

**BARR KUMARAKULASINGHE AND OTHERS
VS
OLLEGASEGARAM**

AMARATUNGA J.
WIMALACHANDRA J.
CALA NO. 396/2001.
D.C. MT. LAVINIA NO.762/03/RE.
NOVEMBER 2, 2004.

Civil Procedure Code-Sections 214,416-Plaintiff abroad-Security for costs-Judicial discretion - Can such an order be made ex parte?

The Plaintiff Petitioner sought to recover a sum of Rs.680,000 as damages and to recover further damages at Rs.20,000 per mensem until the Plaintiffs are restored to possession. The Plaintiffs action was filed through their attorney. After the Defendant's answer and the Plaintiffs replication were filed the Defendant Respondent moved court for an order under Section 416 directing the Plaintiffs to deposit a sum of Rs.10,10,000 as security for costs *ex parte*. The Court ordered the Plaintiff to deposit the said sum.

HELD:

- (i) Section 46 provides that at any stage of the action, if it appears to court that the Plaintiffs are residing out of Sri Lanka, the Court may in its discretion either of its own motion or on the application of any defendant order the Plaintiff to give security-for the payment of all costs incurred and likely to be incurred ;
- (ii) An order calling upon a Plaintiff under sections 416, 417, should be made as a matter of course, and should not be made *ex parte* ;
- (iii) The Court in the exercise of its discretion should be satisfied that the aid of either section 416 and 417 is not being oppressively used by the party moving for security ;
- (iv) Court has also failed to address its mind to the reasonableness of the amount of security moved by the Defendants.

APPLICATION for leave to Appeal from an Order of the the District Court of Mt. Lavinia.

Cases referred to :-

1. *Alahakoon vs Tampoe* - 2002 3 Sri LR 299
2. *Scott vs Mohamadu* - 19 NLR 219
3. *Samarasinghe v. Atchy*

C. E. De Silva with Mrs Pushpa Narendran for Petitioner.

A. R. Surendran with Arul Selvaratnam for the Respondent.

Cur.adv. vult.

January 18, 2005.

GAMINI AMARATUNGA, J.

This is an appeal with leave granted by this Court against the order of the learned Additional District Judge of Mt. Lavinia dated 07.10.2004, directing the plaintiff, in terms of section 416 of the Civil Procedure Code, to deposit a sum of Rs.One million and ten thousand as security for costs. The facts relevant to this appeal are as follows :-

The plaintiffs, through their attorney filed action against the defendant to eject the defendant from premises No. 203, Sri Saranankara Road, Kalubowila, to recover a sum of Rs.680,000 as damages and to recover further damages at Rs.20,000 per mensum from 1.11.2003 until the plaintiffs are restored to possession. After the defendant's answer and the plaintiffs replication, the trial was fixed for 15.12.2004. On 13.09.2004, the defendant filed a motion and affidavit seeking an order from court under section 416 of the Civil Procedure Code directing the plaintiffs to deposit a sum of Rupees one million and ten thousand as security for costs. The defendant moves to support his motion on 23.09.2004 and on that date the matter was postponed to 07.10.2004.

On 07.10.2004 an attorney at law made an application on behalf of the plaintiffs registered attorney for a postponement on the registered attorney's personal grounds. The power of attorney holder of the plaintiffs was also not present in court on that day. No order was made

by court with regard to the postponement sought on behalf of the registered attorney for the plaintiffs. Instead the court proceeded to hear the submission of the learned President's Counsel for the defendant in support of the application for an order directing the plaintiffs to furnish security for costs.

The learned President's Counsel submitted that since all of the plaintiffs lived abroad, the defendant had a right to make an application for an order directing the plaintiffs to furnish security for costs. The learned counsel submitted that there was no provision for filing objections to such an application. The learned judge thereupon made order directing the plaintiffs to deposit a sum of Rs. One Million and ten thousand (Rs.10,10,000) in Court one month before the trial date i.e. 15.12.2004. This appeal is against that order.

Section 416 provides that at any stage of the action, if it appears to Court that the plaintiffs are residing outside Sri Lanka, the Court may in its discretion and either of its own motion or on the application of any defendant order the plaintiff to give security for the payment of all costs incurred and likely to be incurred by the defendant.

According to the section itself the Court has a discretion in the matter. The Court has to exercise its discretion judicially. In exercising the discretion vested in Court under section 416, the Court has to take into account several matters. The Court has to consider the validity of the cause of action in the sense whether there is a case to be tried on the pleadings. The Court has also to see whether the proceedings were being protracted by the plaintiff, either wilfully or due to lack of diligence, incurred costs under this section means costs which the court may finally award, regardless of what the party may actually spend. *Alahakone vs Tampoe*⁽¹⁾. In deciding the amount of security to be deposited the court must have regard to the total costs that can be ordered in an action of that category at the rates prescribed for the purpose of Section 214. The Court also has to bear in mind that if the security ordered by Court is not furnished the Court has the power to dismiss the action. Therefore the Court has to ensure that the provisions of section 416 are not used oppressively to keep the plaintiff out of Court.

An order calling upon a plaintiff under sections 416 and 417 of the Code should not be made as a matter of course. The Court in the exercise of its discretion should be satisfied that the aid of either section is not being oppressively used by the party moving for security. *Scott vs Mohamadu*⁽²⁾ *Samarasinghe vs. Atchy*⁽³⁾ and Order to a plaintiff living outside the jurisdiction of Court to give security for costs should not be made ex-parte. *Samarasinghe vs Atchy* (Supra)

In this case the defendant has failed to explain to Court why the defendant wanted the plaintiffs to deposit such an enormous sum when the plaintiffs' action was valued at Rs.700,000 and the defendants counter claim at Rs.400,000.

The learned judge has also failed to address her mind to the reasonableness of the amount of security moved by the defendants. The order of the learned judge does not contain the reasons why the Court ordered the plaintiffs to deposit Rs.10,10,000 as security and the basis upon which the said amount was computed. The learned judge's order does not contain the reasons for the order. There is a total failure to judicially exercise the discretion vested in court under section 416. The learned judge has also failed to consider whether the plaintiffs demand for such an unusually large amount as security is an attempt to use section 416 oppressively. Further the order has been made ex-parte without making any order with regard to the application for postponement made on behalf of the registered attorney for the plaintiffs.

For the foregoing reasons this appeal must be allowed. Accordingly I set aside the order dated 07.10.2004 and direct the learned judge to hear both sides on the defendant's application for security for costs and make an appropriate order upon a proper exercise of the discretion available to Court. The parties shall bear their own costs.

WIMALACHANDRA, J. – I agree.

Appeal allowed.

District Court directed to hear both sides and make an appropriate order.