

SUBRAMANIAM

v.

SHABDEEN**COURT OF APPEAL**

TAMBIAH, J. AND T. D. G. DE ALWIS, J.

C.A.—L.A. 9/83—D.C. COLOMBO 2209/SPECIAL

JUNE 10, 1983 AND NOVEMBER 8, 1983.

Application for dissolution of interim injunction in a suit for ejectment and recovery of the business and appurtenant furniture and fittings and damages.—Principles governing the exercise of discretion to grant an injunction.

The plaintiff (respondent) was the tenant of premises No. 249, Galle Road, Kollupitiya, where he ran a hotel business using his own furniture, fittings and equipment. On 4.6.1977 he entered into an Agreement (X2) with the defendant (appellant) whereby he permitted the defendant to carry on the hotel business for five years from 4.6.1977 to 4.6.1982 in return for the payment of a monthly commission of Rs. 859 and a deposit of Rs. 10,000 refundable at the expiry of the Agreement. The defendant paid the deposit of Rs. 10,000 and the plaintiff handed over the business with the furniture, fittings and equipment.

The defendant, however, failed to pay the water rates and electricity dues and the monthly payments due for the period 4.10.1981 to 3.6.1982. He also failed to hand back the business with the furniture, fittings and equipment on 4.6.1982 and was arranging to hand them over to a third party. The plaintiff then filed the present suit for the payment of the money due and for the recovery of the premises, business with equipment and fittings and damages in a sum of Rs. 5,000 per month from 4.6.1982. He sought an interim injunction restraining the defendant from carrying on the said business or handing over the business to any third party.

On 30.8.1982, the District Judge granted the plaintiff an interim injunction ex parte as prayed for. On 3.9.1982, the defendant filed petition and affidavit and prayed for the dissolution of the interim injunction.

The District Judge refused the application to dissolve the injunction.

Held—

The principles which govern the exercise of the discretion to grant an interim injunction are—

- (1) The person who seeks an interim injunction must show Court that there is a serious matter to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief. In other words, he must establish a *prima facie* case. He must first show the *prima facie* existence of a legal right and that there was an infringement or invasion of that legal right.

- (2) The plaintiff must show that irreparable injury will be caused to him if the injunction is not granted. Where damages are an adequate remedy, no injunction will lie. The test to be applied is, "is it just that the plaintiff should be confined to his remedy in damages?"
- (3) The balance of convenience should favour the grant of the interim injunction and here the test is "how does the injury that the defendant will suffer if the injunction is granted and he ultimately comes out victorious weigh against the injury which the plaintiff will suffer if the injunction is refused and he wins?" Where any doubt exists as to the plaintiff's right or if his right is not disputed but its violation is denied the court will take into consideration the balance of convenience. If the plaintiff establishes his right and its infringement the balance of convenience need not be considered.

The plaintiff had established a strong prima facie case to his entitlement to carry on the business and the violation of his rights. It would not be just to confine the plaintiff to his remedy in damages. An interim injunction must be granted to stop the wrong doer from obtaining the benefits arising from his own wrongful conduct. The application to dissolve the injunction therefore could not succeed.

Cases referred to

- (1) *Jinadasa v. Weerasinghe* (1929) 31 NLR 33, 35.
- (2) *Wickramaratne v. Thavendrarajah* S.C. 17/82 - C.A. - L.A. 6/82. S.C. Minutes of 25.9.81.
- (3) *Seelawathie Mallawa v. Millie Keerthiratne*, C.A. - LA 103/81 C.A. Minutes of 25.9.81.
- (4) *Yakkaduwa Sri Pragnarama Thero v. Minister of Education* (1969) 71 NLR 506.
- (5) *Seelawathie Mallawa v. Millie Keerthiratne*, S.C. 80/81 S.C. Minutes of 12.5.82.
- (6) *Pounds et al v. Ganegama* (1939) 40 NLR 73.

APPEAL from an Order of the District Court of Colombo.

H. W. Jayewardene, Q.C., with *N. S. A. Goonetilleke* and *N. Mahendran* for the defendant-appellant.

Eric Amerasinghe, S. A. with *Jacotyn Serewiratne* and *Miss Duniyangoda* for the plaintiff-respondent.

January 13, 1984.

TAMBIAH, J.

This appeal is from an order of the learned Additional District Judge, dated 31st January, 1983, refusing the defendant-appellant's application for dissolution of the interim injunction issued by him.

The plaintiff-respondent filed action and prayed for ejection of the defendant, his agents, servants, and others holding under him, from a portion of premises No. 249, Galle Road, Kollupitiya, where the business of "Hotel de Liberty" is carried on, for their ejection from the aforesaid business, for recovery of a sum of Rs.50,000/- being the value of furniture, equipment and fittings, of a sum of Rs.6,800/- being arrears of monthly payment and of a sum of Rs.5,000/- per month as damages from 4.6.82 until restoration of possession of the said premises and of the said business. The prayer also contained an application for an interim injunction restraining and preventing the appellant, his agents and servants and others holding under him from carrying on the said business of "Hotel de Liberty" in a portion of the said premises and from subletting, subleasing or parting with the possession of the said portion of the premises, of the said business, and of the said furniture, equipment and fittings.

* The facts set out in the plaint and affidavit which are relied on by the plaintiff in support of his application for an interim injunction were as follows: That the plaintiff is a tenant of premises No. 249, under one Mrs. Fatha Rally; that he was carrying on a Hotel business under the name "Rex Cafe", which was registered in his name (X1); that he was the owner of all the equipment and fittings of the said Hotel business; that by an Agreement dated 4.6.77(X2), the plaintiff permitted the defendant to carry on the said business for the period commencing 4.6.77 up to 4.6.82; that the said Agreement provided, inter alia, (1) that the defendant shall deposit Rs. 10,000/- which was refundable on the expiry of the Agreement after deducting unpaid monthly commission, (2) that the defendant shall pay Rs..850/- as monthly commission, (3) that the defendant shall hand back all articles, furniture and fittings valued at Rs.50,000/- on the expiry of the Agreement, (4) that the plaintiff shall pay the rent due in respect of the premises and the

Hotel licence fee, while the defendant will be responsible for the payment of salaries to the employees, the water tax, and the electricity bills in respect of the premises, (5) that the defendant shall hand back possession of the premises and the business on or before 3.6.1982 and that if the defendant fails to hand back the business and the articles by the said date, the plaintiff will be entitled to damages at Rs.55/- a day as from 3.6.82 ; that the defendant paid the deposit of Rs. 10,000/-, and the plaintiff handed over to him the said Hotel business, the premises together with the fittings and equipment ; that on or about 28.10.1977, the business name was changed to "Hotel de Liberty" with the consent of the defendant, that the registration of the business was accordingly amended (X3), and the plaintiff continues to be the owner of "Hotel de Liberty" ; that the Eating-House licences have been issued in the plaintiff's name (X6) ; that the defendant has failed to pay the water rates up to July, 1982, amounting to about Rs. 1,000/=-, and the electricity bills up to June, 1982, amounting to Rs. 23,485/- ; that the defendant has failed to make the monthly payment due under the said Agreement for the period 4.10.1981 to 3.6.1982, amounting to Rs.6,800/- ; that on 3.6.1982, the plaintiff called upon the defendant to hand over possession of the said business, premises and equipment and fittings of the said business, but the defendant has failed to comply with the said request and is wrongfully and unlawfully possessing the said business, premises and equipment, thereby causing loss and damage to him which he estimates at Rs. 5,000/- per month ; that the defendant is making arrangements to sublease or part with possession of the said business, premises and equipment to a third party ; that grave and irreparable loss is being suffered by the plaintiff by the defendant carrying on the said business and that irreparable loss and damage will be suffered by him in the event of the defendant subletting or parting with the possession of the said business, premises and equipment and fittings ; that a judgment entered in plaintiff's favour would be rendered nugatory, futile and ineffective by the defendant carrying on the said business and if the defendant sublets or parts with the possession of the said business, premises and equipment and fittings.

On this material, the learned Additional District Judge on 30.8.82 granted ex-parte, the interim injunction prayed for. On 3.9.82, the defendant filed petition and affidavit and prayed for the

dissolution of the interim injunction on the grounds, inter alia, that the plaintiff has in his plaint estimated his claim by way of damages, that on a balance of convenience no interim injunction would be issued, that since March, 1971, the defendant has been carrying on business in the said premises, and that the business is his sole livelihood as his only income is from the said business, that at the plaintiff's request and on a promise by him to extend the lease for a further period of five years, the defendant had expended a sum of Rs. 141,250/= in repairing the portion of the premises in which the business was carried on, and that the plaintiff agreed to give him credit for the amount so expended, that certain items of equipment and fittings have been replaced by him at a cost of Rs.52,500/= and therefore it would be unjust and inequitable to issue an interim injunction restraining the defendant from carrying on the business and that grave and irreparable loss would be suffered by him, and not by the plaintiff, if the interim injunction is allowed to stand.

In the said petition and affidavit, the defendant admitted the execution of the agreement dated 4.6.77, and that there was a contract between him and the plaintiff; he admitted the payment of Rs. 10,000/- as deposit; he admitted that the business of "Rex Cafe" was, and the business of "Hotel de Liberty" is, registered in the name of the plaintiff; he also admitted that the said agreement expired in June 1982. The petition and affidavit go on to state that no payments were made for the period October 1981 to June 1982 by reason of the fact that he had to pay Rs.10,000/= as licence fees for 1981 and 1982, ("B" and "C"), and that the plaintiff requested him to set off the amount due for the said period against the sum of Rs.10,000/=; that he has paid the licence fees in respect of some of the earlier years. The receipts "B" and "C" have been issued in the plaintiff's name. The defendant states that all electricity bills and water rates have been paid by him.

In the answer dated 17.12.82 filed by the defendant, he took up a new position— that he was a tenant of the plaintiff in respect of a portion of the premises and that the Agreement (X2) was a sham and did not represent the true nature of the transaction between the parties.

The application for dissolution of the interim injunction came up for inquiry on 10.1.83 and after hearing Counsel for the parties, the learned Additional District Judge delivered his order dated 31.01.83, refusing the defendant's application to dissolve the interim injunction. The learned Judge ordered the plaintiff to give Rs.5,000/= as security.

The question that arises in this appeal is whether the learned Judge had correctly exercised his discretionary powers in restraining the defendant, his servants and agents from carrying on the business of "Hotel de Liberty" at a portion of premises No. 249. It would appear that at the inquiry, the defendant gave an undertaking that he would not sublet or hand over possession of the portion of the premises, the business and furniture, equipments and fittings to a third party. Learned Queen's Counsel for the appellant stated that he was not contesting that part of the interim injunction which related to subletting or parting with possession to a third party.

It was the learned Queen's Counsel's submissions that :-

- (1) the learned Judge has misdirected himself when he held that if an interim injunction is not issued, irreparable damage will be caused to the plaintiff. The plaintiff has quantified his damages in the plaint at Rs.5,000/- per month ; in the Agreement (X2), the damages have been estimated at Rs. 55/- per day. The learned Judge has not addressed his mind to the fact that the plaintiff has assessed his damages. Where a plaintiff himself has assessed his damages, no injunction will lie--*Jinadasa v. Weerasinghe* (1).
- (2) on a balance of convenience, no interim injunction should issue. In view of *Ganegama's Case* (6) the plaintiff cannot obtain an interim injunction to prevent the defendant from entering the premises. The injunction issued does not deprive the defendant of possession of the premises nor of possession of the business and the articles and the equipment. The defendant cannot carry on the business, nor can the plaintiff carry on the said business. Until the case is decided both parties cannot carry on the business. What practical benefit does the plaintiff get by the issue of the interim injunction ? If the defendant runs the business until the case is decided and in the event of his losing the case finally, the plaintiff would not lose ; he will get back his business as a going concern and the articles, equipment and fittings or its value estimated at Rs. 50,000/-, plus get his monthly commission and his damages. On the other hand, if the defendant is restrained from carrying on the said business until the case is decided, he would suffer loss and will be deprived of his sole means of livelihood. Equity demands that the status quo be maintained until the Court decides that the defendant be ejected.

- (3) The Agreement (X2) is a sham and was entered into to evade the provisions of the Rent Act. It was a subterfuge or a camouflage to cloak the subletting and the recovery of rent in excess of the authorised rent. A Court is entitled to go behind the veil and say that there is in fact and in truth no agreement as is recited in the Agreement X2—*Wickremaratne v. Thavendrarajah* (2). This is a triable issue to be determined at the trial. An interim injunction would not issue pending the determination of this issue.

The interim injunction was asked for in the plaint. It is s.54(a) of the Judicature Act No. 2 of 1978 that is applicable. The section states that the Court may grant an injunction where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff.

The principles which govern the exercise of the discretion conferred by this section have been set out in several cases and are to the following effect :—

- (1) A person who seeks an interim injunction must satisfy the Court that there is a serious matter to be tried at the hearing and that on the facts before it, there is a probability that the plaintiff is entitled to relief—*Jinadasa v. Weerasinghe* (1).

" In other words he must establish a prima facie case. This means that he must show that there is a serious matter in relation to his legal rights to be tried at the hearing and that the probabilities are that he will win." (Soza, J. in *Seelawathie Mallawa v. Millie Keerthiratne* (3)).

The plaintiff therefore must first show the prima facie existence of a legal right and that there was an infringement or invasion of the legal right.

- (2) The plaintiff must next satisfy Court that irreparable injury will accrue to him if the injunction is not granted. The term " irreparable injury " means an injury that cannot be adequately compensated for in damages.

Where damages are an adequate remedy, no injunction will lie (*Jinadasa's case* (supra)).

The principle has been reformulated by Soza, J. in *Seelawathie Mallawa's case* (supra) as follows—

" Is it just that the plaintiff should be confined to his remedy in damages ? "

(3) The third condition is the principle of the "balance of convenience". How does the injury which the defendant will suffer if the injunction is granted and he ultimately comes out victorious, weigh against the injury which the plaintiff will suffer if the injunction is refused and he wins? (Soza, J. in *Seelawathie Mallawa's case* (supra)). Where any doubt exists as to the plaintiff's right, or if his right is not disputed, but its violation is denied, the Court, in determining whether an interlocutory injunction should be granted, takes into consideration the balance of convenience to the parties. (H.N.G. Fernando, C.J., in *Yakkaduwe Sri Pragnarama Thero v. Minister of Education* (4)).

If the plaintiff establishes his right and its infringement, the "balance of convenience" need not then be considered.

In the present case, no oral evidence was led at the inquiry. Whether an interim injunction should issue or not depended on facts supported by affidavits. The defendant, in his petition and affidavit, admitted that he took the business from the plaintiff under the Agreement (X2); that the business of "Rex Cafe" was registered in the plaintiff's name; that the new business of "Hotel de Liberty" is also registered in the plaintiff's name; that he paid Rs. 10,000/- in terms of the Agreement; that at least for the period June 1977 to September 1981, the monthly payments as commission payable under the Agreement were paid to the plaintiff; that the receipts for the licence fees have been issued in the plaintiff's name; that the Agreement expired in June 1982. These are uncontested facts. In terms of the Agreement, the defendant was liable to hand over possession of the business at the expiry of the lease. It is not disputed that he has refused to do so. The plaintiff has therefore established a prima facie right to the possession of the business of "Hotel de Liberty", and a violation of this right, when the defendant failed to hand over the possession.

The plaintiff's position is that the defendant's right to carry on the business came to an end when the Agreement X2 expired on 4.6.82. The Agreement is not disputed by the defendant. The defendant's position, however, is that on account of an oral promise given by the plaintiff that he would give an extension for a further period of five years at the expiry of the Agreement X2, he expended a sum of Rs. 141,250/- in effecting repairs, for which

amount credit was to be given to him. There is not a word in the whole of the petition and affidavit filed by the defendant that the Agreement X2 was a sham and that the defendant, in truth and in fact, was a tenant of the plaintiff in respect of a portion of the premises. For the first time, this position was taken up in the answer. It remains a bare statement of the defendant in the answer, unsupported by an affidavit. No evidence was led at the inquiry. Parties chose to rely on the affidavits filed. Though the learned Judge adverted to the submission of learned Counsel on this matter, he correctly did not deal with the submission at this stage of the case as it is only an assertion in the answer which was not proved. On the defendant's own admissions, the Agreement X2 was one which was acted upon by him. It seems to me that the plaintiff has established a strong prima facie case, on the material before the learned Judge.

Prima facie, therefore, after the Agreement X2 expired on 4.6.82, the defendant is in wrongful and unlawful possession of the business. It will take a long time for the case to be finally disposed of. Is it just that the plaintiff should be confined to his remedy in damages? I do not think so. Until the case is finally disposed of, the defendant will be wrongfully earning a large income from the business; while the plaintiff, who has established prima facie his right to carry on the said business, will be deprived of his right to earn the same income during the same period. The learned Judge himself took the same view. There is this further principle that an injunction would issue to stop a wrong doer from obtaining benefits arising out of his wrongful conduct. If a person in unlawful possession could not be ejected pending trial, he could still be restrained from taking any benefits arising out of such wrongful possession, otherwise the Court would be a party to the preserving for such person a position of advantage brought about by his own unlawful or wrongful conduct (Victor Perera, J. in *Seelawathie Mallawa v. Millie Keerthiratne* (5))

I confirm the order of the learned Judge dated 31.1.1983 and dismiss the appeal with costs. In view of my judgment, I pro forma, dismiss the Revision Application, No. 115/83, filed by the appellant in regard to this same matter, but make no order as to costs.

T. D. G. DE ALWIS. J.—I agree.
Appeal dismissed with costs.