ALAHAKONE
v.
TAMPOE

SUPREME COURT
FERNANDO, J.
AMERASINGHE, J. AND
PERERA, J.
SC APPEAL NO. 26/94
CA REVISION APPLICATION NO. 433/93
DC COLOMBO NO. 15585/L
FEBRUARY 24, 1994

Civil Procedure Code – Security for costs where plaintiff resident out of Sri Lanka – Discretion of the court – Section 416 of the Code – "Incurred costs".

The plaintiff, a permanent resident of Australia instituted action to have the sale of the land in suit set aside on the ground of *laesio enormis*. There was then due from the defendant to the plaintiff a sum of Rs. 910,000 upon a mortgage of the said land. As a matter of fact the plaintiff was not protracting the proceedings in the case.

Held:

(1) The discretion of the court to order security for costs of the defendant under section 416 of the Civil Procedure Code should be exercised judicially and with reason; and the amount ordered should itself be reasonable.

(2) Section 416 provides for "security" which is required to be furnished, in order to create a fund from which an order for costs made by the court could be satisfied, if such costs are not directly paid by the plaintiff. "Incurred" costs under the section means that amount of costs which the court may financially award, regardless of what the party may actually spend.

(3) In making the order the court should not be unduly influenced by the view that the plaintiff did not have a *prima facie* case or the absence of a valuation report annexed to the plaint.

(4) In the instant case order for costs was unnecessary and premature in that firstly, the trial could well be concluded within a short time; secondly, at

the stage of the application the defendant had in his hand a sum of Rs. 910,000 of the plaintiff's money on the mortgage of land which was sufficient security for such costs.

Cases referred to :

1. *Scott* v. *Mohamadu* – (1914) 18 NLR 53.
2. *Girahagama* v. *Hathurusinghe* – (1946) 35 CLW 65.
3. *Senanayake* v. *De Croos* – (1940) 41 NLR 189.

APPEAL from the judgment of the Court of Appeal.

A. K. Premadasa, PC with *C. E. de Silva* for plantiff-appellant.

S. Mahenthiran with *N. R. Sivendram* for defendant-respondent.

Cur. adv. vult.

March 15, 1994

FERNANDO, J.

The plaintiff-respondent-petitioner (the plaintiff), a permanent resident of Australia, instituted this action to have a sale of land set aside on the ground of *laesio enormis.* The defendant-petitioner-respondent (the defendant) applied under section 416 of the Civil Procedure Code for an order directing the plantiff to furnish security for costs.

The learned trial Judge refused to exercise his discretion in favour of the defendant. In his order he referred to the fact (which was not disputed before us) that there was then due from the defendant to the plaintiff a sum of Rs. 910,000 upon a mortgage of the land which was the subject-matter of the action; he also observed that the proceedings were not being protracted by the plaintiff, either wilfully or by lack of due diligence in prosecuting his claim. He held that the application was "premature".

Acting in revision, the Court of Appeal ordered the deposit of security in a sum of Rs. 300,000 observing:

"... mere residence outside Sri Lanka will not attract an order for (security for) costs. Therefore, the court is entitled in the exercise of its discretion (to) examine *the validity of the cause of action,* if not in its totality, which would be a premature exercise but on the test whether there is a case to be tried on the pleadings submitted to Court. The plaintiff's claim that the market value is Rs. six million is not *supported by any valuation of the property annexed to the plaint* ... In an action of this nature it is (the) value of the property that is the matter in issue. It transpires that the plaintiff has not accepted a valuation taken on Court commission as well ... But, this court would refrain from making any observations as to the merits of the case. However, an influencing factor in the ordering of security would be the *existence of a prima facie case* at the time the application is made. This is subordinate to the prime factor of the residence of the plaintiff outside Sri Lanka. We cannot agree that the application for costs is premature." [emphasis added.]

The order of the Court of Appeal contains no reference to the two matters mentioned in the order of the learned trial Judge; it seems to have been unduly influenced by the view that the plaintiff did not have a *prima facie* case, and the absence of a valuation report annexed to the plaint; and gives no indication whatever as to how the amount of security was fixed as high as Rs. 300,000.

The plaintiff applied for special leave to appeal. Having heard both counsel, we granted special leave. As counsel agreed that the matter in issue was fit for immediate consideration and disposal, without the need for written submissions, we took up the appeal for hearing at once.

An order for the deposit of security, if not complied with, would result in the dismissal of the plaintiff's action under and in terms of section 418 (1). Such an order must be made with due regard to these drastic consequences, and the court's discretion must be exercised, judicially and with reasons, and not as a matter of course: *Scott* v. *Mohamadu*,[1] *Girahagama* v. *Hathurusinghe*[2] Such security is for "the payment of all costs incurred and likely to be incurred". Two questions arise. Did the circumstances justify the exercise of that discretion, and, if so, was the amount ordered reasonable?

Learned counsel for the defendant sought to justify the order of the Court of Appeal on the basis that it was common knowledge that in a matter of this nature legal fees would exceed Rs. 10,000 for a day at the trial, and would range from Rs. 30,000 to Rs. 50,000 for each appeal. On the assumption that 15 to 20 dates of trial would be required, he submitted that Rs. 300,000 was a fair assessment. He also contended that an order under section 416 could only be made once, that thereafter the Judge was *functus*, and accordingly, the Judge must assess the costs likely to be incurred assuming the maximum number of dates of trial, two appeals, and even a possible retrial. This would be an oppressive use of section 416, resulting in a possible denial of the plaintiff's right to his day in court. The power conferred by section 416 is one to which section 4 of the Interpretation Ordinance (cap. 2) applies, and may be exercised, from time to time, as the interests of justice require; the Judge is not bound to estimate all likely costs in one attempt. I will assume that section 416 does extend to costs of appeal, although I doubt this. I cannot agree with learned counsel that "incurred" costs must be construed as meaning or including all costs actually incurred. It is "security" which is required to be furnished, in order to create a fund from which an order for costs made by the court could be satisfied, if such costs are not directly paid by the plaintiff. Accordingly, "incurred" costs means that amount

of costs which the court may finally award, regardless of what the party may actually spend. Counsel conceded that, having regard to the amounts prescribed in the second schedule to the Code, costs awarded by the trial court could not exceed Rs. 40,000; and that even if costs in appeal were included, a sum of Rs. 70,000 would still be on the high side. The Court of Appeal was clearly wrong in ordering a prohibitively higher amount.

The decision of the learned trial Judge that the defendant's application was premature appears to have been based on the fact that there was, at that point of time, no real risk that the defendant would be unable to recover any costs awarded to him, because it was open to him, in some appropriate way, to recover the same out of the sums due from him to the plaintiff: in other words, that he already had sufficient security for such costs. Looked at another way, the defendant admittedly had Rs. 910,000 of the plaintiff's money: why should the plaintiff be asked to deposit any additional sum of money to meet a possible claim by the defendant (for a relatively small amount) until that sum was exhausted, or nearing exhaustion? It was contended on behalf of the defendant, that this sum was being repaid in periodic instalments, and that at some future date the defendant would not owe the plaintiff anything at all. That is speculative, because if the necessary co-operation is forthcoming from parties and their legal advisers, the trial can well be concluded within a short time. The purpose of an order under section 416 being to ensure that an order for costs would be satisfied, so long as the defendant owed money to the plaintiff, such an order was unnecessary and "premature". The learned trial Judge correctly exercised his discretion, consistently with the principles laid down in previous decisions (such as *Senanayake v. de Croos*,[3] where the likely difficulty of recovering such costs was regarded as a relevant factor) which continue to be applicable despite the amendment of section 416 by Law, No. 20 of 1977. The Court

of Appeal was in error in acting upon impressions as to the maintainability of the plaintiff's case, especially because of the absence of a document not required by law to be annexed to the plaint. No prejudice has been caused to the defendant because it is open to him to make another application if and when the circumstances warrant it.

It was for these reasons that, at the conclusion of the argument, 110
we made order allowing the appeal, without costs, and directed the learned trial Judge to hear and determine the action expeditiously.

AMERASINGHE, J. – I agree.

PERERA, J. – I agree.

Appeal allowed.