

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

In the matter of an application for Leave to Appeal under Section 5(2) of the High Court of the Provinces (Special Provisions) Act No 10 of 1996 read with Section 754(2) of the Civil Procedure Code.

Sarangi Charika Kuruppu of No 3/14,
Canbera Avenue, Dandenong , Australia and appearing by
her power of attorney holder Gulawattage Don Dayaratana
of Ovitigala Road, Munagama, Horana.

PLANTIFF

SC Appeal NO 194/2011
S.C (H.C) L.A No.46/2011
C.H.C NO. 295/2010/MR

Vs.

DFCC Bank PLC of No 73/5, Galle Road,
Colombo 03.

DEFENDANT

And Now

Sarangi Charika Kuruppu of No 3/14, Canberra Avenue,
Dandenong , Australia and appearing by her power of
attorney holder Gulawattage Don Dayaratana of Ovitigala
Road, Munagama, Horana

PLANTIFF-PETITIONER

Vs.

DFCC Bank PLC of No 73/5, Galle Road,
Colombo 03.

DEFENDANT-RESPONDENT

Before

Chandra Ekanayake, J.
Priyasath Dep, PC J
Buwaneka Aluwihare, PC J

Counsel

S.A Parathalingam,PC with
Varuna Senadeera for the Plaintiff Appellant
Kushan D'Alwis, PC with Kaushalya Nawaratne
for the Defendant-Respondent.

Argued on

15.12.2015.

**Written Submissions
tendered on**

23.11.2011 (by the Plaintiff-Appellant)
16.02.2012 (by the Defendant Respondent)

Decided on

28. 03. 2016.

Chandra Ekanayake, J

The plaintiff- appellant (hereafter referred to as the appellant) by petition dated 01/06/2011 filed in this Court (together with an affidavit of her power of attorney holder) had sought inter-alia leave to appeal against the order of the Learned Judge of the Commercial High Court dated 13/05/2011, to set aside the same and to issue an interim injunction as prayed for in sub-paragraph (f) of the prayer to the plaint filed in case No.CHC/295/2010/ MR in the Commercial High Court of Colombo. An order staying all proceedings in the aforesaid case No: CHC/295/2010/MR and also for an order suspending the operation of the said order dated 13.05.2011 until final conclusion and determination of this case were also sought by the appellant (as per sub-paragraphs (d) and (e) of the the prayer to the petition)

When the above application was supported on 27/11/2011 this Court had granted leave to appeal on the following questions of law :-

- (1) has the Learned Judge of the Commercial High Court erred in holding that the purported cause of action of the petitioner is based on the conduct of a recipient of rights from a co-owner of a land in respect of which the petitioner has co-owned rights and not a cause of action based on a “commercial transaction” between the respondent bank and the other co- owner?
- (2) has the the Commercial High Court Judge erred in proceeding to make order after coming to the categorical finding that the transaction pleaded in the plaint is not a “commercial transaction”?
- (3) has the Learned judge of the Commercial High Court in his said order erred and/or misdirected himself in applying the judgment in Abeywardana Vs Abeywardana (1993) 1 S.L.R 272 to the facts of this case and thereby erroneously holding that the contents of the affidavit tendered with the plaint may be based on hearsay and cannot

be accepted for the purpose of confirming a cause of action?

(4) has the Learned Judge of the Commercial High Court in his said order erred in holding that the affirmant of the said affidavit should adduce his grounds of belief, has totally disregarded the provisions of Section 181 of the Civil Procedure Code

The appellant had instituted action against the defendant - respondent bank(hereinafter referred to as the respondent) praying for the following main reliefs, namely :-

5.
 - that the aforesaid mortgage bond bearing No 552 dated 29/03/2006(X11) and that the notice of resolution passed by the board of directors of the respondent bank (X13) are wrongful, unlawful , ab-initio null and void and of no force or avail in law,
 - that the respondent is not entitled to sell by public auction the land and premises morefully described in the schedule to the plaint in terms of the said resolution (X13) and to sell by public auction the said property based on the aforesaid mortgage bond (X11),
 - a permanent injunction preventing the respondent and its servants, agents and all those holding under it from taking further steps in terms of the said resolution and/or selling, and/or alienating and/or in any other manner disposing the said property - vide sub prayer (e) of the prayer to the plaint.

The basis of the plaint is as follows :-

The appellant had become aware of notice of a resolution (X13)passed by the board of directors of the respondent bank under Section 8 of the Recoveries of Loans by Banks (Special Provisions) Act No 4 of 1990 published in the newspapers. The appellant had made repeated representations not to take any further steps with regard to the said resolution. Notwithstanding the aforesaid requests the respondent bank had proceeded to take further steps in respect of the said resolution. It is the stance of the appellant that Attanayake

Mudiyanselage Ariyadasa (the step father of the appellant) who being a person said to be entitled only to an undivided 2/6 share of the said property is not entitled to execute a mortgage bond in respect of the entirety of the property. The appellant contends that on or about 29.03.2006 the said A.M.Ariyadasa has purported to have mortgaged the entirety of the said land and premises which is morefully described in the schedule to the plaint by mortgage bond bearing No.552 of 29.03.2006 attested by S.D.N.Kannangara N P - (X11). It has been further contended by the appellant that she was not a signatory to the said mortgage bond and A.M.Ariyadasa by executing the said mortgage bond in the above manner has acted in derogation of the the rights of appellant in respect of the said property. As per the title averred in the plaint the appellant is entitled to an undivided 1/6 share of the property. On the above basis the appellant claims that the said mortgage bond is wrongful, unlawful, ab-initio null and void and of no force or avail in law and thus the respondent is not entitled to sell by public auction the property described in the schedule to the plaint.

When the application in the plaint was supported before the Commercial High Court on 19/05/2010 Learned Judge had issued an enjoining order as pleaded in sub prayer (g) of the plaint together with a notice of interim injunction. On receipt of the same the respondent had filed its statement of objections (together with an affidavit and documents). The inquiry into the application for interim injunction had been disposed of by way of written submissions. The Learned Judge had pronounced the impugned order dated 13/05/2011. By the above order the appellant's application for interim injunction was dismissed.

At the hearing before this Court Learned Counsel who appeared for the appellant heavily laid stress on the fact that aforesaid A.M Ariyadasa who is entitled only to an undivided 2/6th share of the said property is not entitled to execute the aforesaid mortgage bond bearing No 552 dated 29.03.2006 in respect of the entirety of the said land and premises, which being a co-owned property.

Perusal of the impugned order reveals that the Learned Judge had observed the following:-

- (a) that the defendant had not raised any objection with regard to jurisdiction of the Court in the Commercial High Court,
- (b) for the Court to be clothed with jurisdiction to hear and conclude a case of this nature the cause of action has to be one which has arisen on a commercial transaction. The alleged cause of action submitted by plaintiff is against the defendant bank and a careful consideration of the averments in the plaint disclose that the alleged cause of action has not arisen from a commercial transaction between the two parties,
- (c) if at all any commercial transaction could arise between the defendant bank and the 2nd husband of the plaintiff's mother who is a co-owner of the mortgaged property,
- (d) for the above reasons this cause of action has not arisen on a commercial transaction between the appellant and the respondent.

Further at page 6 of the impugned order he had concluded that in terms of Section 4 of the above mentioned Act No. 4 of 1990, a resolution can be passed by the bank in respect of any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover unpaid portion of such loan and interest thereon subject to the terms stipulated in section 13 of the Act. The said Section 4 thus reads as follows:-

“Subject to the provisions of Section 7 the Board may by resolution to be recorded in writing authorize any person specified in the resolution to sell by public auction any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the whole of the unpaid portion of such loan , and the interest thereon upon the date of the sale , together with the moneys and costs recoverable under Section 13.”

By sub prayers (a) and (b) to the petition the mortgage bond (X11) and the board resolution (X13) are sought to be declared null and void. As per sub prayers (d) and (e) to the plaint, a declaration to the effect that the respondent is not entitled to sell the mortgaged property by public auction and a permanent injunction preventing the respondent from taking any steps in relation to the resolution (X13) have been sought respectively. By sub prayers (f) and (g) to the plaint an interim injunction and an enjoining order also had been sought.

A party who seeks an interim injunction must as a rule, should 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 an interim injunction.

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”? in other words, it must appear from the plaint that the probabilities are such that the party who is seeking the interim injunction is entitled to a judgment in his favour. That is 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 *Martin Burn Ltd., v. R.N.Banerjee*, (AIR) 1958 SC 79 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.”

When deciding whether a *prima facie* case has been established by an applicant for an interim injunction, the court has to first satisfy itself that there is a serious question to be tried at the hearing and that on the facts and circumstances of each case whether there is a probability that the plaintiff is entitled to the relief claimed. In this regard pronouncement by Dalton J, (at page 34) in the case of Jinadasa vs. Weerasinghe (31 NLR 33) would lend assistance. Per Dalton, J., whilst adopting the language of Cotton L.J. in Preston Vs. Luck (Supra) (1884) 24 CH.497:-

“ 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 plaintiff are entitled to relief.”

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 1962 - 64NLR 283. Per H.N.G. Fernando J., (as he then was) in the above case at page 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. Weerasinghe¹). 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.”

The following principles of law were enunciated in F.D.Bandaranaike vs. State Film Corporation (1981 2 SLR 287) with regard to the sequential tests that should be applied in deciding whether or not to grant an interim injunction. Those are :-

- '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.'

With regard to a *prima facie* case the conclusion in the impugned judgment appears to be that the appellant has no claims for a *prima facie* cause of action. Further it is stated that under section 4 of the above Act No.4 of 1990 read with provisions of section 7 the board of directors of the bank may by a written resolution authorize a sale by public auction of any property mortgaged to the bank as security for any loan in respect of which default has been made in order to recover the money stated therein. The appellant's main complaint is that entire property has been mortgaged inclusive of her undivided share also. This alone would suffice to arrive at the conclusion that there is a serious question to be tried pertaining to the appellant's legal rights. When the entire transaction is considered it has arisen from a commercial transaction. It is not necessary that the appellant should be certain to win the main case. For the above reasons I am inclined to the view that the appellant has succeeded in establishing a *prima facie* case.

If a *prima facie* case is established then we go on and see where the balance of convenience lie and whether equitable considerations favour the grant of the injunction.

In the aforecited case of F.D.Bandaranaike vs. State Film Corporation (1981 2 SLR 287), Justice Zosa has summarized the matters in granting an interim injunction at page 302. He has proceeded to state 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 possibilities are he will win.”

When all the facts and circumstances of this case are considered it becomes amply clear that the damage the appellant would suffer in the event the injunction is refused would be greater than the damage if any, that would be caused to the other party. Therefore, the balance of convenience too favours the granting of the injunction. In my view equitable considerations also favour the issuance of the injunction.

Now I shall advert to consider the 3rd and 4th questions of law on which leave to appeal was granted by this Court. This leads me to examine whether the Learned Judge has misdirected himself in applying the decision in *Abeywardena V Abeywardena* – 1993 - 1SLR, 272 to the facts of this case and erroneously held that the contents of the affidavit may be based on hearsay and as such cannot be accepted to support the cause of action. The affidavit filed in the commercial High Court is filed by the power of attorney holder of the appellant. On a perusal of the affidavit I am unable to conclude that the affidavit is based on hearsay evidence.

With regard to the above affidavit the Learned Judge has observed that the facts averred in the affidavit do not appear to be within his personal knowledge and based on his personal

observations. All what is required is that an affidavit should satisfy the requirements stipulated in section 181 of the Civil Procedure Code.

It is well settled that an affidavit has to be filed along with the plaint when an interim injunction is sought by the plaintiff. However, the affidavit has to be in terms of section 181 of the Civil Procedure Code. In this case the conclusions arrived upon by the Learned Judge at page 7 of the impugned order does not appear to be correct for the reason that the affidavit in question is one in compliance with provisions of the above section 181. In view of the above analysis the 3rd and 4th questions of law also have to be answered in the affirmative.

For the aforesaid reasons I am inclined to the view that the conclusions arrived upon in the impugned judgment by the Learned Judge are found to be incorrect. Viewed in the above context I proceed to answer all questions of law on which leave to appeal was granted in the affirmative. This appeal is allowed with taxed costs. The interim injunction sought by sub prayer (f) to the plaint is granted operative till final determination of this action.

Registrar of this Court is directed to transmit a copy of this judgement together with the original record in Case No.CHC/295/2010/MR to the Registrar of the Commercial High Court, Colombo forthwith.

Judge of the Supreme Court

Priyasath Dep, PC J

I agree.

Judge of the Supreme Court

Buwaneka Aluwihare, PC J

I agree.

Judge of the Supreme Court.