

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC
OF SRI LANKA

In the matter of an Application for leave to appeal
under Section 754(2) of the Civil Procedure Code
for an interim Order.

Court of Appeal Case No.

CA/LTA/0234/1999

D.C. Colombo Case No.

5235/SPL

1. Shabbir Abbasbhoy Gulamhussein

No. 264, Grandpass Road,
Colombo 14

2. Khuzaima Taivabbhai Gulamhussein

No. 140, Grandpass Road,
Colombo 14.

Trustees of the "M. Adamjee Family Trust"
having its office at No. 140, Grandpass Road,
Colombo 14.

Petitioners

Vs

1. M.D.C. Tennekoon Gunasena

No. 110/3, Thurstan Road,
Colombo 03

And 05 others

Respondents

Before:

M. T. MOHAMMED LAFFAR, J.

WICKUM. A. KALUARACHCHI, J.

Counsel: Saumya Amarasekara, PC with Ms. Zainab Ismail for the 2nd Plaintiff – Appellant, instructed by Nithi Murugesu & Associates.

N.R. Sivenden with R. Udumulla for the added Plaintiff-Appellant, instructed by Nithi Murugesu & Associates.

A. Nanayakkara and Ms. Noorani Amarasinghe for the Defendant- Respondents, instructed by T.R. Izadeen.

Argued on: 30.10.2023.

Written Submissions on: 04.12.2023 (By the 2nd Plaintiff)
04.12.2023 (By the added Plaintiff)
05.12.2023 (By the Respondents)

Decided on: 06.02.2024

MOHAMMED LAFFAR, J.

This is an Application filed by the Plaintiff-Appellants (hereinafter referred to as the Appellants) seeking leave to appeal from the Order of the learned District Judge of Colombo dated 23-09-1999 (P10) in case No. 5235/SPL. Since it is not manifestly clear whether the leave to appeal has been granted by this Court, having considered the journal entries and the submissions of the learned Counsel appearing for the parties, this Court on 28-10-2019, presumed that the leave has already been granted. This Court is mindful of the fact that the instant Application has been filed in 1999, approximately 24 years ago.

Admittedly, the larger land which is described in the 1st schedule to the plaint was owned by the Appellants, trustees of the Adamjee Family Trust. The said larger land was subdivided into Lots 1-9 in plan bearing No. 8851 (X2). The lots 1-7 were transferred to the Defendant-Respondents (hereinafter referred to as the Respondents). It is common ground that the right of way to the said portions of land owned by the Respondents is over

the road reservation marked as lots 8 and 9 in plan X2. The Appellants are the owners of the remaining portion of the larger land which is situated along the northern boundary of lots 1-9.

The Plaintiffs sought an interim injunction in the District Court of Colombo restraining the Defendants from blocking or obstructing or preventing or interfering with the use of the said Road Reservation, including the right to use the reservations to gain access to 37th Lane from Thurstan Road. Furthermore, the Appellants are seeking an interim injunction, preventing the defendants from obstructing the Plaintiffs from using the said road reservations to gain access from their land (Lot 102 in plan X2) to the Thurstan Road. The learned District Judge, by the impugned Order dated 23-09-1999 dismissed the Application for the interim injunction. Being aggrieved by the Order, the Appellants have filed the instant leave to appeal Application.

Lord **Denning M.R. in Hubbard Vs. Vosper**¹ observed that;

“in considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes, it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead.”

This decision has been adhered to in the case of **Mohinudeen Vs. Bank of Ceylon**².

The Contention of the Appellants is that they are entitled to the right of way in dispute, namely lots 8 and 9 on the basis that they have soil right over the same. The contention of the Respondents is that they have gained prescriptive title to use the said right of way. In terms of the admitted title plan marked X2, the premises No. 102 owned by the Appellants has direct access from the main road, namely Thurstan Road. The disputed road reservation is only to the lands owned by the Respondents. It is evident that there is no access from the Appellants' land to the disputed road reservations. Moreover, it is abundantly clear from plan X2 that there is no access from lot 9 to 37th lane. Hence, on the face of it, the Appellants

¹ (1972) 2.Q.B.84 at 96

² 2001 (3) SLR. p25

are not entitled to an interim injunction to have access from Thurstan Road to 37th lane. These facts have been well substantiated from the statement made by one Zainudeen Kurban Hussain Teyabaly to the Kollupitiya Police stating that there was an access from their land (lot 102) to the disputed road reservation and the said access was close for several years ago and recently when they are about to open the access, the Respondents are objecting to the same. It is manifestly clear that the purported access from Appellants' land to the disputed right of way was not in existence for a long period of time. The Court will consider the question as to whether the harm which the Respondents will suffer if the injunction is granted is greater than the harm which the Appellant will suffer if it is refused?

In this Application, if the injunction is refused, there is no likelihood of irreparable damage being caused to the Appellants as their land has direct access to the main road. If the injunction is granted harm and prejudice will cause to the Respondent as the disputed right of way is the only access to the Respondents' land from the main road. In the case of **Yakkaduwe Sri Pragnarama Thero Vs. Minister of Education**³ it was held that;

“An interlocutory injunction will not be granted if there is no likelihood of irreparable damage being caused to the petitioner. Moreover, the burden of proof that the inconvenience which the petitioner will suffer by the refusal of the injunction is greater than that which the respondent will suffer, if the, Application is granted, lies on the petitioner.”

In refusing the interim injunction, the learned District Judge has rightly observed the fact that there had been a wall in existence for a long time between the disputed road reservations and premises No. 102, and therefore, it is impossible to create an access for the Appellants by way of an interim injunction.

Be that as it may, having instituted the action in the District Court of Colombo the Appellants are seeking *inter-alia* a declaration that they are entitled to use the right of way in dispute. It is pertinent to note that the Appellant, after the institution of the said action within one month on 16-12-1998 by deed bearing No. 25 had transferred their land, namely lot No.102 and the disputed road reservation. In these contexts, the Appellants are not entitled to the interim injunctions as prayed for because

³ 71 NLR 506.

they are not owners of the subject matter. Moreover, it appears to this Court that the Appellants suppressed these facts to the District Court in their affidavit.

In this regard, I refer to the observation made by the Court of Appeal in ***Nimal Weerasooriya Vs. Guruge Property Sales (Pvt.) Ltd⁴.***

“The suppression of the material facts by itself is sufficient ground to refuse an Application for interim relief as the relief so sought is a discretionary relief to be granted by the Court and the party seeking such relief is manifestly duty bound to appraise Court of all material facts. A person seeking injunctive relief is required to make an honest disclosure of all relevant facts the failure of which would amount to abuse of process of Court.”

In this respect, I am of the view that there is no basis to interfere with the determination of the learned District Judge of Colombo refusing to issue interim injunctions against the Respondents as prayed for in the prayers to the plaint. Thus, the appeal is dismissed with costs fixed at Rs. 75,000/-. The Registrar is directed to communicate this Order to the learned District Judge of Colombo forthwith.

Appeal dismissed.

JUDGE OF THE COURT OF APPEAL

WICKUM. A. KALUARACHCHI, J.

I agree.

JUDGE OF THE COURT OF APPEAL

⁴ CALA 284/99. CA. Minute of 10-05-2001