Entresol Louis Cyrano & ORS v Saltlake Resorts Ltd

2004 SCJ 305 2004 MR 268

IN CHAMBERS

IN THE SUPREME COURT OF MAURITIUS

In the matter of:

Louis Cyrano Entresol & Ors

Applicants

v.

Saltlake Resorts Ltd.

Respondent

In the presence of:

1. The Director of Department of the Environment EIA DESK

2. The Minister of Environment and National Development Unit

Co-Respondents

JUDGMENT

The four applicants are fishermen from the village of Bel Ombre and neighbouring localities. On 27 October 2004, on their ex-parte application, I granted an interim injunction restraining and prohibiting the respondent company, the promoter of a hotel resort in the said region, and/or its préposés from proceeding with any beach and lagoonal works pending the determination of the appeal lodged before the Environment Appeal Tribunal. Affidavits have now been exchanged in relation to whether the interim injunction should be made interlocutory.

Section 54(2) of The Environment Protection Act 2002 (the Act) provides that within 30 days of a decision of the Minister to whom responsibility for the subject of the environment is assigned, any person may appeal to the Environment Appeal Tribunal set up under section 53 of the Act. On 5 October 2004, an Environmental Impact Assessment (EIA) licence was granted by the Ministry of Environment and National Development Unit to the respondent company "for the construction of a 35 m jetty, the floating pontoon and the repositioning of the existing boulders for the creation and profiling of swimming zones 1 and 2". Purporting to act under section 54(2), on 21 October 2004, the four applicants lodged an appeal before the Tribunal. I am given to understand that the appeal was called, the first time, before the Tribunal on 9 November 2004 and the date of hearing is not known yet.

On the other hand, on 15 October 2004, the Ministry of Environment with the agreement of the Ministry of Fisheries approved the commencement of works and such works were in progress until the grant of the interim injunction. The need for the urgent execution of such works has been stressed by the respondent company as the hotel is to open shortly and has already received bookings. Indeed it is urged on behalf of the respondent company that unless the beach and lagoonal works are completed on time for the opening of the hotel, it will suffer disastrous financial consequences.

It is the contention of the respondent company that the interim injunction should be discharged on the following grounds:

(a) the Judge in Chambers does not have jurisdiction to grant the order prayed for;

(b) the applicants have failed to make a full and frank disclosure and a fair presentation of their case at the time they made the ex-parte application to the Judge in Chambers;

(c) the applicants have been guilty of laches;

(d) the applicants cannot vindicate an alleged public wrong;

(e) the applicants have not established any right, let alone any legal right, that the Judge in Chambers should protect;

(f) the appeal, to which the respondent has not been made a party, may take several months to be determined;

(g) the applicants have not established a case, let alone a serious case, for the order to issue;

(h) the balance of convenience lies clearly in favour of the respondent;

(i) any alleged prejudice to the applicants (which is denied) can be compensated in cash and the respondent has ample means to compensate the applicants.

As regards the challenge of my jurisdiction to grant the interlocutory injunction, it is submitted on behalf of the respondent company that, in the absence of a substantive action before the Supreme Court, the present application is not maintainable. This stand is shared by learned Counsel for the co-respondents. The decisions in Yadally v. Sohotoo and Anor [1958 MR 194] and Bundhoo v. Baichoo [1979 SCJ 13] are referred to as authorities for such proposition.

Learned Counsel rightly conceded however that the challenge of my jurisdiction is taken with diffidence. If I am to understand learned Counsel, since there is no actual main action before the Supreme Court seeking relief as per the injunction applied for, I am precluded from granting such interlocutory relief. This is not my understanding of the powers of the Judge in Chambers as regards injunctions. That an injunction is only a remedy is trite law. It can in most cases only be granted if the applicant has a cause of action entitling him to substantive relief. This well settled principle is described in the words of Lord Diplock in the oft quoted case of The Siskina [1979 AC 210] at page 256:

"That the High Court has no power to grant an interlocutory injunction except in protection or assertion of some legal or equitable right which it has jurisdiction to enforce by final judgment, was laid down in the classic judgment of Cotton L. J. in North London Railway Co. v. Great Northern Railway Co. [1883 11 QBD] 3030, 39-40, which has been consistently followed ever since".

It may be remembered that in the case of The Siskina, the House of Lords refused the injunction on the ground that the defendant, a foreign company, was not amenable to the jurisdiction of the Court.

What the law requires is that the applicant has a legal or equitable right which can be enforced by the Court and in relation to which interlocutory relief is sought. In many instances, the applicant seeks the interlocutory relief in connection of a main case which is awaiting trial. In many others - textbook writers refer often to cases in restraint in trade as examples - the applicant may choose not to proceed with the main case. If the claimant has a substantive cause of action, his application for interlocutory relief in the nature of an injunction is maintainable. It is not required of him to have actually lodged a main case. Thus, if the applicants are successful in the present application and in their appeal before the Tribunal, they may legitimately not consider a main case. The injunction prayed for is pending the hearing of the appeal before the Tribunal. Ground (a) therefore fails.

Do the applicants have a right in law for the enforcement of which the respondent is amenable to the jurisdiction of the present Court? I now turn to grounds (d), (e) and (f) which were argued together. The right in law of the applicants to fish at and around Bel Ombre, thereby earning their livelihood is seriously put into question by the respondent company. To my mind, though, such right in law undoubtedly exists if it is interfered with to such extent that special damages result therefrom, such right being based in tort. I am fortified in my view by examples of injunctions granted in cases of pollution given in N. D. Basu's Law of Injunctions (3rd - Enlarged and Revised - Edition), although the learned author speaks of the existence of equitable right. I read at page 623:

"Pollution. Injunction to protect water rights are very common illustrations of equitable intervention because of the inadequacy of legal remedies. The principle governing the equitable jurisdiction are essentially the same as in nuisance, the legal wrong being in the same class of torts. For a more detailed statement of these principles, therefore, reference should be made to the preceding chapter (4): herein are simply stated the more general rules as illustrated in the case on water rights. Pollution of running waters is a matter of frequent injunction (5). The grounds of the jurisdiction are to prevent multiplicity of acts because of continuing or recurring wrong (7), or to prevent irreparable injury (6), or the fact that the damages are not susceptible of estimation, and hence a verdict would be in the nature of conjecture (8). ….."

What is applicable in cases of alleged pollution is all the more applicable to cases of alleged damage to the environment. Grounds (d), (e) and (f) accordingly, in my view, fail.

Under ground (b), it is argued that the failure of the applicants to disclose in their application that they did not submit comment/representation to the Director of the Department of Environment, must be fatal to the application. This view is shared by learned Counsel for the co-respondents. Section 20 of the Act provides that an EIA report submitted in connection with an application for an EIA licence shall be open for inspection. The Director of Environment shall give notice of public inspection in the Gazette and also in two dailies and the public may submit written comments within a specified time. It is not denied by the applicants that they did not submit comments and/ or representations to the Director. However it is averred by them that they only took cognizance of the notices in the course of the present application in the affidavits of the Acting Director. Also it is averred they have and had no duty under the Act to submit comments/representations. Further, section 54(2) of the Act which creates the right of appeal to the Tribunal, does not lay down as prerequisite to the lodging of an appeal the prior submission of comments/representations to the Director.

There is no doubt that non-disclosure of material facts may lead to the discharge of an interim injunction, even if such non-disclosure was innocent and not intended to mislead. Learned Counsel for the respondent company cited the decision of Balancy J. in Robert Lesage and Ors v. The Town and Country Planning Board [1997 SCJ 427] where the requirement of a full and frank disclosure of material facts in an application for injunctive is stated as follows:

"….. failure to disclose material facts is an overriding consideration which may lead to an interim injunction being discharged even where the normal criteria for the grant of an injunction are satisfied ….."

However the grant of an injunction is a discretionary exercise and each application must be judged on its merits. It is not therefore surprising that in the same case, reference is made to the observations of Glidewell L. J. in Lloyds Bowmaker Ltd. v. Britannia Arrow Holdings [1988 1 WLR] 1337 at pp

1343H-1344A:

"When the whole of the facts, including that of the original non-disclosure, are before (the Court, it) may well grant ….. a second injunction if the original non-disclosure was innocent and if an injunction could properly be granted even had the facts been disclosed ….."

In the present application, not only do the applicants state that they were unaware of the notices inviting public comments but also that the authorities and the respondent company were at all times aware of their objections to beach and lagoonal works. In fact, a meeting was held on 6 February 2003, where the tourism development project of the region of Bel Ombre was presented by the Chairman of Cie Sucrière de Bel Ombre Ltd. to the "forces vives" of the locality, members of the village of Bel Ombre/ St. Martin and Baie du Cap. The meeting was held in presence of the hotel promoters including the representative of respondent company. At the meeting, to a question from a fisherman, the Chairman "said that there was no plan to any digging of (sic) other marine works in the lagoon in the initial hotel projects. But, he guaranteed that all legal and environmental aspects would be protected if there would be any future marine projects and, the fishermen would be in the frontline of communication if such a case occurred". (Emphasis added). The applicants also state that the hotel promoters including the respondent and themselves were present at a meeting held on 30 August 2004 by the Ministry of Fisheries in connection with the Integrated Resorts Scheme of Bel Ombre. At the meeting they again voiced their objections. The presence of the applicants at the meeting is not denied by the respondent company although the fact that they voiced objections is denied.

In the light of the above, had all the facts been disclosed, they would have shown that the applicants objected at all material times and the fishermen were given the assurance that they would be "in the frontline of communication", should there be a marine project. Accordingly, the present application comes within the instances in which as observed by Glidewell L. J., an injunction could still properly be granted.

I now turn to the issue raised in ground (g) viz. whether the applicants have raised a serious question to be tried. It is submitted by learned Counsel for the respondent company and the co-respondents that the 8 grounds of

appeal invoked before the Tribunal are vague and accordingly, it cannot be said that there is a serious question to be tried. From the tenor of section 55 of the Act, appeals before the Tribunal are full hearings at which evidence is admitted. Section 55(2) and (3) read as follows:

" (2) Where the Tribunal adjourns any proceedings, it may resume them at such place and time as the Chairman of the Tribunal may determine.

(3) Subject to any regulations made under Section 58, all appeals before the Tribunal shall be instituted and conducted –

(a) as far as possible in the same manner as proceedings in a civil matter before a district Magistrate;

(b) in accordance with the law of evidence in force in Mauritius;

(c) in public, except with the agreement of all the parties, or where the Tribunal so orders in the interests of public order."

The applicants have filed affidavits to the effect that the works carried out by the respondent company are detrimental to the environment. The issue raised is eminently within the attributes of the Tribunal and, in the light of the affidavits and the attributes of the Tribunal, it cannot be said that no serious question has been raised. That the contents of the applicants' objections have been taken into account by the Director of Environment does not preclude the Tribunal from considering the same objections.

I must now consider whether the balance of convenience lies in favour of the granting or the refusing of the interlocutory relief sought. On the one hand, the applicants assert that the works undertaken by the respondent company will deprive them of their livelihood and also of a way of life, thus causing irreparable injury which cannot be compensated by damages. On the other hand, the respondent company rejoins that the granting of the injunction will cause great financial loss which the applicants who have limited means, will be unable to compensate. It is in these cases where damages prove to be inadequate remedies and the granting or refusing of the injunction will cause equal prejudice to the parties that a status quo is ordered by the Court. In the oft quoted words of Lord Diplock in American Cyanamid Co. v. Ethicon Ltd. [1975 AC 396] at 408F, "where other factors appear to be evenly

balanced it is a counsel of prudence to take such measures as are calculated to preserve the status quo". Such "status quo" is as conceded by learned Counsel for the respondent company that which prevailed at the time of the issue of the licence. In my view it should be at the time the licence is issued but before the start of the works by the respondent company.

In addition to what I have stated above, it is furthermore my view that on the facts and in law, it is just and convenient to grant the interlocutory injunction prayed for. The respondent company applied for an EIA licence to make coastal improvements works on the beach on 5 July 2004. On 5 October 2004, it was issued with the licence described above. In the letter granting the licence, the Acting Director of Environment rightly drew the attention of the respondent company that "(This) licence is granted subject to any appeal within 30 days as from the date of issue, as specified under section 54(2) of the Environment Protection Act 2002". On 15 October 2004, the respondent company started the works. At the time the works started, the decision of the Minister approving the EIA had not yet been published in the Gazette and in the press as required under section 23(5) of the Act. The decision was published in the issue of Le Mauricien of 25 October 2004. Common sense dictates that since the legislator, in its supreme wisdom, has granted a right of appeal from the decision of the Minister, the commencement of the works by the respondent company cannot be effected before the lapse of the delay for appeal. Otherwise the right of appeal is illusory and rendered nugatory.

One final issue is whether I should require the applicants to "fortify" their undertaking in damages to the respondent company. Learned Counsel for the applicants cited the decision in Allen v. Jambo Holdings Ltd. [1980 1 WLR] 1252 as authority for the proposition that the applicants who are of limited means should not be denied the remedy of an injunction on the ground that an undertaking given by them in damages may prove of no or little value. I respectfully agree.

For the above reasons, I grant the interlocutory injunction prayed for. With costs. I certify as to Counsel.

A. F. Chui Yew Cheong Judge

15 November 2004

For Applicants: Mrs. Attorney A. Prayag

Mr. E. Sinatambou, of Counsel

For Respondent: Mr. Attorney R. Bucktowonsing

Mr. R. Pursem together with Mr. R. Unnuth, of Counsel

For Co-Respondents: Mrs. F. Maudarbaccus-Moolna, Chief State Attorney

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