

PHOENIX ADVERTISING (PVT) LTD.
v.
H. A. ABHAYAGUNAWARDENA, DEPUTY SECRETARY
TO THE TREASURY

COURT OF APPEAL.
S. N. SILVA, J. (P/CA)
RANARAJA, J.
C.A. REVISION APPLICATION NO. 1015/93
MARCH 02, 21 AND 28, 1994.

Injunction – Specific performance of contract of personal services such as contract of agency – Judicature Act, No. 2 of 1978 section 54 (1) – Prima facie proof.

Held:

The respondent (applicant for interim injunction) had failed to adduce *prima facie* proof of being the sole advertising agent of the Development Lottery. An injunction will not lie in law to enforce specific performance of a contract of personal services such as a contract of agency.

Per Ranaraja, J. :

... The servant cannot claim specific performance of the contract of employment nor an injunction restraining the employer from dismissing him and from taking consequential steps. The remedy of an employee who has been wrongfully dismissed is an action for damages.

Cases referred to :

1. *Jinadasa v. Weerasinghe* 31 NLR 33.
2. *Dias Bandaranaike v. The Film Corporation et al* (1981) 2 Sri LR 287.
3. *Amerasekera v. Mitsui & Co. Ltd. et al* S.C. 33 – 34/92 [1993] 1 Sri LR 22.
4. *Vine v. National Dock Labour Board* (1957) AC 488.
5. *Hotel Galaxy Pvt. Ltd. et al v. Mercantile Hotels Management Ltd.* [1987] 1 Sri LR 5, 21.

APPLICATION for revision of the Order of the District Judge of Colombo.

Shibly Aziz, P.C. (Actg. A.G.) with *Chanaka de Silva, S.C.* for petitioner.

Romesh de Silva, P.C. with *P. Kumarasinghe, S. D. Yogendran* and *N. Choksy* for respondent.

May 11, 1994.

RANARAJA, J.

The Petitioner who was the Deputy Secretary to the Treasury at the commencement of this action was by virtue of his office appointed the Trustee of the Development Lottery Trust, established on 25.5.1993 to promote and conduct lotteries for the purpose of raising funds for the President's Fund and the Mahapola Higher Education Fund. There was to be a Board of Management of the Trust to which the Trustee could delegate any of his functions, powers and duties, including the power to enter into contracts, agreements. At the times material to this action, the Chairman of the Board was one George Ratnayake.

The Respondent is an advertising agency whose Managing Director was one Irwin Weerackody. It appears that the Respondent's main source of income was the 15% advertising commission paid by the media from fees charged from the advertisers. The services of the Respondent have been utilised for advertising the development lotteries for about ten years. On 29.6.1993 a proposal was made by the Board of Management to require the Respondent to give back 50% of the commission earned from advertising the development lotteries. The Respondent by letter dated 26.07.1993 refused to act on this proposal. The Board of Management at its meeting held on 28.07.1993 unanimously decided that the Development Lotteries Trust should not do any advertising through the Respondent in future. This decision was conveyed to the Respondent by letter dated 31.07.1993.

The Respondent thereupon filed action by way of plaint and affidavit in the District Court pleading *inter alia* that it was specifically agreed between the Respondent and those in control of the Development Lottery and also the Defendant acting through his agents that;

- (1) the plaintiff was to be the sole agent for placing advertisements for the Development Lottery;
- (2) all advertisements placed by the Development Lottery had as its sole agent the Plaintiff;
- (3) no advertisements were to be placed by the Development Lottery without the plaintiff being designated and acting as the advertising agent.

The purported termination of the plaintiff's services, it was alleged, was *mala fide* and motivated by improper, unlawful and unethical considerations and was therefore null and void. Amongst the reliefs prayed for were a permanent injunction, interim injunction and an enjoining order preventing the Defendant and his agents from advertising, making any advertisement or placing any advertisement of the Development Lottery except with the plaintiff as sole agent.

On 03.09.1993 the learned District Judge issued an enjoining order as prayed for and notice of interim injunction to be served on the present Petitioner, who filed his objections and affidavit against the issuing of an interim injunction. After both parties were given an opportunity of filing written submissions, the learned District Judge granted an interim injunction as prayed for. The application in revision is to have the said order set aside.

Section 54(1) of the Judicature Act, No. 2 of 1978 provides:

"where in any action instituted in a ... District Court ... it appears—

(a) from the plaint that the plaintiff demands and is entitled to a judgment against the defendant, restraining the commission or continuation of an act ... the commission or continuance of which would produce injury to the plaintiff ...;

The court may, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, grant an injunction restraining any such defendant from;

(1) committing or continuing any such act ...".

The decisions interpreting section 54 of the Judicature Act and section 86 of the Courts Ordinance clearly show that before a court grants an interim injunction it 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. (see *Jinadasa v. Weerasinghe* ⁽¹⁾) or that there is a serious matter in relation to his legal rights to be tried at the hearing and that he has a good chance of winning (see *Dias Bandaranaike v. The Film Corporation et al* ⁽²⁾).

It appears to me that Dr. Amerasinghe, J. has adopted a very practical approach to section 54 of the Judicature Act in *Amerasekera v. Mitsui & Co. Ltd.* ⁽³⁾ wherein His Lordship expresses

the view that the court should have been satisfied that the plaintiff had a *prima facie* claim and a reasonable prospect of success even in the light of the defence raised in the pleadings, objections and submissions of the defendants ... An injunction should not be issued unless the court was satisfied that the plaintiff had actual legally recognisable rights and not merely rights claimed by his ... The question the learned District Judge had to consider was what was proper to be done between the time for the matter relating to the injunction and the hearing and final determination of the action. He did not have to decide the rights of the parties any further than was necessary to determining the question".

The sum total of the Respondent's lengthy plaint and documents filed in the District Court is that the Petitioner engaged the services of the respondent for advertising the Development Lottery as sole advertising agent and that by letter dated 31.7.1993 such services were terminated wrongfully. The relief claimed is in effect a declaration that the Respondent had the right to continue as sole advertising agent of the Development Lottery.

The District Judge therefore had to first decide whether the Respondent's pleadings disclosed that he had a legally recognisable right. Though the Respondent pleaded a subsisting agreement with the Petitioner, it failed to produce any written agreement which gave it the right to continue as the sole advertising agent of the Development Lottery. The only written agreement on the subject produced in this court, was between the Secretary, Ministry of Plan Implementation and Irwin Weerackody referred to, which purports to nominate the respondent as the sole advertising agent for the Development Lottery for three years commencing 1st November 1985. The learned District Judge has completely overlooked the submission made on behalf of the petitioner that the respondent had failed to adduce *prima facie* proof that it was in fact the sole advertising agent of the Development Lottery. The petitioner on the other hand had produced several documents to substantiate his statements in the affidavit that the respondent was not the sole advertising agent of the Development Lottery, even during the three year period covered by the agreement referred to. Although some reference in passing has been made to the documents produced by the petitioner, the learned District Judge has failed to grasp their true import on the assertion of the respondent that it was the sole advertising agent of the Development Lottery.

Learned President's Counsel for the respondent submitted that the petitioner as Trustee of the Development Lotteries Trust is bound to act within the four corners of the trust document and that when he purported to terminate the services of the respondent for not agreeing to make a refund of 50% of the agent's commission to the Development Lottery, he exceeded his powers as Trustee. The learned counsel however did not specifically draw the attention of court to any of the terms of the trust document which prohibited the Trustee or the Board of Management from terminating the services of the respondent. On the contrary the Board of Management is given power, in the name of the trust to enter into contracts and agreements on behalf of the trust. Although an allegation has been made that the Chairman of the Board of Management had demanded the 50% refund for himself, there was no documentary evidence in support of this allegation.

The Learned District Judge has completely disregarded the submission made on behalf of the respondent that an injunction will not lie in law to enforce specific performance of a contract of personal services such as a contract of agency. **Boustead on Agency, 12th Edition, Article 10 says:**

"No action is maintainable at the suit of either principal or agent to compel the specific performance of a contract of agency. It is inconsistent with the confidential nature of the relationship of master and servant that it should continue contrary to the will of one of the parties thereto. Therefore the court will not grant specific performance of a contract of employment nor will it grant an injunction for the fulfilment of a contract of employment".

The letter of the respondent dated 26.7.1993 and the reply of the petitioner dated 31.7.1993 disclose that serious differences had arisen between the parties and the mutual confidence that existed previously between them as advertiser and advertising agent was lost for ever. It was impossible for the relationship as principal and agent to continue any further. To compel the petitioner to employ the respondent as sole advertising agent against his will, for duties involving utmost confidence could lead to enormous mischief.

If a master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated albeit in breach of contract (See *Vine v. National Dock Labour Board*⁽⁴⁾). Accordingly, the servant cannot claim specific performance of the contract of employment nor an injunction restraining the employer from dismissing him and from taking consequential steps. The remedy of an employee who has been wrongfully dismissed is an action for damages. (See *Hotel Galaxy Pvt. Ltd. et al v. Mercantile Hotels Management Ltd.*⁽⁵⁾).

The effect of the interim injunction granted by the District Judge is to order specific performance by directing the petitioner to continue to employ the respondent as the advertising agent of the Development Lottery. The decisions and authorities cited above do not countenance such a course. The respondent has if at all a remedy in damages but not by way of interim or permanent injunction.

The Learned District Judge has been in error in not considering these two very important aspects of the law which militated against the granting of an interim injunction in the present case. This error calls for the exercise of the extraordinary powers of this court in revision. I allow the application of the petitioner and set aside the order of the learned District Judge dated 10.12.1993 with costs fixed at Rs. 5000/-.

S. N. SILVA, J. (P/CA.) – I agree.

Application allowed.