Respondent from taking steps to execute the writ in case No. 8865/M. That application was refused. Thereafter, on 21st July 1995 the present application for an interim injunction was made in the present case 16939/L which was refused after due inquiry and the present application before this Court is to revise and set aside the order of the learned Additional District Judge refusing the interim injunction and for the issue of the interim injunction as prayed for in the petition dated 21st July 1995. The main contention of the Petitioner's Counsel at the hearing of the application was that although the learned Additional District Judge had held in his order that the Petitioners had failed to make out a prima facie case and were as such not entitled to an interim injunction, the Petitioners had in fact made out such a case in as much as they were the owners of the seized property as at the date of the seizure. It was also contended that the learned Additional District Judge had erred in using against the Petitioners, the finding of the District Judge, namely that there was a conveyance in fraud of the creditors in the District Judge's order refusing the claim made at the seizure by the Petitioners. It was also submitted that the balance of convenience favours the Petitioners as the property is under seizure.

Although, the Additional District Judge has referred in his order to the reasons for the rejection of the Petitioners claim at the claim inquiry, the Additional District Judge has not refused the application for interim injunction on that ground alone.

In *Hubbard v. Vosper*[1], *Lord Denning M.R.* said "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 the strength of the defence and then decide what is best to be done".

I may also refer to the judgment in *Jinadasa v. Weerasinghe*[2], *where in Dalton J.* used the language of *Cotton L.G. in Preston v. Luck*[3], namely, that "the Court must be satisfied that there is a serious question to be tried at the hearing and on the facts before it there is a probability that the Plaintiff is entitled to relief".

In this instance when considering the whole case it is seen that there is no probability that the Petitioners will succeed in obtaining the reliefs prayed for in the plaint.

Firstly, the conveyance to the Petitioners (issues - "children") by the judgment-debtors (father) was on 24th August 1993 after the ex-parte decree was entered against him on 22nd November 1992.

Secondly, although the judgment debtor (Defendants) in case No. 8865/M has filed petition and affidavit to set aside the ex-parte decree, that was done on 26th May 1995 even though the judgment-creditor (Defendant in 8865/M) must certainly have known that an ex-parte decree had been entered against him at the latest by 14th July 1994 when the property was seized in execution. So that for ten (10) months the judgment-debtor(Defendants) in 8865/M, the donor on deed of gift No. 3584 of 24th August 1993 to the Petitioners (donees) did not take any steps to have the ex-parte decree set aside. This clearly shows, that although he knew about the ex-parte decree against him, the donor on the deed 3584 did not bother to take steps

to have the ex-parte decree vacated, because, in my view he knew all along of the case against him, and summons had been served on him and he never appeared in answer to summons because he had taken steps to thwart the Respondent by gifting the property to his sons and daughter and he only filed petition and affidavit to assist the Petitioner's in this case and that too after this case was instituted. Besides, the judgment-debtor in case No. 8865/M has not sought to vacate the ex-parte decree within reasonable time. All this leads one to the irresistible inference that the judgment-debtor and the Petitioners (father and sons) were hand in glove on this.

I may also add that this application for interim injunction had been made one year after the property was seized. This delay also stands against the Petitioners.

The Petitioner's Counsel referred this Court to the decisions in *Silva v. Mack*[4], *Silva v. Mendis*[5], *Mukthar v. Ismail*[6], *Silva v. Ibrahim Rowter*[7], *Atukorale v. Atukorale*[8]. These judgments though relating to action instituted under Section 247 of the Civil Procedure Code have no applicability to the present application relating to the issue of an interim injunction.

For the above mentioned reasons this application is dismissed and consequently any stay order issued also lapses.

The Petitioners and their father, the judgment-debtor in case No. 8865/M have left no stone unturned in their endeavour to thwart the Respondent. I therefore award the Respondent costs in a sum of Rs. 21,000/- payable by the Petitioners.

Application dismissed.