

**IN THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA**

SC (CHC) Appeal No. 13/2010

H.C. (Civil) 47/2009 MR

Phoenix Ventures Limited

No.409, 3rd Floor

Galle Road

Colombo 03

Plaintiff

Vs

Superior Palayakat (Private)
Limited

Unit No.8/2, No.05,

Milagiriya Avenue,

Colombo 04

Defendant

And Now Between

Superior Palayakat (Private)
Limited

Unit No.8/2, No.5,

Milagiriya Avenue,

Colombo 04.

Defendant - Petitioner

Vs

Phoenix Ventures Limited

No.403, 3rd Floor,

Galle Road,

Colombo 03.

Plaintiff- Respondent

Before: Saleem Marsoof, PC, J.

Sripavan J.

Suresh Chandra J.

Counsel:

Romesh De Silva PC with Geethaka Gunewardena for the Defendant-Appellant

Kushan De Alwis with Manoj Bandara for the Plaintiff– Respondent

Argued on : 22.02.2012

Decided on : 02.07.2012

Suresh Chandra, J

This is an appeal against the Order made by the Commercial High Court of Colombo granting an Interim Injunction restraining the Defendant – Appellant (Hereinafter referred to as ‘the Defendant’) from placing any person in possession or occupation in the mortgaged property.

The summary of the facts which gave rise to this question are as follows:

The Defendant who had gained ownership of the property described in the schedule to the Plaint by virtue of the Deeds of Transfer bearing No.1371 and No.1372 had become the owner of the contiguous allotment of land . The Defendant had intended to develop

erect and construct on the said allotment of land a condominium building comprising residential apartments called “Palais Maharaj”.

The Plaintiff – Respondent (hereinafter referred to as ‘the Plaintiff’) intended to purchase and the Defendant agreed to sell to the Plaintiff 17 apartments of the condominium at a price of Rs.7 million per apartment. The Plaintiff paid the Defendant a sum of Rs.86,700,000 in advance being part of the purchase consideration for the said 17 apartments and accordingly 17 sale and purchase agreements were signed and executed between the Plaintiff and the Defendant for a purchase consideration amounting to a sum of Rs.119 million for all 17 apartments. Clause 20(i) of the said Sale and Purchase Agreements provided that in the event of the Defendant’s failure to complete and deliver to the Plaintiff vacant possession of all the 17 apartments that the Plaintiff was entitled to specific performance or to terminate the Agreements and if such termination occurred the Defendant was to refund to the Plaintiff in each agreement a sum of Rs.7 million together with a further sum of Rs.3 million as liquidated damages which the total amount due to the Plaintiff would amount to Rs.170 million.

As security for repayment of the said sum of Rs.170 million in the event the Plaintiff elects to terminate the agreements, the Defendant mortgaged and hypothecated in favour of the Plaintiff the contiguous allotments of land as described in the 1st schedule to the Plaint by a primary mortgage bond bearing No.283 dated 13th July 2005 and attested by G.C. Jayangani Perera Notary Public. The Plaintiff after granting an extension of 15 months for the proposed condominium units to be completed and due to the Defendant being unable to complete the said condominium units within the extended time period, exercised their option to terminate the Sale and Purchase Agreements by letter dated 31st December 2008 and to handover vacant possession of the said 17 apartments. The Defendant did not comply with the said demand of the Plaintiff and denied the claim of the Plaintiff.

The Plaintiff filed action against the Defendant in the Commercial High Court of Colombo seeking for the reliefs prayed for in the Plaint. The Court issued an enjoining order against the Defendant and subsequently after inquiry an interim injunction was granted against the Defendant which stated that:

“until the hearing and determination of this action preventing the Defendant and/or its servants, agents and/or any persons acting directly or indirectly on behalf of or in the name of the Defendant, from placing any person and/or entity in possession and/or occupation of any of the apartments set out in the second schedule to the plaint or any other part of the building constructed on the land morefully described in the 1st schedule hereto in any manner whatsoever.”

The Defendant aggrieved by the said Order of the Commercial High Court sought leave to appeal against the said Order to this Court where leave was granted on 07.06.2010 on the questions set out in the Petition of Appeal.

The only question of law which needs to be considered in this appeal is whether the Interim Injunction issued by the Commercial High Court has been granted according to established principles of the law. Considering the facts in the case it is evident that there were 17 Sale and Purchase Agreements entered into between the Defendant and the Plaintiff from which the circumstances which has led upto the present action occurred. It is clear from the pleadings in the Plaint that the action in the Commercial High Court is an action in relation to recovery of monies due to the Plaintiff according to the Sale and Purchase Agreements. The recovery of monies due to the Plaintiff was secured by the Defendant using the said Mortgage Bond by keeping the land as security. The issue was as to whether an interim injunction could be granted to prevent the Defendant from placing any persons in possession or occupation of the said property in the light of the aforesaid circumstances.

It would be appropriate to consider the main criteria that needs to be satisfied for the granting of an interim injunction as was held by Soza J in Felix Dias Bandaranayake v The State Film Corporation and another 1981(2) SLR 287. Soza J held that

“In deciding whether or not to grant an interim injunction the following sequential tests should be applied:

1. 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 serious

question to be tried in relation to his legal rights and that the probabilities are that he will win.

2. In whose favour is the balance of convenience- the main factor being the uncompensatable disadvantage or irreparable damage to either party?

3. 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. The material on which the Court should act as the affidavits supplied by plaintiff and defendant. Oral evidence can be led only of consent or upon acquiescence.”

The contention of the Defendant is that the claim by the Plaintiff is for recovery of money and therefore there is no irreparable loss which would entitle them to an interim injunction. They even contended that the balance of convenience was on the part of the Defendant rather than on the Plaintiff. They also have submitted that the Plaintiff has failed to establish a prima facie case.

In considering the averments in the Plaint it is quite clear that the Plaintiff had established a prima facie case in that the Agreements had been entered in to for the purchase of 17 apartments, that the Defendant had failed to honour the said agreements, that the Defendant had agreed to pay a definite sum of Rs.170 million in the event of breach, that as security for the said sum the Defendant had executed a mortgage bond and that the Plaintiff had a cause of action against the Defendant to recover the said money, which factors establish the fact that there is a prima facie case established by the Plaintiff against the Defendant. The Commercial High Court had considered these factors in arriving at the conclusion that the Plaintiff had established a prima facie case.

As regards the position of the Defendant in relation to the Plaintiff's action being only a money claim, the Commercial High Court had considered the fact that it is not only to claim monies due that was sought by the Plaintiff but was also to secure their rights in relation to the mortgage of the property and also from preventing the mortgaged property getting in to the hands of 3rd parties which would frustrate the efforts of the

Plaintiff from securing their rights in relation to the mortgaged property. This view of the Commercial High Court accords with reason and cannot be faulted as asserted by the Defendant.

Halsbury's Laws of England , Volume 32 (4th Edition) at paragraph 596 on page 286 states that "the Mortgagee is entitled to restrain the mortgagor from conduct which would prejudice the mortgage security."

In relation to the aspect of balance of convenience the Defendant has submitted that the Defendant had to develop and sell 88 apartments, that apartment building was almost complete, that the Plaintiff at most had a right to 17 apartments only and that the injunction sought covered the entire apartment complex consisting of 88 apartments. They further contended that if the injunction was not granted that the Defendant could develop and sell the 88 apartments and with the injunction in place they could not sell the apartments. It is apparent that the apartments have not been completed during the time agreed upon. It is also evident that the injunction does not prevent the Defendant from completing the building by continuing with the construction. With the construction being incomplete the possibility of selling any apartments in such a state would also be at question. In these circumstances it is hard to say that the balance of convenience was with the Defendant rather than with the Plaintiff. The Commercial High Court having considered the averments in the Plaintiff, the Objections and the submissions of the parties had arrived at the conclusion that the balance of convenience was with the Plaintiff, which conclusion too cannot be faulted in the circumstances of the case.

The objective of the Plaintiff in seeking an interim injunction has been to prevent the Defendant from placing or putting into possession of the building 3rd parties which would jeopardize the interests of the Plaintiff in the process of the recovery of the monies due to them which is apparent from the documents that had been filed by the Plaintiff and in taking steps in pursuing with their action based on the breach of agreements and securing their rights in respect of the mortgage bond. This mode of action can be considered as a bona fide attempt to safeguard their rights rather than to jeopardize the position of the Defendant.

It is to be observed from the submissions of the Defendant that the Defendant was under a misapprehension that the injunction obtained against them has prevented them from developing and completing the apartments. If they continue with the development and complete the apartments it would enable them to sort out the difficulties created in the present action.

The injunction was issued in February 2010. The present action before this Court has taken more than two years to reach its conclusion. If the Defendant had in the meantime continued with the process of developing the property which they intended to initially, they would have gained much ground in reducing their liabilities and perhaps been able to resolve their dispute with the Plaintiff in an amicable manner.

The questions of law on which leave was granted by this Court are answered in favour of the Plaintiff in view of the above conclusions.

In the above circumstances the Appeal of the Defendant is dismissed and the Order of the Commercial High Court regarding the grant of the Interim Injunction is affirmed. In all the circumstances of the case no order is made regarding costs.

JUDGE OF THE SUPREME COURT

SALEEM MARSOOF PC, J.

I agree.

JUDGE OF THE SUPREME COURT

SRIPAVAN, J.

I agree.

JUDGE OF THE SUPREME COURT