THE STATE

v.

TRANSPORT CONTROL BOARD

ex parte

VATUKOULA EXPRESS BUS SERVICE

[HIGH COURT, 1990 (Jayaratne J) 17 October]

Revisional Jurisdiction

Practice (Civil)- award of costs on withdrawal of action- entitlement to damages when ex parte interim injunction obtained without full disclosure.

An applicant for Judicial Review which had been granted leave to move for Judicial Review and an interim injunction sought to discontinue the proceedings. Granting leave the High Court HELD: (i) that an interested party to the Judicial Review was entitled to recover its costs and (ii) that it was also entitled to damages resulting from the grant of the interim injunction without full disclosure.

Cases cited:

Giles v. Randall [1915] 1 KB 291
Republic of Peru v. Douglas Brothers & Company 55 L.T.R. 802
Smith v. Day (1882) 21 Ch. D. 421.

G. P. Shankar for the Applicant
S. M. Koya for the Interested Party (Sunbeam Transport Ltd)

Interlocutory application in proceedings for Judicial Review

Jayaratne J:

The applicant, Vatukoula Express Bus Service has made an application for leave to discontinue its application for judicial review. Mr. Koya representing Sunbeam Transport Limited figuring as the 2nd Respondent in the case is seeking two major reliefs arising therefrom. He is moving court that the relief by way of cost be made conditional to the granting of leave to the applicant, the said Vatukoula Express Bus Service. I shall set down the two reliefs claimed by Mr. Koya.

> "(A) That the Applicant do pay to the Second Respondent costs thrown away and that such costs be awarded on the basis of common fund and solicitor/client relationship or in the alternative on a higher scale under Order 62 of the High Court Rules, 1988 and Appendix 4 thereof;
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> (B) That the Second Respondent do have liberty to apply for an Order that an inquiry be made as to the quantum of damages sustained by the Second Respondent between 13th November,

> 1986 (when an Interim Injunction was granted to the Applicant) and 1st April, 1987 (when the said Interim Injunction was dissolved) by reason of the Applicant operating Vatukoula/Suva (return service daily) under the expired Road Service Licence No. 12/9/46; and the Applicant do pay the same including the costs of such enquiry.

The relief under costs is again divided into two parts coming under the invocation of two different High Court Rules which I would like to set down below.

A(1) Costs on terms
A(2) Costs on Solicitor-client basis

In support of A(1) he invokes Order 21 rule 3 of the High Court Rules 1988 and in support of the 2nd limb of the claim A(2) he invokes Order 62, r. 25(4) of the High Court Rules.

Order 21 rule 3 reads as follows:

> "(1) Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against whom it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks just.
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> (2) An application for the grant of leave under this rule may be made by summons or motion or by notice under Order 25 , Rule 7."

While appreciating the chronology of main events drawn up by Mr. Koya which no doubt facilitated me a great deal, I would like to expose a little of the history of the case so as to fully understand the present application before Court.

It is reliably understood that Vatukoula had had a Road Service Licence (R.S.L.) to ply their buses from Vatukoula to Suva and back from 1981. It is admitted by all parties to this case that the Transport Control Board refused to renew it in 1986. Then Vatukoula Express Bus Service filed papers for leave for judicial review of the decision of Transport Control Board followed by papers for judicial review and an interim injunction. The interim injunction was granted to the said applicant. Justice Rooney discharged the interim injunction on the summons taken out by Sunbeam. The rest of the events are the same as given in the chronology of events by Mr Koya.

As is seen in the file as well as in the chronology of events the interim injunction was discharged on 1/4/86 and a second application for interlocutory injunction by the very same Vatukoula Bus Service was refused by Justice Sheehan. Therefore what matters to court to consider the question of damages (if any) is the interim injunction granted earlier and discharged subsequently and not the second one which was of no consequence to the issue of damages.

Taking the first major relief of costs which is being considered from two angles - namely as a term to be imposed to the granting of leave and on a solicitor-client basis, I have no doubt in my mind that this is a fit case where costs have to be ordered. Mr. Shankar himself has not expressed any opposition to the granting of the costs.

The court has the discretion both to grant costs and also to make it a condition to the granting of the applications to discontinue. No doubt the Order is clear that the discontinuance may be allowed on such terms as to costs. The Order is one thing, the application of it to a set of given circumstances is another. The applicant is financially capable of meeting the costs if and when ordered. It is a Company plying buses. It is quite reasonable to think that the applicant will pay. There is no possibility neither is there a probability for the applicant to abscond to evade payment. I therefore do not consider that the payment of costs be made a term to the application.

Mr. Koya is seeking an order that costs be awarded on the basis of common fund and solicitor/client basis or alternatively on a higher scale. In support of this claim, he has mentioned that there was inordinate delay on the part of Vatukoula Express Bus Service to seek Judicial Reviews; it lacked *bona fides* in the applications; there were no reasons given for the discontinuance. In my view even the cumulative effect of all these reasons does not warrant an order for costs on the higher scale.

Furthermore this case did not go beyond an interlocutory stage and the decision in Giles v. Randall [1915] 1 KB 291 is of assistance to me not to allow higher scale costs in the instant case. I therefore order costs thrown away against the applicant for the second respondent and the first respondent on party to party basis. In the absence of any opposition to the granting of the leave to discontinue the application for the Judicial Review, I do allow the application of the Applicant subject to the payment of costs as ordered above.

Now I shall come to the second major relief claimed by Mr. Koya. To determine this issue of damages, I can greatly rely on the ruling of Justice Rooney. He is the Justice who dissolved the interim injunction on 1/4/86 on the summons taken out by Mr. Koya. Justice Rooney has remarked thus on the question of *locus standi* of the Sunbeam Transport Limited: 'It is to be noted that the existing interim injunction does not directly affect Sunbeam. It does not require Sunbeam to do or refrain from doing anything. The injunction does not constitute a Road Service Licence under Section 63 of the Traffic Act (Cap 176), it merely prevents the Transport Control Board but not any other authority from interfering with

the operation of the applicants buses under the terms of the expressed Road Service Licence.'

He has further remarked that, the interim injunction indirectly affects Sunbeam and the Third Respondent (Reliance) in as much as they are in competition with the applicant on the route covered by the Road Service Licence which has expired.

In his ruling he also remarked that although 'it is perhaps unusual for a party who is not directly affected by an injunction to apply for its discharge the present application by Sunbeam has not been made with any objection based upon the ground that it has no *locus standi* to apply'.

These remarks of Justice Rooney all go to show that the Sunbeam, although indirectly, is not directly affected by the issuance of the interim injunction. But Justice Rooney has not taken that ground as the one for the dissolution of the interim injunction. It is none other than the suppression of material facts that has caused him to dissolve the interim injunction. There is overwhelming authority to the effect that an interim injunction obtained *exparte* can be discharged on the non observance of *uberima fides* principle. Going further on the premise, it is most unreasonable and misleading to suppress a material fact on the obtaining of an interim injunction. The court hears of no opposition, sees no opposition and considers no opposition other than the one sided version placed on affidavit when ordering an ex parte interim injunction. The decision in Republic of Peru v. Douglas Brothers & Company 55 L.T.R. 802 is in support of the above. There are many more recent decisions which have followed this. Justice Rooney has remarked thus: -

> "It appears to be the position that when the applicant applied on the 13th November 1983 for leave to apply to review the decision of the Board not to renew the applicant's expired licence, it had not finished its dealings with that authority. When it applied for and obtained an interim injunction it still had expectations that the Transport Control Board might neither grant a temporary licence or a new licence. If the court had been so advised it might have decided that it would be the better course to refuse an interim injunction until the intention of the Board, which was due to meet on the same day, had become known. I t follows that the failure to disclose the existence of these later applications to the Transport Control Board were material and could have affected the manner in which the Court exercised its discretion.
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> I accept the proposition that whenever a party moves this Court for relief ex parte upon which an order may be made affecting the rights of another, without the person concerned being given an opportunity to be heard, the party so applying must act with the utmost good faith and made a full disclosure of all relevant material which might have a bearing on the Court's decision. Failure to do

so, places the Court in a false position and may induce it to make orders grossly prejudicial to the rights of others."

A With regard to the enforcement of the undertaking to pay damages by the applicant I seek support in the decision of Smith v. Day (1882) 21 Ch.D. 421. It is no doubt clear that the court can exercise its discretion to enforce the undertaking re damages given by a party to court. The decision is clear and unanimous among all the Judges that if the court is misdirected in the obtaining of the interim injunction by the suppression of material facts and the non observance
B of utmost good faith, damages can be granted to the side that suffered monetary losses by the issuance of the interim injunction. There are other reasons why damages may not be allowed such as the very minimal and trivial nature of the damages or delay in claiming the damages and a mistake on the part of the Judge.Primarily I see no reason why damages should not be allowed for there is a clear indication highlighted by Justice Rooney regarding the suppression of
C material fact. Justice Jessel M.R. in this case has said that "I doubt whether you are entitled to it. This is not like an action for damages. A Plaintiff who gives an undertaking pays damages if he has suppressed material facts or otherwise allowed the injunction improperly but I do not think that the Defendant is entitled to damages because the Judge has made a mistake".

D I therefore rule that Sunbeam Transport Limited is entitled to damages and the Chief Registrar is hereby directed to assess the damages arising out of the grant of the interim ijunction to the applicant and 2nd Respondent is entitled to costs of inquiry into damages.

(Applications granted.)

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