

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

In an application for Leave to Appeal/Appeal in terms of Section 5(c) (1) of the High Court of the Provinces (Special Provisions)(Amendment) Act, No. 54 of 2006 read together with Article 127 of the Constitution of the Democratic Socialist Republic of Sri Lanka.

S.C.(HCCA) (LA) No. 346/2013
NWP HCCA Case No. 28/2012(Rev)
D.C.Kuliyapitiya Case No. 76/L

1. Geekiyanage Thanuja Sanjeeewani
Amarasinghe
No. 14. Vijitha Road,
Dehiwala.
2. Geekiyanage Sardha Maheshini
Amarasinghe
Sisira Niwasa,
Narammala.
3. Dona Kusuma Sardhalatha
Amarasinghe
Sisira Niwasa
Narammala.

Plaintiff-Petitioners-Petitioners

Vs.

1. Geekiyanage Nirosha Prasadini
Kahandawarachchi
No. 2, Esther Place
Park Road, Colombo 05.
2. Chanaka Ravindra Kahandawarachchi
No. 2, Esther Place
Park Road, Colombo 05.

Defendant-Respondents-Respondents

Before	:	Priyasath Dep, PC. J Sarah de Abrew, J & Priyantha Jayawardana, J
Counsel	:	Rohan Sahabandu , PC for the Plaintiff-Petitioners- Petitioners
		Chrishmal Warnasooriya for the Defendant-Respondents- Respondents
Argued on	:	05.06.2014
Decided on	:	31.03.2015

Priyasath Dep, PC, J

1. The Plaintiffs-Petitioners-Petitioners above named (hereinafter referred to as "Petitioners") instituted an action in the District Court of Kuliyapitiya bearing No. DC 76/L against the 1st and 2nd Defendants –Respondents- Respondents (hereinafter referred to as the "Respondents") seeking inter alia the following reliefs;
 - a. A declaration that the 2nd Petitioner is the absolute owner of the land described in the 2nd schedule to the Plaintiff which is a divided portion of the land described in the 1st Schedule to the Plaintiff, subject to the life interest of the 3rd Petitioner,
 - b. A declaration that the 1st Petitioner is the absolute owner of the land described in the 3rd schedule to the Plaintiff which is a divided portion of the land described in the 1st schedule to the Plaintiff, subject to the life interest of the 3rd Petitioner,
 - c. to eject the Respondents from the house standing on the land described in the 3rd schedule to the Plaintiff,
 - d. (i) an interim injunction restraining the Respondents from cutting down the trees, destroying the cultivation and obstructing the 3rd Petitioner's right to life interest in the lands described in the 2nd and 3rd schedules to the Plaintiff until the conclusion of the matter.
(ii) an enjoining order preventing the Respondents from doing aforesaid acts until the granting of the aforesaid interim injunction.

(e) Issue a commission to a surveyor to survey and prepare a plan pertaining to the lands described in the schedule to the Plaintiff.

2. The learned Additional District Court Judge of Kuliapitiya by order dated 11th December 2009 refused to grant an enjoining order as prayed for by the Petitioners.

3. In terms of the aforesaid order dated 11th December 2009 marked 'X2' the District Court issued notices of interim injunction to the Respondents returnable on the 4th of January 2010. The Respondents on 2nd August 2010 filed the statement of objections and the answer marked X3 and X4 respectively. The parties agreed that the inquiry into the interim injunction could be disposed of by way of written submissions.

4. The learned Additional District Judge of Kuliapitiya by the Order dated 16th December 2010 marked X5 refused the interim injunction prayed for by the Petitioners.

5. The learned Additional District Court Judge was of the view that if the Petitioners are successful in the action and the judgment is in favour of the Petitioners in respect of the ownership to the property referred to in the 2nd and 3rd schedules to the plaint, the damages caused to the property could be remedied by way of compensation.

6. The Petitioners state that when this case was taken up on the 26th of June 2012 in the District Court of Kuliapitiya, they informed court that the Respondents were cutting down trees and causing irreparable loss to the property and therefore in terms of the orders marked "X2" and "X5" moved the court to issue a commission to assess the damages that had been caused by the Respondents to the property belonging to the Petitioners.

7. The Petitioners filed a petition dated 4th July 2012 and on 9th July 2012 supported the same to obtain a commission from the court in respect of the following issues:

- a) To survey the lands described in the 2nd and 3rd schedule to the Plaintiff;
- b) To assess and/or estimate the damage that had been caused by the Respondents to the trees and/or cultivation in the lands described in the 2nd and 3rd schedule to the plaint.
- c) To submit a full report in respect of the properties including the trees and permanent cultivation in the lands described in the 2nd and 3rd schedule to the Plaintiff;
- d) To ascertain the net profits receivable monthly and /or annually in the lands described in the 2nd and 3rd schedule to the Plaintiff.

8.. The learned District Judge on 9th July 2010 allowed the Petitioners' application for a commission and issued a commission returnable on the 25th of October 2012.

9. The Petitioners state that the Respondents were not satisfied with the order dated 9th July 2012 made by the learned District Court Judge of Kuliapitiya allowing a commission,

filed an application bearing No. 14/2012 (LA) in the High Court of Civil Appeal, Kurunegala seeking to set aside the said order dated 9th July 2012.

10 On 31st July 2012 the High Court of Civil Appeal, Kurunegala refused to grant leave to appeal to the aforesaid application of the Respondents and dismissed the Application.

11. Thereafter the Petitioners took steps to issue a commission to a court approved/listed surveyor returnable on the 25th of October 2012.

12. The Petitioners state that on 25th of October 2012 Mr. J.A. Rohitha Jayalath, licensed surveyor and assessor appointed by court as the commissioner, has tendered to court a Plan bearing No. 431 dated 22nd October 2012 together with a report prepared by him in performing his duties assigned to him by the court.

13. The Petitioners state that the report of the surveyor revealed that;

- (a) The Respondents are obstructing and /or preventing the 3rd Petitioner from exercising her rights and entitlements as the life interest holder of the property;
- (b) The Respondents had cut down several trees in the lands belonging to the Petitioners and removed the tree trunks making it impossible for the commissioner to estimate and assess the damage caused to the trees;
- (c) The Commissioner was prevented and/or obstructed and/or unassisted by the Respondents from properly assessing and estimating the net monthly/annual profits receivable from the coconut cultivation in the lands described in the 2nd and 3rd schedule to the Plaintiff.

14. In the circumstances, the Petitioners based on the report submitted that :

- (a) The Commissioner could not assess and estimate the damage caused to the trees and cultivation in the lands described in the 2nd and 3rd schedule to the Plaintiff.
- (b) the commissioner could not assess and estimate the net monthly and/or annual income receivable from the cultivation in the lands described in the 2nd and 3rd schedule to the Plaintiff.

15. The Petitioners submit that the order marked X5 is incapable of protecting the rights of the Petitioners and thus proved to be futile in view of the evidence transpired from the commissioner's report.

16 Therefore, being aggrieved and dissatisfied with the said order marked "X5" made by the learned Additional District Judge, the Petitioners invoked the revisionary jurisdiction of the High Court of Civil Appeal, Kurunegala by filing the application bearing No. NWP / HCCA 28/2012 seeking inter alia the following reliefs among other reliefs prayed for:

- (a) Revise and/ or vary and /or set aside the order of the Learned Additional District Judge in the District Court of Kuliapitiya case No. 76/L dated 16th December 2010.
- (b) Direct the District Court Judge of Kuliapitiya to hold a fresh inquiry into the application for the interim injunction made by the Petitioners in case No. 76/L;

17. The learned Judges of the High Court of Civil Appeal, Kurunegala by the order dated 17th July 2013 refused to grant the interim relief prayed for by the Petitioners and directed to fix the matter for objections of the Respondents on 27th August 2013.

18. The Petitioners submitted that the learned High Court judges having observed that the damages cannot be assessed erred when it refused to grant the interim relief prayed for by the Petitioners.

19. The Petitioners submitted that the reasons given by the Learned High Court Judges in refusing the Petitioners' application for the interim relief are based on surmise and conjuncture when they held that neither the Petitioners appealed against the order marked "X5" though the damage was not practicably assessable nor they moved the court for a commission immediately after the refusal of the interim injunction.

20. Being aggrieved by the order of the High Court of Civil Appeals, Kurunegala, the Petitioners filed this application in this court seeking leave.

21. When this application was taken up for support the learned Counsel for the Respondents raised the following Preliminary Objections:-

- (1) This matter is not fit for review in terms 128(2) of the Constitution.

The learned Counsel submitted that the High Court correctly refused the interim relief for the reason that the material placed before the High Court seeking a revision of the order of the District Judge made in 2010 was based on Commissioners report filed in 2012.

- (2) The affidavits tendered to Court on behalf of the Petitioners are defective for the reason that all affidavits filed are deposed and affirmed and the attestation cannot be relied upon and this amounts to violation of Rules 2 and 6 of the Supreme Court Rules of 1990.
- (3) The Petitioners are guilty of misrepresentation for the reason that he had given a different address as the place of residence.

22. The Petitioner filed the revision application in the High Court of Civil Appeal, Kurunegala in Case No. 28/2012 on 05.12.2012 to revise the order dated 16.12.2010 of the District Court of Kuliapitiya refusing the interim injunction and also to obtain a stay order based on the Commissioner's report dated 25.10.2012

23. The Petitioner did not take steps to revise the order of the District Court made on 16-12-2010 until this application was filed in High Court of Civil Appeal on 5-12-2012 almost two years after the order of the District Judge.

24. The Respondents submitted that by filing a revision application in the High Court(Civil Appeal) on 05.12.2012 the Petitioners sought to revise the order of the learned District Judge dated 16.12.2010 based on a Commissioner's report dated 09.07.2012. The District Judge made the order upon considering the material that was placed at that time before the court by the parties. The said order could not be revised by the High Court based on a report obtained subsequently after one and a half years. Respondents stated that they did not have an opportunity to challenge the report of the Commissioner. Therefore, Respondents submitted that the Petitioners cannot seek to revise the order made in 16th December 2002 on the basis of a report made available on 25.10.2012.

25. The Petitioners in this case sought interim injunction at two different stages of the proceedings. In the first instance by their Plaintiff dated 09.12.2009 sought an interim injunction. The Learned District Judge having inquired into the application refused to grant interim injunction. The second instance was when the case was pending in the District Court, Plaintiffs (Petitioners) filed a revision application in the High Court of Civil Appeal to revise the order of refusal based on the Commissioners report and to direct the learned District Judge to hold a fresh inquiry into the application for an interim injunction.

26. District Courts under the Judicature Act . The relevant section is the section 54 of the Judicature Act which reads thus:

54. (1) Where in any action instituted in a High Court, District Court or a Family Court , it appears –

- (a) from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance, the commission or continuance of which would produce injury to the plaintiff; or
- (b) that the defendant during the pendency of the action is doing or committing or procuring or suffering to be done or committed , or threatens or is about to do so procure or suffer to be done or committed, an act or nuisance in violation of the plaintiff's rights in respect of the subject-matter of the action and tending to render the judgment ineffectual, or
- (c) that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff,

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

- (i) Committing or continuing any such act or nuisance;
- (ii) Doing or committing any such act or nuisance;
- (iii) Removing or disposing of such property.

27. The jurisdiction to grant injunctions is given to High Court/District Court under section 54(1) (a) of the Judicature Act to prevent the commission of act or nuisance which will produce injury to the Plaintiff. Under section 54 (1) (b) interim injunction could be granted during the pendency of the action if the defendant commit or threatens to commit an act or nuisance in violation of the plaintiffs rights in respect of the subject matter of the action and tending to render the judgment ineffective.

28. The first application for the interim injunction filed in the District Court was refused as there were no sufficient grounds to grant relief. The question that arises is as to whether after the refusal of the interim injunction, the Petitioner could make a new application for an interim injunction in the same court.

29. Interim injunctions are issued to prevent the commission of an act or nuisance which violate the rights of the Plaintiff that will render the final judgment ineffectual. The purpose of the interim injunction is to maintain the status quo and protect the subject matter of the case.

30. The question that arises is when the case is pending a party commits acts in violation of the Plaintiff's rights in relation to the subject matter of the property upon proof of such acts, could the same court grant relief in spite of the fact that it has previously refused to intervene.

31. The Petitioners position is that when the District Court refused to grant an injunction the court becomes funtus as far as granting of interim injunctions are concerned and therefore it is necessary to move the High Court by filing a revision application to revise the earlier order and direct the District Judge to hold a fresh inquiry.

32. I am of the view that after the earlier order of refusal, if fresh acts are committed by the defendants which violates the rights of the plaintiff which will render the judgment ineffectual upon proof of such violations a party could invoke the jurisdiction of the District Court. The change of circumstances, emergence of new grounds as a result of committing or threatening to commit acts or nuisance entitle a party to invoke the jurisdiction of the same court in spite of the previous refusal and the Court has jurisdiction to entertain such an application. These actions are referred to as *quia timet* actions incidental to the main actions.

33. The proper course of action for the Petitioner is to seek interim relief in the District Court itself, if there are fresh material regarding commission, continuance or threatened to commit acts or nuisances by the Defendants subsequent to the refusal of the previous application which will render the judgment ineffectual..

34. The first preliminary objection though referred to as a preliminary objection is also the main issue that has to be considered by this court in granting leave. I have carefully considered the comprehensive written submissions filed by both parties on this issue. I uphold the first preliminary objection raised by the learned Counsel for the Respondents. In view of this decision there is no need to consider the other preliminary objections raised by the Respondents regarding the maintainability of the application.

35. Therefore I am of the view that the Learned High Court of Civil Appeals correctly refused the application to revise the order of learned Additional District Judge made on 16-12-2010 refusing to grant an interim injunction.

Leave to appeal refused. No Costs.

Judge of the Supreme Court

Sarath de Abrew J.

I agree.

Judge of the Supreme Court

Priyantha Jayawardene P..C., J.

I agree.

Judge of the Supreme Court