

**SEYLAN BANK LTD.,
VS
PIYASENA AND ANOTHER**

COURT OF APPEAL
WIMALACHANDRA J
C.A.L.A. 326/03
D.C. EMBILIPITIYA 7713/L
JANUARY 27, 28, 2005

Civil Procedure Code - Interim Injunction - Ingredients - Cause of action - quia timet actions - person in possession - No title - Is he entitled to injunctive relief? Recovery of Loans by Bank (Sp. Pro) Act, and 4 of 1990 - Cause of Action

The plaintiff - respondent mortgaged a certain land to the 1st Defendant Petitioner Bank, and as he had defaulted the repayment of the loan, the Bank sought to recover same by invoking the Provisions of Act No. 4 of 1990.

The plaintiff Respondent had stated that the corpus belonged to the 2nd Defendant Land Reform Commission and that the Land Reform Commission is taking steps to transfer the property to him, and that the Bank has no authority to parate - execute the property. The Court granted the injunction sought by the Plaintiff restraining the Defendant Petitioner Bank from parate execution of the property.

On leave being sought by the Defendant Bank :

- 1) It appears that the boundaries of the land mortgaged are different from that of the land which is the corpus. Even if the Plaintiff has no title to the property, the facts placed before Court show that at the time of filing action he was in possession of the land.

It may be possible to file action against a person who has threatened to disturb the possession of the Plaintiff and to use the evidence which he has at hand to establish his possession against the person who only threatens and does not so far disturb his possession.

- 2) An interim injunction will be granted *quia-timet* to restrain an apprehended or threatened injury, if in addition to the other requirements necessary to qualify for an interim injunction, it is established that firstly the injury is certain or very imminent and secondly that the likely mischief will be of a very substantial nature.
- 3) The land belongs to the Land Reform Commission and the Land Reform Commission was taking steps to transfer it to the Plaintiff. The Plaintiff had established that there is a strong possibility that the apprehended mischief will in fact arise, the Defendant-Bank has already taken steps to auction the land in question.
- 4) If the wrong land is auctioned the inconvenience which the Plaintiff will suffer by the refusal of the injunction is greater than that which the 1st Defendant will suffer if it is granted, the balance of convenience favours the Plaintiff.
- 5) The relief claimed by the Plaintiff is founded on the violation of his right to possession of the land described in the plaint by the 1st Defendant Petitioner. A person in possession is entitled to possess it without fear of unjustifiable interference from outsiders.

Application for Leave to Appeal from an Order of the District Court of Embilipitiya.

Cases referred to :

1. *Preston vs Luck* - 1887 27 ch. 497 at p. 505 and 506.
2. *Jinadasa vs Weerasinghe* - 1929 - 31NLR 33
3. *Montgomery vs Montgomery* - 1964 2 AER 22
4. *Gouriet vs Union of Post Office Workers* - 1978 AC 435, 1977 3 WLR 300, 1977 3 AER 70 HL (E)
5. *Richard Perera vs Albert Perera* 1963 67 NLR 443 at 448.
6. *Jackson vs Spittel* - 1880 LR 5 CA 542.
7. *Lowe vs Fernando* - 16 NLR 398.
8. *Ceylon Land and Produce Co. Ltd. vs. Malcolmson* - 12 NLR 16 at 19.
9. *Fernando vs Silva* - 1878 - 1 SCC 28

Tilaka Bandara Waduressa for 1st Defendant Petitioner.

Rohan Sahabandu for 2nd Defendant Respondent.

Plaintiff Respondent absent and unrepresented.

cur. adv. vult.

May 12, 2005

WIMALACHANDRA, J.

This is an application for leave to appeal from the order of the District Judge of Embilipitiya dated 19.08.2003. By that order the learned judge has granted the interim injunction sought by the plaintiff-respondent (plaintiff) prayed for in the prayer to the plaint, restraining the 1st defendant - respondent (1st defendant) from auctioning the land described in the schedule to the plaint.

The petitioner states that the land described in the schedule to the statement of objections of the petitioner filed in the District Court, at one stage belonged to D.D. Sepala Ratnayake and he had transferred it to Imiyage Don Gunaratne by deed No ;34858 dated 28.02.1968 attested by D.M.A. Diyagama N.P.

The said Gunaratne had transferred the said land to Kekunawala Pathirage Piyasena, who is the plaintiff, by deed No. 883 dated 04.12.1979 attested by B. Vithanage N.P.

The Plaintiff had mortgaged the said land to the 1st defendant by notarial deeds No. 1012 dated 1.7.1992, and No. 1152 dated 16.11.1993, both attested by K.S. Abeyratne N.P. He had also executed mortgage bonds No. 7213 dated 13.5.1996 and No. 6656 dated 28.04.1995, both attested by S.E. Weeraratne, N.P. The Plaintiff had obtained Rs. 2058981/73 from the 1st defendant by keeping the aforesaid land as security. The plaintiff had defaulted the repayment of the loan facilities he obtained from the 1st defendant and the 1st defendant had taken steps to recover the defaulted sum as at 29.2.2000, amounting to Rs. 2,058,981/73, in terms of the provisions of the recovery of Loans by Banks (Special Provisions) Act No. 4 of 1990.

It is the position of the plaintiff that the said land depicted as lot 1 in plan No. 1193 LR 6/204 dated 10.04.2001 prepared by the licensed Surveyor G.W.K. Manamperi belongs to the Land Reform Commission, the 2nd defendant, and the 2nd defendant is in the process of taking steps to transfer the said land to the plaintiff. Accordingly, the plaintiff states that the petitioner has no right to auction the land by way of parate-execution under the Recovery of Loans by Banks (Special) Act. This position is confirmed by the 2nd defendant - Respondent (defendant), the Land Reform Commission. The 2nd defendant has taken up the position in its answer filed in the District Court that the land mortgaged to the 1st defendant Bank belongs to the 2nd defendant and the 2nd defendant was taking steps to transfer the property, which is the subject matter of this action, to the plaintiff.

The learned Judge in his order has granted the interim injunction prayed for by the plaintiff mainly on the ground that the main question that has to be decided is whether the land in question belongs to the 2nd defendant, the Land Reform Commission.

In deciding the question whether to issue an interim injunction, the first requirement that has to be established is whether the plaintiff has a *prima facie* case. The plaintiff filed this action for a judgment, that he be declared as the possessor of the land described in the schedule to the plaint and to prevent the 1st defendant-bank from selling the land by public auction.

In issuing an injunction, it is settled law that there must be a *prima facie* case, meaning that there is a serious question to be tried at the hearing, and that on the facts of the case before Court there is a probability

that the plaintiff is entitled to relief. *Preston vs Luck* ⁽¹⁾ at 505 and 506, *Jinadasa Vs. Weerasinghe* ⁽²⁾. Moreover, on the face of the plaint the person applying for an injunction must show that he is not bound to fail by virtue of some apparent defect. (Row on Injunctions 6th edition at page 247)

The Court will issue an interim injunction only to protect a legal right (*Montgomery Vs. Montgomery*) ⁽³⁾ where the plaintiff has no legal right recognisable by the Courts, an interim injunction should not be issued (*Gouriet Vs. Union of Post Office Workers*) ⁽⁴⁾ * There must be some apparent violation of rights to which the plaintiff appears to be entitled and not merely of rights which he claims" per H.N.G. Fernando, J. in *Richard Perera Vs Albert Perera* ⁽⁵⁾ per Justice Soza, at page 84 of Judges Journal, Volume I.

In the light of the above discussion it is appropriate to examine whether there is a cause of action against the 1st defendant. The plaintiff has not prayed for a declaration of title to the property described in the schedule to the plaint. His main reliefs are ; that

- (i) the plaintiff's possession to the land described in the schedule to the plaint be confirmed.
- (ii) the 1st defendant - bank has no legal right to auction the land described in the schedule to the plaint.

Every action is based on a cause of action. A cause of action means a particular act on the part of the defendant-which gives the plaintiff his cause of action (*Jackson Vs. Spittel* ⁽⁶⁾)

A question arises as to whether a cause of action is fully accrued to the plaintiff as at the date of the institution of this action. It appears that the relief claimed by the plaintiff in paragraph (1) of the prayer to the plaint is founded on the violation of his right to possession of the land described in the plaint by the 1st defendant.

It was held in the case of *Lowe Vs. Fernando* ⁽⁷⁾ that the expression "cause of action" generally imparts two things, viz. a right in the plaintiff and a violation of it by the defendant and cause of action means the whole cause of action *i.e.* all the facts which together constitute the plaintiff's right to maintain the action.

Admittedly the plaintiff is in possession of the property which is the subject matter of this action. A person who is in possession is entitled to possess it without fear of unjustifiable interference from outsiders.

The 2nd defendant, the Land Reform Commission filed answer and has taken the position that the land belongs to the Land Reform Commission. The 2nd defendant in its answer states that the 2nd defendant was taking steps to transfer the property in question to the plaintiff. It appears that the plaintiff is in possession of the property in anticipation of the transfer of title deeds in his favour.

The 1st defendant's position is that the plaintiff mortgaged the said land to the 1st defendant as security for the repayment of the banking facilities obtained from the 1st defendant. However it appears that the boundaries of the land mortgaged to the bank are different from that of the land which is subject matter of this action. The 2nd defendant, the Land Reform Commission claims to be the owner of this land. In these circumstances, it is important to ascertain and identify the land mortgaged to the 1st defendant by the plaintiff. In these circumstances, it appears that there is a serious question to be tried at the hearing, and that on the facts before this Court the plaintiff has a fair question to raise to the existence of a legal right. Moreover, the 2nd defendant in no uncertain terms has stated that the land, which is the subject matter, belongs to the 2nd defendant and was taking steps to transfer the land to the plaintiff and it was the 2nd defendant who placed the plaintiff in possession of the said land.

Even if the plaintiff has no title to the property, the facts placed before Court show that at the time of filing action he was in possession of the land. It may be possible to file action against a person who has threatened to disturb the possession of the plaintiff and to use the evidence which he has at hand to establish his possession against the person who only threatens and does not so far disturb his possession.

With regard to this type of action, *Wood Renten J.* in the case of the *Ceylon Land and Produce Co. Ltd. Vs. Malcolmson*⁽¹⁹⁾ cited with approval the following passage in the Judgment of Phear, C.J. in *Fernando Vs. Silva*⁽²⁰⁾

“ If nothing has yet happened to prevent, or to interfere with, the plaintiff's present enjoyment of his property, where no cause

has yet occurred to render it necessary for him to have actual recourse to a Court of Justice for remedy, yet it may sometimes be right that he should be afforded an opportunity of making *de bene esse* use of that evidence which he has at hand to establish title against a person who only threatens and does not yet disturb it."

At page 20, Wood Renten, J. said:

" The necessary ingredients in an action *quia timet* are, (a) actual or imminent injury ; (b) prospective damage of a substantial, if not, irreparable kind"

Justice Soza, in his article " the Interim Injunction in Sri Lanka" published in the Judges Journal Vol. 1 at page 89 states as follows :

"An interim injunction will be granted *quia timet* to restrain an apprehended or threatened injury if in addition to the other requirements necessary to qualify for an interim injunction, it is established that firstly the injury is certain or very imminent and secondly that the likely mischief will be of a very substantial nature."

In the instant case that plaintiff has established that there is a strong probability that the apprehended mischief will in fact arise. The 1st defendant- bank has already taken steps to auction the land which is the subject matter of this action.

According to the documents marked P3(b) P3(c), P3(d) and P3(e) it appears that the plaintiff has obtained banking facilities from the 1st defendant- bank and as security for repayment he has mortgaged a property called and known as Kirilawel-Katuwa depicted as lot 247 in V.P. 779 which is in extent of 2A. 00R. 00P. The land described in the schedule to the plaint is a portion of Kiralawel - Katuwa Nindagama depicted as Lot 1 in Plan No. 1193 prepared by Licensed Surveyor G.W.K. Manamperi dated 1.5.2001 and L.R.C. No. 6/204 which is in extent of 00A. 03R. 17.6 P. In the circumstances the correct identification of the land is necessary, which can only be ascertained at the trial and not at this stage.

As regards the balance of convenience, the Court will have to determine whether the harm which the 1st defendant will suffer if the injunction is granted be greater than the harm which the plaintiff will suffer if it is refused. In the instant case, it appears that if the wrong land is auctioned the inconvenience which the plaintiff will suffer by the refusal of the injunction is greater than that which the 1st defendant will suffer, if it is granted. Accordingly, the balance of convenience favours the plaintiff.

For these reasons, I see no necessity to interfere with the order made by the learned District Judge dated 19.08.2003. Accordingly, leave to appeal is refused and the 1st defendant's application is dismissed without costs.

Application dismissed
