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Containing cases and other matters decided by the Supreme Court and the Court of Appeal of the Democratic Socialist Republic of Sri Lanka

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or the Arbitrators, are unable to reach an agreement required of them under such procedure, any party may apply to the High Court to take necessary measures towards the appointment of the Arbitrator or Arbitrators".

The Respondent urged the following grounds before the High Court for refusing to select a sole Arbitrator from the three Arbitrators nominated by the Petitioner in terms of Clause 19.5 of the Contract:-

(a) The nominated Arbitrators are foreign nationals residing outside the country and would be extremely expensive as Colombo is the place of Arbitration;

(b) The Contract is based on ICTAD general conditions and the nominated Arbitrators do not show any experience in ICTAD conditions and any other law of Sri Lanka. The Contract provides that the applicable law is the law of the Democratic Socialist Republic of Sri Lanka.

The Petitioner, in its Statement of Objections, inter alia, brought to the attention of the Learned High Court Judge that the High Court was devoid of jurisdiction to hear and determine the matters raised in the Respondent's purported Petition for the following reasons, namely:-

(a) that the purported Petition filed by the Respondent was not one which was contemplated under and in terms of Section 7 of the Arbitration Act, No. 11 of 1995

(b) that Section 7(1) of the said Act provides that the parties shall be free to agree on a procedure for appointing the Arbitrators.

(c) that sub-section (2) of Section 7, authorizes the Court to appoint an Arbitrator/Arbitrators, only where the parties have not agreed as to a procedure for appointing an Arbitrator;

(d) that in the instant case parties have, in fact, mutually agreed, in the Conditions of Contract on a procedure for the appointment of an arbitrator in terms of Clause 19.5 thereof and that fact was common ground between the parties.

(e) that Clause 19.5 provided as follows:

"Any doubt, difference, dispute, controversy or claim arising, out of or in connection with or touching or concerning the execution or maintenance of the works in this contract, or on the interpretation thereof or on the rights, duties, obligations, or liabilities of any of the parties thereto or on the operation, breach, termination, abandonment, foreclosure or invalidity thereof, shall be finally settled by arbitration after written notice by either party to the Contract to the other for a decision to a sole arbitrator to be appointed as hereinafter provided.

The party desiring arbitration shall nominate three arbitrators out of which one to be nominated by other party within 21 days of the receipt of the said request. If the other party does not nominate one to serve as Arbitrator within the stipulated period the party calling for arbitration shall nominate one of the three and inform the other party accordingly.

The arbitration shall be conducted in accordance with Arbitration Act No. 11 of 1995. . . "

The High Court by its order dated 11th March 2011 concluded, inter alia, that the procedure adopted by the Petitioner to appoint Mr. J. Neville Tait who is one of the three arbitrators is contrary to Clause 19.5 of the Agreement; that

the said act of appointment has been done without authority; that there seems to be no agreement between the Petitioner and the Respondent regarding the appointment of arbitrators; that in such a situation the High Court has the power to appoint a suitable arbitrator under Section 7(4)(sic) of the Act. Accordingly, the High Court appointed Mr. Walter Ladduwahetty as the Arbitrator under section 7 (4) (sic) of the Arbitration Ordinance (sic).

Learned President's Counsel for the Petitioner submitted that the order of the High Court has shattered and rendered nugatory the legitimate expectation of the legislature and of all parties, local and foreign, who had hitherto believed and/ or had been made to believe by the decisions of the Supreme Court, the treatises of jurists and learned writers on the subject, that in Sri Lanka under the Act, "parties are free to select an Arbitrator of any nationality, gender or professional qualifications"
(emphasis added)

There is force in the submissions of the Learned President's Counsel. In fact, in the case of Merchant *Bank of Sri Lanka Ltd. Vs. D.V. D. A. Tillekeratne*[1] this Court held that "party autonomy is a fundamental principle of Arbitration Law and this is given effect to by the legislation in Section 7(1) of the Arbitration Act."

The predicament in which the Petitioner is placed is that it is unable to challenge the Order of the High Court as no appeal or revision lies in respect of any order, judgment or decree of the High Court in terms of Section 37(1) except from an order, judgment or decree of the High Court under PART VII of the Act (emphasis added).

In terms of Section 26 too there is no right of challenge to the orders of the arbitral tribunal until after an award has been made by the Arbitrator or Arbitrators.

It is in this background, as the legislature did not provide for a challenge to decisions of the High Court under Section 7, the Petitioner invoked the inherent jurisdiction of this Court on the basis that the Supreme Court is the highest and final Superior Court of Record under Article 118 read with Article 105(3) of the Constitution with an unlimited, independent and separate basis of jurisdiction, to protect and fulfill the judicial function of administering justice, in the absence of any express statutory provisions.

Learned President's Counsel relied on Halsbury's Laws of England (4th Edition) 1982, Vol 37 at page 23 which describes the inherent jurisdiction of Court as follows:-

> *"In sum, it may be said that the inherent jurisdiction of Court is virile and viable doctrine and has been defined as being the reserve or fund of powers, which the Court may draw up as necessary whenever it is just or equitable to do so, in particular, to ensure the observance of due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them."*

It would be a matter for determination by the Court in each individual case whether the circumstances of the case make out the necessity to exercise the inherent power and make it incumbent on the Court to exercise that power to do justice between the parties. Hence, the inherent power of the Court has to be exercised carefully and with caution and only where such exercise is justified considering the facts of the case, which saddens the conscience of the Court.

A seven judge bench of the Supreme Court in *Ganeshanathan Vs. Vivienne Gunawardene*[2] took the view that the Supreme Court, as the Superior Court of

Record has inherent powers to make corrections to meet the ends of justice, the exercise of which would depend on the facts of each case. (emphasis added) Samarakoon, C.J. at 329 observed as follows:-

> *"As a Superior Court of record there is no doubt that it has inherent powers to make corrections to meet the ends of justice. In Mohamed Vs. Annamalai Chettiar(3) the Court used its inherent powers to free an insolvent from arrest pending the decision of his appeal to the Privy Council although there was no statutory authority for such an Order, Costs have been awarded to a successful party from the inception of the Supreme Court using its inherent power – Karuppannan Vs. Commissioner for Registration of Indian and Pakistani Residents. Inherent powers have been used to correct errors which were demonstrably and manifestly wrong and it was necessary in the interests of justice to put matters right. Decisions made per in curiam have been corrected."*

The cases cited above clearly demonstrate that inherent power implies by its very nature a power which cannot be expressed in terms but which must reside in a Court for achieving the higher and the main purpose of a Court, namely, the purpose of doing justice in a cause before it and for seeing that the act of the Court does no injury or harm to any of the suitors. Circumstances requiring the use of such a power cannot be foreseen. The legislature enacts provisions to meet the circumstances that can be foreseen and once provision has been made in the Statute, the occasion to invoke inherent power in that circumstance practically vanished. Thus, when the Statute provides a method so as to meet a contingency in a particular manner, any other method thought of by the Court cannot then be said to be a method which would advance the interest of justice. It is in this sense, that no occasion for the exercise of any inherent power arises when the statute expressly provides for what is to be done in that

situation. The remedy provided by the statute may not be an efficacious one. It may even lack the necessities to grant quick relief. However, it is well settled and accepted as axiomatic that justice be administered in accordance with the law of the land. It may be pertinent to quote the observation of Martensz, J. in *Alice Kotalawela Vs. W. H. Perera and another*[4].

> *"Justice must be done according to law. If hardship results from the law in force the remedy must be effected by legislation. There would be chaos if a judge was entitled to create a procedure to meet exigencies of every case in which he considers the law would work injustice."*

This means, if all the powers which will be necessary to secure the ends of justice exists at some point and such existence is recognized by the statute, inherent power of a court cannot be invoked disregarding express statutory provision. A similar view was expressed by Garvin S.P.J. in *Mohamed Vs. Annamalia Chettiar (Supra)* in the following words:

> *"No Court may disregard the law of the land or purport in any given case, to ignore its provisions. Where a matter has been specifically dealt with or provided for by law there can be no question that the law must prevail, for justice must be done according to law. It is only when the law is silent that a case for the exercise by a Court of its inherent power can arise."*

Learned President's Counsel argued that the legislature did not provide for a challenge to the decision of the High Court made under Section 7 of the Act, which has placed the Petitioner into peril most unreasonably. However, an award once pronounced by an Arbitrator can be challenged on one of the specific grounds set out in Section 32 of the Act which includes "the composition of the arbitral tribunal not in accordance with the agreement of parties or was not in accordance with the provisions of the Act."

Even in the case of *Merchant Bank of Sri Lanka Ltd. Vs. Tilekeratne (Supra)* relied on by the Learned President's Counsel, the Petitioner invoked the jurisdiction of the Court after the award has been made by the Arbitrator. As rightly submitted by the learned Deputy Solicitor General, the Act provides a sufficient remedy to the petitioner enabling it to apply to the High Court to set aside the arbitral award on the ground that the composition of the arbitral tribunal was not in accordance with the agreement of parties, Thus, the Act gives the Petitioner an express provision to invoke the jurisdiction of the High Court in a particular manner once an award is made and the party seeking to enforce the right must resort to that remedy and not to others. It cannot be the duty of any Court to exercise its inherent powers when it plainly appears that, in doing so, the Court would be using a jurisdiction which the legislature has forbidden it to exercise. Any lacuna in the law is to be dealt with by the legislature if it causes any inconvenience or hardship to a litigant.

It is therefore unnecessary to emphasize that the ambit and scope of the Court's power to interpose its inherent authority cannot be invoked in regard to matters which are sufficiently covered by a specific provision of the Act, namely, Section 32 thereof.

For the reasons set out above, this Court refuses to exercise its inherent jurisdiction and dismisses this application, however, in all the circumstances without costs.

MARSOOF, P.C. J. - I agree.

IMAM, J. - I agree.

Application dismissed.

KARIYAWASAM VS. SUJATHA JANAKI AND 2 OTHERS

SUPREME COURT
SALEEM MARSOOF PC., J.
CHANDRA EKANAYAKE, J. AND
SATHYA HETTIGE PC., J.
S. C. APPEAL NO. 33A/2012
SC/HCCA/LA NO. 516/2011
WP/HCCA/COL NO. 119/2011-LA
D. C. COLOMBO NO. DRE – 011/2011
DECEMBER 21ST, 2012
MARCH 7TH, 2013

Mediation Boards Act, No. 72 of 1988 – Section 7(1) – Actions other than those involving the grant of any provisional remedy – Not to be filed without certificates of non – settlement – Interim Injunctions – Sequential tests – Prima facie case – Balance of convenience – Equitable considerations

The complaint of the Plaintiff is that the 1st Defendant without informing her, had placed the 2nd and 3rd Defendants in possession of the subject matter as subtenants. The Plaintiff consequently moved the District Court to grant a declaration to the effect that the 1st Defendant's tenancy had come to an end and the Plaintiff is the rightful owner of the subject matter and that the Defendants be ejected from the said premises and interim injunction as prayed for in the prayer to the plaint be granted.

After inquiry the District Court by its order dated 20.10.2011 issued interim injunction as prayed for in the Plaint. When this order was challenged in the Civil Appellate High Court by way of leave to appeal, the High Court dismissed the application. The Defendant also raised a preliminary objection that this application cannot be maintained without a non – settlement certificate obtained in terms of the provisions of Section 7(1) of the Mediation Boards Act, No. 72 of 1988.

On appeal,

Held:

(1) If the relief prayed for in an action in respect of any dispute includes a prayer for the grant of any provisional remedy under

Part V of the Civil Procedure Code, the Court may entertain and determine such action in so far as it relates to the grant of such provisional remedy. As such the conclusion of the High Court to the effect that since there is an application for interim injunction, the matter could be proceeded with, in the absence of the certificate of non – settlement is correct.

(2) A prima facie case does not mean a case which is proved to the hilt but it must appear from the plaint that the probabilities are such that the Plaintiff is entitled to a judgment in his favour. The Plaintiff must show that a legal right of his is being infringed and that he will probably succeed in establishing his rights.

(3) When considering whether an applicant has established a prima facie case, the Court should not embark upon a detailed and full investigation of the merits of the parties at this stage. It is sufficient if the applicant established that probabilities are that he will win.

(4) Granting of interim injunctions being a discretionary remedy, when granting or refusing the same, discretion has to be exercised reasonably, judiciously and more particularly, on sound legal principles after weighing the conflicting probabilities of both parties.

(5) In considering the balance of convenience, if the Court is of the opinion that the mischief which would likely to be caused to the applicant by refusing the injunction is greater than the loss that is likely to be suffered by the opposite party in granting the injunction, the inevitable conclusion of the Court has to be that the balance of convenience favours the applicant.

(6) The nature of an injunction is to restrain the wrongdoer from obtaining any benefits arising from his own wrongful conduct.

(7) The primary purpose of granting an interim injunction is to maintain and preserve the *status quo* at the time of institution of the proceedings and to prevent any change in it until the final determination of the suit.

Cases referred to:

1. *Martin Burn Ltd., Vs. R. N. Banerjee* – (AIR) 1958 SC 79
2. *Jinadasa Vs. Weerasinghe* – 31 NLR 33
3. *Preston Vs. Luck* – (1834) 24 C.H. 497

4. *F.D. Bandaranaike Vs. State Film Corporation* – (1981) 2 Sri L.R. 287
5. *Gulam Hussain Vs. Cohen* – (1995) 2 Sri L.R. 370
6. *Dissanayake Vs. Agricultural and Industrial Corporation* –(1962) 64 NLR 283
7. *Seelawathi Mellawa Vs. Keerthiratne* – (1982) 1 Sri L.R. 384 at page 389
8. *Subramaniam Vs. Shabdeen* – (1984) 1 Sri L.R. 48

APPEAL from the order of the High Court of Civil Appeal.

W. Dayaratne P.C., with *R. Jayawardena* for the 1st Defendant – Petitioner – Appellant

Ali Sabri, PC with *Kasun Premaratne and Nuwan Bopage* for the Plaintiff – Respondent – Respondent

D.H. Siriwardena with *Kayantha de Silva* for the 2nd Defendant – Respondent – Respondent.

Cur.adv.vult.

October 01, 2013

CHANDRA EKANAYAKE, J.

The 1st Defendant – Petitioner – Appellant (hereinafter sometimes referred to as the 1st Defendant) by her petition dated 08.12.2011 (filed together with her affidavit) had sought *inter alia*, leave to appeal against the order of the High Court of Civil Appeal of Western Province (Holden in Colombo) dated 06.12.2011 (P 20) in Application bearing No. WP/HCCA/Col/119/2011/LA, to set aside the said order and the order of the learned Additional District Judge dated 20.10.2011 (P18) in D.C. Colombo case No. DRE-011/2011 and to order the learned Additional District Judge to dismiss the plaint of the Plaintiff – Respondent – Respondent (hereinafter sometimes referred to as the plaintiff). on the preliminary objec-

tions raised by her in sub paragraphs (a) to (c) and (e) of the said petition. Further by sub paragraph (d) of the prayer to the said petition the 1st Defendant – Appellant had sought to vacate the interim injunctions issued by the said order dated 20.10.2011 in terms of prayer "b" and "W" of the plaint filed against her in the said D.C. Colombo case. The learned Judges of the High Court of Civil Appeal by the impugned order dated 06.12.2011 had refused leave to appeal against the order of the learned Additional District Judge dated 20.10.2011. This appeal has been preferred against the 2nd order of the High Court of Civil Appeal (P20),

The learned Additional District Judge by order dated 20.10.2011 (P18) had proceeded to issue interim injunctions as per sub paragraphs "b" and "W" of the prayer to the plaint dated 24.03.2011 [P14(e)]. In terms of the above sub – paragraphs of the prayer to the plaint the aforesaid 2 interim injuctions appear to be as follows:

ඉ: මෙහි පහත උපලේඛණයේ විස්තර කර ඇති දේපල තෙවන පාර්ශ්වයකට විකිණීමෙන් සහ/හෝ බදු දීමෙන් සහ/හෝ කුළියට දීමෙන් සහ/හෝ උකස් කිරීමෙන් සහ/හෝ වෙනත් තෙවන පාර්ශවයක් භුක්තියේ පිහිටුවීමෙන් සහ/හෝ එකී දේපල කෙරෙහි තවත් පාර්ශවයක් වෙත අයිතිවාසිකම ඇති කරන්නා වූ කවර ආකාරයක හෝ ක්‍රියාවක් සිදු කිරීමෙන් සහ/හෝ එකී දේපලේ පවත්නා ස්වභාවය (Status quo) වෙනස් වන ආකාරයේ කවර හෝ ක්‍රියාවක් සිදු කිරීමෙන් විත්තිකරුවන් ඇතුළු ඔවුන් මගින් සහ ඔවුන් යටතේ කටයුතු කරනු ලබන සේවක නියෝජිතාදී සියලුම දෙනා වලක්වන්නාවූ අතුරු ඉන්ජන්ෂන් තහනම් ආඥාවක් ලබා දෙන ලෙසත්,

ඌ: මෙහි පහත උපලේඛණයේ විස්තර කර ඇති දේපලේ අනවසරයෙන් රැඳී සිටීමත් පැමිණිලිකාරියගේ අයිතිය හබ කරන අතරතුර

එකී දේපලෙන් විත්තිකරුවන් අයුතු ලෙස ප්‍රයෝජන ලබා ගැනීම වැලැක්වීම සඳහා එකී දේපලේ විත්තිකරුවන් ඇතුලු ඔවුන් මගින් සහ ඔවුන් යටතේ කටයුතු කරනු ලබන සේවක නියෝජිතාදී සියලුම දෙනා මගින් සහ ඔවුන් යටතේ කටයුතු කරනු ලබන සේවක නියෝජිතාදී සියලුම දෙනා ව්‍යාපාරික කටයුතුවල නියැලීමෙන් සහ/හෝ එකී දේපලේ භුක්තියේ සිටීමින් ලාභ ප්‍රයෝජන උපයා ගැනීමෙන් වළක්වන්නාවූ වූ අතුරු ඉන්ජන්ෂන් තහනම් ආඥාවක් ලබා දෙන ලෙසත්".

By the petition filed in this Court dated 08.12.2011 the 1st Defendant – Appellant has sought to set aside the order of the learned Additional Judge dated 20.10.2011. When the above application was supported, this Court by its order dated 10.02.2012 had granted leave to appeal on the questions of law set out in sub paragraphs 36(d) and 36 (g) of the said petition dated 08.12.2011. The aforementioned sub-paragraphs are reproduced below:

(d) Have their Lordships misdirected when they held that the 1st Defendant – Petitioner has sub-let the premises to the 2nd Defendant – Respondents and thereby forfeited her tenancy when there is not a single document in proof of the said contention and furthermore, when the 1st Defendant – Petitioner has clearly stated at the Section 18A Inquiry that the 2nd Defendant – Respondent do not live under her?

(g) Have their Lordships of the Civil Appellate High Court as well as the learned District Judge misdirected themselves by drawing the inference that the 1st Defendant – Petitioner has sub – let the premises to the 2nd and 3rd Defendant – Respondents in order to

justify the issuing of interim injunctions against the 1st Defendant – Petitioner, when the said inference is against the weight of the documentary evidence annexed with the Plaintiff – Respondent's plaint in D.C. Colombo case No. DRE-011/2011?

The basis of the plaint filed in the District Court was that the plaintiff had become the owner of the subject matter on the deed of gift bearing No. 603 dated 03.03.1971 and same had been given on a lease agreement to one Francis whereby he had become the lawful lessee of the subject matter. Even after the expiry of the said lease agreement the aforesaid Francis had continued to be the tenant. On the death of said Francis one of his sons by the name K.T. Dayananda had continued the business carried on by his father (Francis) and continued to be the tenant of the plaintiff. The said Dayananda too had died on or about 25.12.1995 and by a last will supposed to have been left by him prior to his death his tenancy had been transferred to the 1st defendant a minor at the time. Thus her first application had been made to the Rent Board through the executors of her dead father's last will. However, the 1st defendant subsequently had made another application to the Rent Board for a Certificate of Tenancy and had been successful and thereafter continued to be in the premises continuing with the bakery business of her dead father. The complaint of the plaintiff had been that the 1st defendant without informing her has put the 2nd and 3rd defendants into possession of the subject matter under her as subtenants and 2nd and 3rd defendants are continuing with their business activities in the subject matter. In the above premises, the plaintiff had moved the District Court to grant a declaration to the effect that the 1st defendant's tenancy

came to an end due to operation of law and that the plaintiff is the rightful owner of the subject matter and the defendants be ejected from the aforesaid premises and interim injunctions as prayed for in sub paragraphs (ඉ) and (ඊ) of the prayer of the plaint.

The 1st defendant by his statement of objections whilst denying the averments in the plaint had moved for a dismissal of the application for interim injunctions. After inquiry the learned Additional District Judge by order dated 20.10.2011 (P18) had issued interim injunctions as prayed for. When this order was impugned in the Civil Appeal High Court by leave to appeal application bearing No. WP/HCCA/COL/119/2011/ LA, the learned High Court Judges by their order dated 06.12.2011 (P20) having refused leave to appeal had dismissed the application subject to costs. This is the order this appeal has been preferred from.

It is to be observed that in P20 the learned High Court Judges had proceeded to hold that as per the tenancy Certificate (P4) issued by the Rent Board in respect of the subject matter to wit- premises No. 19, Avissawella Road, Kirulapone, the 1st defendant was the lawful tenant of the entire premises and the 2nd and 3rd defendants had come into occupation of 2 portions of the said premises under the 1st defendant. On the evidence that had been available before the Rent Board and also on a perusal of the available documentary evidence in this case, the 2nd and 3rd defendants appear to have come into occupation under the 1st defendant. The main basis of the findings of the learned High Court Judges appears to be that when the 1st defendant's tenancy ended, the occupation of 2nd and 3rd defendants also becomes unlawful and as such the plaintiff has successfully established a *prima facie* case in her favour.

I shall first advert to the preliminary objection raised by the 1st defendant in the District Court and also when the leave to appeal application bearing No. WP/HCCA/Col – LA -119/2011 was supported before the Civil Appeal High Court. It had been on the premise that this application could not have been maintained without a non-settlement certificate obtained under the provisions of section 7(1) of the Mediation Boards Act No. 72 of 1988. The aforesaid section is reproduced below:

Section 7(1)

"Where a Panel has been appointed for a Mediation Board area, subject to the provisions of subsection (2) no proceeding in respect of any dispute arising wholly or partly within that area or an offence alleged to have been committed within that area shall be instituted in, or be entertained by any court of first instance if:-

(a) the dispute is in relation to movable or immovable property or a debt, damage or demand, which does not exceed twenty five thousand rupees in value; or

(b) the dispute gives rise to a cause of action in a court not being an action specified in the Third Schedule to this Act; or

(c) the offence is an offence specified in the Second Schedule to this Act, unless the person instituting such action produces the certificate of non-settlement referred to in section 12 or section 14(2):

"Provided however that where the relief prayed for in an action in respect of any such dispute includes a prayer for the grant of any provisional remedy under Part V of the Civil Procedure Code, or where a disputant to any dispute

in respect of which an application has been made under section 6 subsequently institutes an action in any court in respect of that dispute including a prayer for a provisional remedy under Part V of the Civil Procedure Code, the court may entertain and determine such action in so far as it relates only to the grant of such provisional remedy. After such determination, the court shall:-

. . .

. . . .

(2) .....”

On a plain reading of the above section it is manifestly clear that if the relief prayed for in an action in respect of any dispute includes a prayer for the grant of any provisional remedy under Part V of the Civil Procedure Code, the Court may entertain and determine such action in so far as it relates to the grant of such provisional remedy. In the case at hand the prayer includes a provisional remedy under Part V of the Civil Procedure Code. As such the conclusion of the High Court Judges to the effect that since there is an application for interim injunction matter could be proceeded with, in the absence of the certificate of non-settlement is correct.

A party who seeks an interim injunction as a rule, would be able to satisfy Court on three requirements viz;

(i) Has the plaintiff made out a *prima facie* case?

(ii) Does the balance of convenience lie in favour of the plaintiff?

(iii) Do the conduct and dealings of the parties justify the grant of the same. In other words do equitable considerations favour the grant of the same.

The line of authorities on interim injunctions would amply demonstrate that, the first and foremost thing that should be satisfied by an applicant seeking an interim injunction is: "has the applicant made out a *prima-facie* case?" That is, it must appear from the plaint that the probabilities are such that plaintiff is entitled to a judgment in his favour.

In other words the plaintiff must show that a legal right of his is being infringed and that he will probably succeed in establishing his rights. A *prima facie* case – does not mean a case which is proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed and accepted. In the case of *Murtin Burn Ltd., Vs. R. N. Banerjee,* (1) at 85: the Supreme Court of India (Bhagwati, J) had opted to outline the ambit and scope of connotation *"prima –facie"* case as follows:-

> "A *prima facie* case does not mean a case proved to the hilt but a case which can be said to be established if the evidence which is led in support of the same were believed. *While determining whether a prima facie case had been made out the relevant consideration is whether on the evidence led it was possible to arrive at the conclusion in question and not whether that was the only conclusion which could be arrived at on that evidence."*

In ascertaining whether a plaintiff was successful in establishing a *prima facie* case the pronouncement by Dalton, J. (at 34) in the case of *Jinadasa Vs.Weerasinghe* (2) would lend assistance. Per Dalton, J., whilst adopting the language of Cotton L.J. in *Preston Vs. Luck*(3) :

> "In such a matter court should 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 plaintiffs are entitled to relief."

In this regard it would also be pertinent to consider the decision in *F. D. Bandaranaike Vs. State Film Corporation* [4] wherein the following principle of law was enunciated with regard to the sequential tests that should be applied in deciding whether or not to grant an interim injunction, namely:

- has the plaintiff made out a strong *prima facie* case of infringement or imminent infringement of a legal right to which he has title, that is, that there is a question to be tried in relation to his legal rights and that the probabilities are that he will win.

- in whose favour is the balance of convenience,

- as the injunction is an equitable relief granted in the discretion of the Court do the conduct and dealings of the parties justify grant of the injunction.'

Further in the case of *Gulam Hussain Vs. Cohen*[5] per S.N. Silva, J. (P/CA), (as then he was) at 370;

> "The matters to be considered in granting an interim injunction have been crystallized in several judgments of this Court and of Supreme Court. In the case of *Bandaranaike Vs. The State Film Corporation (Supra)* Soza J., summarized these matters as follows:
>
> In Sri Lanka we start off with a *prima facie* case that is, the applicant for an interim injunction must show 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. It is not necessary that the Plaintiff should be certain to win. It is sufficient if the probabilities are he will win."

When considering whether an applicant for an interim injunction has passed the test of establishing a *prima facie* case, the Court should not embark upon a detailed and full investigation of the merits of the parties at this stage. But, it would suffice if the applicant could establish that probabilities are that he will win. In this regard assistance could also be derived from the decision in *Dissanayake Vs. Agricultural and Industrial Corporation*[6]. Per H. N. G. Fernando J., (as he then was) in the above case at 285:-

> "The proper question for decision upon an application for an interim injunction is 'whether there is a serious matter to be tried at the hearing' *Jinadasa Vs. Weerasinghe (Supra)*. If it appears from the pleadings already filed that such a matter does exist, the further question is whether the circumstances are such that a decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued."

Perusal of the Additional District Judge's Order (P18) reveals that his conclusion was mainly based on the footing that it had been revealed even at the inquiry before the Rent Board that there had been no evidence even in 2004 to establish that the business was not carried on by the 1st Defendant - or any one on her behalf. By the document marked A12 on Air which is the same as P4) i.e., the order of the Rent Board of Colombo in application No. 27454, the applicant namely – M. N. Kariyawasam (present 1st defendant) was issued a Tenancy Certificate bearing No. 5733. The appeal preferred against this to the Rent Control Board of Review also had been dismissed as per P9. On the material that had been available the conclusion of the District Court is not erroneous. The subject matter appears to be the same and in my view the learned District Judge could not have arrived upon a finding different to that.

Further it is to be observed that as per the Tenancy Certificate (p4) issued by the Rent Board, the premises were No. 19 in its entirety. Thus is becomes amply clear that the tenant of premises No. 19 was the 1st defendant. But 2nd and 3rd defendants who had come into possession of portions of the said premises bearing No. 19 had disputed plaintiff's rights to the premises and further the 1st defendant does not appear to have offered any explanation at all as to how the 2nd and 3rd defendants came into possession of the premises of which 1st defendant was the sole tenant. In the above backdrop the conclusion of the learned District Judge to the effect that the 1st to 3rd defendants all were in unlawful and wrongful possession of the subject matter in violation of the provisions of the Rent Act appears to be correct.

Once the Applicant has established the existence of the *prima facie* case, then only the balance of convenience has to be considered. Per Soza, J. *In F. D. Bandaranayake Vs. The State Film Corporation (Supra)* at 303 –"If a prima facie case has been made out we go on and consider where the balance of convenience lies". In other words Court will have to weigh the comparative mischief and/or hardship which is likely to be caused to the applicant by refusal of the injunction and whether it would be greater than the mischief which is likely to be caused to the opposite party by granting the same. Undoubted granting of interim injunctions is at the discretion of the Court. It being a discretionary remedy when granting or refusing same, discretion has to be exercised reasonably, judiciously and more particularly, on sound legal principles after weighing the conflicting probabilities of both parties. If the Court is of the opinion that the mischief which would likely to be caused to the applicant by refusing the injunction is greater than the loss that is likely to be suffered by the opposite party in granting the same, the inevitable conclusion

of the Court has to be that balance of convenience favours the applicant. Then the Court should proceed to grant the interim injunction. An examination of facts and circumstances in the case at hand would amply demonstrate that when the defendants are in wrongful possession violative of the provisions of the Rent Act, in the event of refusal of the injunction, the damage the plaintiff would suffer would be greater than the damage/mischief if any, that would be suffered by the defendants, in the event of granting the injunction. Thus balance of convenience in this instance favour the grant of interim injunctions.

What arises for consideration next is, 'do the conduct and dealings of the parties justify the grant of the interim injunction?' In other words do equitable considerations favour the issuance of the injunction. Having considered the facts and circumstance of this case and the analysis of the learned District Judge. I am inclined to take the view that conduct and dealings of the parties justify the grant of the interim injunctions.

Further it is observed that both the District Court and the Civil Appeal High Court had laid stress on the fact that when a tenant or a lessee becomes an unlawful possessor, he cannot be allowed to obtain the benefit of such wrongdoings. The learned High Court Judges too had relied on the principles of law enunciated in the two decisions, viz – *Seelawathie Mellawa Vs.Millie Keerrthiratna*[7] *and Subramaniam Vs.Shabdeen*[8]. In the case of *Seelawathie Mellawa Vs. Millie. Keerthiratne (Supra)* it was observed by Victor Perera, J. (Wanasundera, J. and Wimalaratne, J. agreeing) P389 that:

"An injunction is the normal way of stopping a wrongdoer from obtaining the benefit of such wrongdoing to the detriment of the aggrieved party"

Further at 391 – per Victor Perera, J. ;

> "..... However, the District Judge had addressed his mind to the underlying principle that 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 the defendant-appellant a position of advantage brought about by her own unlawful or wrongful conduct."

In the case of *Subramaniam Vs. Shabdeen (Supra)* also it was held as follows:

> "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 wrongdoer from obtaining the benefits arising from his own wrongful conduct. The application to dissolve the injunction therefore could not succeed".

Further at 56 of the same judgment Thambiah, J has observed that:-

> "There is this further principle that an injuction would issue to stop a wrongdoer 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 Vs. Millie Keerthiratne (Supra).*

In the case at hand too when the defendants appear to be in wrongful possession of the subject matter they cannot be allowed to obtain the benefits of their wrong doings. The nature of the interim injunction sought by sub paragraph (c) of the prayer to the plaint is to restrain the defendants from obtaining any benefits from their wrongdoings. Therefore the District Judge was correct in granting the said injunction.

It is needless to stress the importance of the need to preserve *status-quo*. The primary purpose of granting interim injunctions is to preserve the *status quo* of the subject matter in dispute until legal rights and conflicting claims of the parties are adjudicated or decided upon. The underlying object of granting temporary injunctions is to maintain and preserve *status quo* at the time of institution of the proceedings and to prevent any change in it until the final determination of the suit. It is more in the nature of protective relief granted in favour of a party to prevent future possible injury.

Learned High Court Judges had based their conclusion on cogent reasons and had proceeded to refuse leave to appeal whilst affirming the District Judge's findings. This appears to be correct and I see no reason to interfere with the same.

In view of the foregoing analysis I proceed to answer both questions of law on which leave to appeal was granted in the negative and this appeal is hereby dismissed. However no order is made with regard to costs of this appeal.

MARSOOF P.C, J. – I agree

HETTIGE PC, J. – I agree.

Appeal dismissed.

KAPUGEEKIYANA VS. HON JANAKA BANDARA TENNAKONE, MINISTER OF LAND AND 6 OTHERS

SUPREME COURT
SHIRANEE TILAKAWARDANE, J.
MARSOOF, P.C., J. AND
DEP, P. C. J.
S. C. APPEAL NO. 161/2010
S. C. SPL. L.A. NO. 186/2010
C. A. APPLICATION NO. 691/2007 (WRIT)
JUNE 26TH, 2013

Land Acquisition Act – Section 2 – Investigation for selecting land for public purpose – Where the Minister decides that land in any area is needed for any public purpose – Acquisition procedure – Section 38A – Immediate possession of certain land acquired for the purposes of local authorities – Section 38 – Order for taking possession of a land or subjecting a land to a servitude – Section 39 – Divesting order – Compensation paid – Improvement Done – Reasonable to divest?

The land in question belonging to the Petitioner was acquired by the Ministry of Lands under the Land Acquisition Act. The Petitioner challenged the acquisition in the Court of Appeal. The first relief sought by the Petitioner was a writ of certiorari to quash the order made by the Minister of Lands and Land Development on 2.1.1986 and published in the Government Gazette on 08.01.1986 whereby the Respondents took possession of the land belonging to the Petitioner under the provisions of Section 38 A of the Land Acquisition Act.

The Petitioner, in the alternative, also sought a writ of mandamus, directing the Respondent to divest the said land on the basis that the land had not been utilized for any purpose nor have there been any improvements carried out on the land. Court of appeal refused both writs.

Held:

(1) It is necessary for the Minister and/or any authority acquiring land, under the Land Acquisition Act to have a clear and distinct public purpose for which the acquisition is commissioned. If the

Minister or Government officials are not aware of the true public purpose of acquiring the land then the act of acquiring the property should be viewed through a lens of zealous concern by the Courts. Acquiring properties under deception and pretense or for a potential nonexistent future public purpose will be unlawful.

(2) Importance and necessity in accordance with the provisions of the Land Acquisition Act should be given to the existence of the knowledge of the genuine public purpose the land would be put to use and to disclose such purpose to the land owner at the time of acquiring the property.

(3) The requisite public purpose was clearly clarified and informed by the Respondents to the Petitioner as specified in Section 2 of the Land Acquisition Act. Therefore, there was an urgent supervening public purpose for acquiring the Petitioner's land.

(4) To grant a divesting order on behalf of the Petitioner as per Section 39A of the Land Acquisition Act, the four conditions set out in Section 39 A (2) must be satisfied.

per Shiranee Tilakawardane, J.

"It is not in dispute that the Respondents have paid compensation to the Petitioner for acquiring his land and furthermore a considerable amount of improvements have been carried out on the land in preparation for building houses. Therefore, it would be unreasonable to divest the land".

APPEAL from the judgment of the Court of Appeal.

Cases referred to:

1. *Manel Fernando and another V. D. M. Jayarathne Minister of Agriculture and Lands*
2. *De Silva Vs. Athukorale, Minister of Lands, irrigation and Mahaweli Development and another* – (1993) 1 Sri L.R. 283

Faiz Musthapha, P. C., with *Faizer Marker, Ashiq Hashim* and *Janka Kroon* instructed by *W.B. Ekanayake* for the 2nd Petitioner – Petitioner – Appellant.

Milinda Gunathilleke, D.S.G. for the Respondents

Cur.adv.vult

November 18, 2013

SHIRANEE TILAKAWARDANE, J.

The Petitioner – Appellant (hereinafter referred to as the Petitioner) has sought Leave to Appeal from the decision of the judgment of the Court of Appeal dated 23.08.2010 whereby the Court of Appeal refused an application made by the Petitioner seeking a writ of certiorari, and in the alternative, a writ of mandamus. This Court granted Special Leave to Appeal on the following questions of law:

1. Whether the Court of Appeal erred in failing to consider the acquisition as *abinitio* void for the reason that no purpose was disclosed in the Section 2 Notice warranting the acquisition.

2. Did the Learned Judges of the Court of Appeal err in law by upholding the acquisition on the basis that there was a supervening public purpose.

3. Did the Learned Judges of the Court of Appeal err on the facts by holding that the acquisition was warranted for the purpose of a subsequent public purpose

4. Did the Learned Judges of the Court of Appeal err in law by placing an unfair burden of proof upon the Petitioner, where there was no ground of urgency to vindicate the acquisition under the provisions of the Land Acquisition Act.

The land in question belonging to the Petitioner was acquired by the Ministry of Lands [hereinafter referred to as the Respondent] under the Land Acquisition Act. The acquisition had taken place under the provisions of **Section 38(a)** of the Land Acquisition Act. A notice was issued under

Section 2 of the above mentioned Act by the District Land Officer and Acquiring Officer for the Colombo District upon the request of the Minister of Lands and Land Development. On the grounds of urgency an order was made on 02.01.1986, and on 08.01.1986 a Government Gazette was published and the Respondents took possession of the land.

The Petitioner challenged the acquisition by seeking two distinct reliefs from the Court of Appeal against the 1st Respondent. The first relied sought by the Petitioner included a writ of certiorari, quashing the order dated 02.01.1986 marked P5 in that Court, on the basis of failing to provide a clear and adequate 'public purpose' on the Section 2 Notice as per the requirements of the Act, failing to show an existing 'public purpose' at the time of the acquisition and failing to reveal grounds of urgency at the time of issuing an order under the provisions of **Section 38(a)** of the Act. The Petitioner secondly, in the alternative, sought a writ of mandamus, directing the Respondent to divest the said land on the basis that the land had not been utilized for any purpose nor have there been any improvements carried out on the land.

The Land Acquisition Act describes the steps that need to be followed when acquiring land; in terms of **Section 2 (1)**, the Minister decides and identifies the area and land that is needed for public purpose. Thereafter, as per **Section 4 (1)**, the Minister directs the Acquiring Officer to serve a notice on the owner and another notice to be exhibited in a conspicuous place on or near the land, thereby giving the owner, or any person who has an interest on the property, an opportunity to object to the acquisition. In the event an objection is made, as per Section 4 (4) of the Act, the Minister will carry out an inquiry and come to a final conclusion. The Minister's

decision will be published in the Gazette and will also be exhibited on or near the land confirming and establishing the finality of the decision. This publication shall be construed as definite evidence of the land being required for a 'public purpose'. as per **Section 5 (2)** of the Act. which notably states as follow: *"A declaration made under subsection (1) in respect of any land or servitude shall be conclusive evidence that such land or servitude is needed for public purpose"*, whilst **Section 7 (2) (c)** allows any person having an interest in the land to make a claim for compensation.

The Petitioner in this case asserts that, the notice issued by the Respondents merely states that the acquisition of the land is for 'public purpose'. The law pertaining to the issuance of notices is found in **Section 2(1)** and **(2)** of the **Land Acquisition Act** which reads as follows:

> *"(1) where the Minister decides that land in any area is needed for any public purpose, he may direct the acquiring officer of the district in which that area lies to cause notice in accordance with subsection (2) to be exhibited in some conspicuous places in that area.*
>
> *(2) the notice referred to in subsection (1) shall be in the Sinhala, Tamil and English languages and shall state that the land in that area specified in the notice is required for a public purpose and that all or any of the acts authorized by subsection (3) may be done on any land in that area in order to investigate the suitability of that land for that public purpose."*

This Court is in agreement with Justice Mark Fernando's broadened illumination of Section 2 (2) of the Act in the Case of *Manel Fernando and another V. D. M. Jayarathne, Minister of Agriculture and Lands,*[1] where the following was established: