GUNASEKERA

vs

ARCHBISHOP OF COLOMBO AND OTHERS

COURT OF APPEAL
AMARATUNGA, J.
WIMALACHANDRA, J.
CALA 171/2004
DC. MT. LAVINIA 472/03/P
OCTOBER 19, 2004

Civil Procedure Code – section 666 – Interim Injunction granted – Exparte – Vacation of same under Section 666 – Is there a time limit ?

The Plaintiff obtained an interim injunction against the 1st Defendant Respondent ex-parte on 24.6.2003. Thereafter on 15.9.2003 the 1st Defendant Respondent filed papers and sought an order to vacate same under Section 666 – Court after Inquiry vacated the interim injunction. The Plaintiff Petitioner thereafter sought leave to appeal from the said Order. it was contended that the 1st Defendant had filed papers to dissolve the interim injunction after 3 months from granting the injunction and the Defendant cannot resort to Section 666.

HELD

(i) Section 666 does not speak of a time period within which a party aggrieved could avail of Section 666. An order for an interim injunction may be set aside by the same court on an application made thereto, by any party dissatisfied with such order.

(ii) An injunction issued ex-parte must be canvassed in the Court which made that order.

(iii) It was correct for the Defendant Petitioner to move under Section 666 of the Civil Procedure Code.

APPLICATION for Leave to Appeal from an order of the District Court of Mt. Lavinia.

Case referred to :

1. *Senanayake* vs *Peiris* – 1992 – 2 Sri LR 169.

Rohan Sahabandu for Petitioner.

Nihal Jayamanne P.C., with Ms *Noorani Amerasinghe* for the 1st Defendant Respondent.

cur. adv. vult.

November 30, 2004

WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the District Judge of Mount Lavinia dated 20.04.2004, setting aside the interim injunction granted in favour of the plaintiff-petitioner (petitioner).

Briefly, the facts relevant to this application are as follows :

The petitioner instituted the partition action bearing No. 472/03/P in the District Court of Mt. Lavinia to partition the land called Lunawewatta and Gorakagahawatte described in the schedule to the plaint. The plaintiff also sought an interim injunction against the 1st defendant-respondent (1st defendant) restraining him from constructing buildings and/or making improvements to the existing buildings on the land.

The application for an interim injunction was supported on 17.06.2003 and the Court issued a notice of interim injunction returnable for 24.06.2004 on the 1st defendant. Admittedly, it was served on one B.L.A.V. Emmanual who was residing in the Archbishop's House, which is the residence of the 1st defendant. The said B.L.A.V. Emmanual swore to an affidavit (marked X) stating *inter-alia* that there was no possibility of the said notice being brought to the notice of the 1st defendant, prior to 24.06.2003 which date was the notice returnable day. On 24.06.2003, since there was no appearance for the 1st defendant, the Court issued the interim injunction as prayed for in the prayer to the plaint. Thereafter on 15.09.2003 the 1st

defendant filed a petition and affidavit and sought an order to vacate the interim injunction under Section 666 of the Civil Procedure Code. Thereafter when the matter was taken up for inquiry the Court directed the parties to file written submissions, and the learned Judge having considered the submissions, delivered the order on 30.04.2004 setting aside the interim injunction granted by the Court. It is against that order the plaintiff has filed this application for leave to appeal.

The learned Counsel for the plaintiff-petitioner (plaintiff) submitted that the learned District Judge has failed to consider the following two preliminary objections raised by the plaintiff at the inquiry in to the application made by the 1st defendant for the vacation of the interim injunction. They are :

(i) the 1st defendant has filed papers to dissolve the interim injunction after 3 months from granting the injunction.

(ii) the 1st defendant cannot resort to section 666 of the Civil Procedure Code to vacate the interim injunction.

Section 666 of the Civil Procedure Code states that an order for an injunction or enjoining order made may be discharged, or varied or set aside by the Court, on application made thereto, by any party dissatisfied with such order.

it is to be noted that Section 666 does not speak of a time period within which a party aggrieved by the Court granting an interim injunction could avail to Section 666 of the Civil Procedure Code. Accordingly, an order for an interim injunction made by a District Court, may be set aside by that Court on an application made thereto, by any party dissatisfied with such order. The setting aside of an interim injunction may be done on a consideration of the merits and the law applicable thereto.

The order made by the learned District Judge on 24.06.2003 is an order made ex-parte as the person against whom that order has been made

was not present in Court and it was made without giving a hearing to the affected party. Accordingly, an injunction issued ex-parte must be first canvassed in the Court which made that order.

It was held in the case of ***Senanayke vs. Peiris***[1] that it has become a rule of practice deeply ingrained in our legal system that a party moving to set aside an ex-parte order must first go before the Court which made the ex-parte order to have it vacated, before moving to the Court of Appeal.

Therefore, it seems to me that it was correct for the 1st defendant to come under Section 666 of the Civil Procedure Code to have the interim injunction set aside.

The plaintiff claims that he is the owner of 1/8th share and the 1st defendant is entitled to 7/8th share, minus 29.12 perches. The plaintiff states (in paragraph 23 of the plaint) that his mother Mary Clotilda Anthony had transferred an undivided 1/8th share to the plaintiff by deed No. 306 dated 08.03.2003. It is to be noted that the plaintiff has failed to produce the said deed No. 306 for the perusal of Court to see whether he became entitled to 1/8th share of the said land. Without producing the said deed it is not possible to come to a conclusion that he has 1/8th share of the land.

The plaintiff's position as stated in the plaint is that his mother had got rights in the land by deed No. 2472 of 11.05.1942. But the plaintiff has not produced this deed.

The plaintiff admits that his father Rowland Gunasekera entered into an agreement bearing No. 1659 dated 08.09.1980 in respect of the land to be partitioned and thereafter executed Deed No. 1696 of 17.02.1981 with Archbishop restricting his rights in the land in suit to 29.12 perches. Deed No. 1696 has been produced marked "X13" by the 1st defendant.

In these circumstances, in the absence of the aforesaid deed No. 306 of 08.03.2003 and Deed No. 2472 of 11.05.1942 the plaintiff cannot establish that he has 1/8th share of the land in suit. As against the aforesaid deeds referred to by the plaintiff which he failed to produce, the 1st defendant produced the Deed No. 1696 marked "X13". According to this deed the plaintiff's father, Rowland Gunasekera has got lot 2 which is in extent

of 29.12 perches and the Archbishop has got lot 1 which is in extent "X1". The plaintiff has conceded that by the said deed marked "X13" his rights were restricted to 29.12 perches. The plaintiff has failed to produce deeds for the 1/8th share he claimed in the corpus. In the absence of the deeds the Court is unable to form an opinion that in addition to the aforesaid 29.12 perches he is also entitled to 1/8th share of the land.

The resultant position is that the plaintiff has failed to establish a *prima facie* case in his favour that he is the owner of 1/8th share of the property in addition to 29.12 perches. The failure to produce the deeds he relied on to establish that he is the owner of a 1/8th share of the property will only disclose the fact that he is now confined to 29.12 perches.

According to the aforesaid partition deed No. 1696 marked "X13" it was agreed between the plaintiff's father Rowland Gunasekera and the Archbishop that lot 1 in plan 2719 belongs to the Archbishop and lot 2 to Rowland Gunasekera in plan "X1". Accordingly the portion belonging to the 1st defendant is clearly demarcated from lot 2 which was given to Rowland Gunasekera.

The plaintiff is under obligation to make the fullest possible disclosure of all material facts within his knowledge. Though the plaintiff claimed 1/9th share by deed No. 306 dated 08.03.2003, the plaintiff did not produce the said deed. In my view this is a material fact, because the failure to establish 1/8th share means that he has only 29.12 perches which is a seperate lot in terms of the deed No. 1696 of 17.02.1981 which is depicted as lot 2 in the plan marked "X1". I am of the strong view that if this fact had been disclosed by producing the relevant deed marked "X13" and the portion plan marked "X1" the learned Judge would have given a different order at the time the Court granted the interim injunction.

In these circumstances the 1st defendant has failed to establish a *prima facie* case in his favour and hence we are not inclined to interfere with the order made by the learned Judge dated 30.04.2004.

For these reasons, the application for leave to appeal is refused and accordingly dismissed without costs.

AMARATUNGA. J. — I agree.

Application dismissed.