CORNEL PERERA
v.
SUREN WICKREMASINGHE AND OTHERS

COURT OF APPEAL.
GUNAWARDANA, J.
C.A. NO. 785/97.
CA/LA NO. 187/97.
D.C. COLOMBO NO. 4413/SPL.
OCTOBER 9, 10, 27, 1997.
NOVEMBER 10, 13, 17, 21, 1997.
DECEMBER 8, 9, 11, 12, 19, 1997.
JANUARY 27, 1998.
FEBRUARY 3, 11, 13, 26, 1998.

Injunction – Interim Injunction – Exercising rights and performing as Managing Director – Appointment of Managing Director for life – Article 120 of the Articles of Association – Interpretation – Object of an Interim Injunction – Procedural unfairness – Procedural impropriety.

The learned District Judge refused the application for an interim injunction restraining the defendants-respondents from interfering with or preventing the plaintiff-petitioner from exercising his rights and performing his functions as the Managing Director of the Company.

The plaintiff-petitioner challenged the appointment of the 1st defendant-respondent as the Managing Director of the Company on the grounds that –

(1) the removal of the plaintiff-petitioner from the office of Managing Director offended against the preliminary Agreement.

(2) the meeting of the Board of Directors, at which the said acts were done had not been duly convened.

Held:

1. Article 120 states that 'The Directors may, from time to time, appoint one or more of their body to the office of Managing Director for such period on such terms . . . subject to the terms of any agreement'.

It is seen that the provision in the preliminary agreement stops short of saying that Cornel Perera is appointed for life, nor is it said so in the Articles. Further, Article 120 provide for the appointment of a Managing Director "from time to time" and also provides for the appointment of more than one Director to the Office of Managing Director and the revocation of such appointment.

Thus, the appointment of the 1st respondent-respondent as the Managing Director is *prima facie* valid for it had been done as provided for by the said Articles of Association.

2. Insufficiency of the Notice (if any) would not make the Court inclined to invalidate an appointment when there is no material to even remotely suggest, let alone show that the quality or the substance of the appointment or decision to appoint or revoke the appointment of the plaintiff-petitioner had been in the slightest degree affected thereby.

Per Gunawardana, J.

"The grounds of procedural fairness relied upon would not themselves persuade the Court to invalidate an appointment or a decision when the Court knows that *prima facie* the case is lost on its merits and the procedural points were being pursued as a last ditch means of invalidating the appointment.

The crucial question is "Had the alleged grounds of procedural unfairness resulted in serious injustice or prejudice for the plaintiff petitioner or would preventing by an interim injunction the operation of the decision to appoint the 1st defendant-respondent till the final determination of the action may well cause injustice greater than leaving the said appointment in place."

APPLICATION in Revision from the Order of the District Court of Colombo.

Cases referred to:

1. *Challendar v. Royle* – 36 ch. D 425.
2. *Pishora Singh v. Smt. Lajo Bai* – 1975 – 77 PLR 30.
3. *Raman Hosiery Factory v. J. K. Synthetic Ltd.* – AIR 1974 Delhi.
4. *Abubucker v. Kunhamoo* – AIR 1958 Mad. 287.
5. *State of Bihar v. Ganesh* – 1969 Pat LJR 177.
6. *American Cyanamid Co. v. Ethicon Ltd.* 1975 – AC 396, 1975. 2 WLR 316, 1975 1 ALL ER 504.

S. Sivarasa, PC with *S. L. Gunasekera, S. Mahenthiran, Nihal Fernando* and *N. R. Sivendran* for plaintiff-petitioner.

I. S. de Silva with *M. A. Sumanthiran* for 2nd, 4th, 5th, 6th and 12th respondents.

M. A. Sumanthiran for 7th and 8th respondents.

I. S. de Silva with *Harsha Cabraal* for 10th and 11th respondents.

Cur. adv. vult.

April 03, 1998.

GUNAWARDANA, J.

This is an application in revision in respect of an order made by the learned District Judge dated 03.10.1997 refusing an application for an interim injunction (to be operative until the final determination of the action) restraining 1st – 8th defendant-respondents from interfering with or preventing the plaintiff-petitioner from exercising his rights and performing his functions as the Managing Director of the Hotel Developers (Lanka) Ltd. which is a limited liability Company.

The background facts relevant to the aforesaid application are as follows:

The plaintiff-petitioner had been the Managing Director of the Hotel Developers Lanka Ltd. and has been voted out of or removed from the said office at a meeting of the Board of Directors held on 28th June, 1995, which board had appointed the 1st defendant-respondent (Suren Wickremasinghe) to the said office.

It was admitted at the hearing before me, or, at least, it must be taken to have been so admitted, that there were altogether 11 Directors and that all 8 of them who were present voted in favour of the 1st defendant-respondent at the aforesaid meeting – for the tenor of the submissions of the plaintiff-petitioner's counsel, which submissions were as follows, couldn't have meant anything else: ". . . that purporting

to appoint the 1st defendant-respondent as the Managing Director, 8 Directors had acted in collusion and there could not have been collusion, had the 8 Directors who were present not acted in concert . . . the 8 Directors who were present obviously had acted in unanimity . . ."

In this action that has been filed in the District Court seeking a permanent injunction as the ultimate relief, the plaintiff-petitioner has impugned or mounted a challenge to the appointment of the 1st defendant-respondent on the following 03 grounds but the counsel for the plaintiff-petitioner on 08.12.97 intimated to Court (at the hearing of this application in revision) that he would not be pressing or relying on the ground (*c*) mentioned below for the purpose of supporting this application (in revision):

(*a*) that the removal of the plaintiff-petitioner from the office of managing director and the appointment of the 1st defendant-respondent thereto offended against the preliminary agreement (P6) wherein it is provided that the plaintiff-petitioner (Cornel Perera) shall be the managing director;

(*b*) that the said removal of the plaintiff-petitioner and consequent appointment of the 1st defendant-respondent were bad inasmuch as the meeting of the Board of Directors, at which the said acts were done, had not been duly convened;

(*c*) that the Board of Directors who removed the plaintiff-petitioner and appointed the 1st defendant-respondent had not been validly constituted.

The fact that the 3 Directors who chose to keep away or claimed that they were prevented from attending the meeting, on the relevant date, due to such factors as inadequacy or the shortness of the notice and the like were the plaintiff-petitioner, his wife and another.

It is a trite observation to make that an interim injunction, such as had been prayed for by the plaintiff-petitioner, is a preventive remedy which is discretionary and the claimant for such relief must

show that he has superior equity in his favour entitling him to the grant of such interim relief by way of temporary injunction. The object of an interim or temporary injunction is to maintain the *status quo* so that if plaintiff in the action ultimately gets judgment in his favour, that judgment would not be rendered nugatory or ineffectual. But, the party who seeks the intervention of Court by way of an interim injunction must, as a general rule, show 3 things:

(*a*) that he has a *prima facie* case which means that it is more probable than not that he is entitled to the ultimate relief prayed for in the action;

(*b*) that in the event of withholding the interim injunction the party seeking it, ie the plaintiff-petitioner in this case, will suffer an irreparable injury;

(*c*) that the balance of convenience is in his favour, ie the plaintiff-petitioner, in this case, has to show that inconvenience that he will suffer in consequence of his being denied the relief by way of an interim injunction will outweigh the inconvenience that the defendant-respondents will undergo as a result of the grant of the interim relief by way of an injunction.

From the above one clear principle emerges that is that when as in this case, the case sought to be set up by the plaintiff is basically improbable in that there is no fair chance or probability of the plaintiff-petitioner being entitled to the relief asked for by him in the action or of the action being ultimately decided in his (plaintiff's) favour there is neither the basis nor reason for preserving the *status quo* until the final determination of the action – because it is more likely rather than unlikely that the ultimate decision will be against him, ie (the plaintiff-petitioner) as would be clear from the sequel. As pointed out above, in considering whether an interim injunction ought to be granted or not, the first point that traditionally demands consideration is this: has the plaintiff-petitioner made out, a *prima facie* case in order to satisfy the Court that he has a fair question to raise as to the existence of the legal right which he has set up or seeks to establish in the action.

The plaintiff-petitioner, in the circumstances of this case, can do that, ie show that he has a fair question to raise as to his (plaintiff-petitioner's) legal right to the ultimate relief he has claimed in the action only if he can show, on the material before or available to the Court, as at this stage, that it is more probable than not that the removal of himself from the office of the Managing Director, and the appointment of the 1st defendant-respondent thereto, is *prima facie* invalid or that the case of the party, ie that of the plaintiff-petitioner, seeking the interim injunction is more probable than not. The argument of the learned President's Counsel for the plaintiff-petitioner, calling in question the validity of the said removal of the plaintiff-petitioner and his replacement with the 1st defendant-petitioner is basically two-fold: (1) that the said acts, ie the removal and appointment complained of were invalid primarily, if not solely, due to the fact that such acts offended against the preliminary agreement, one of the terms of which (agreement) was as follows: "The Managing Director of the new company shall be Cornel L. Perera" – who is the plaintiff-petitioner; (ii) that the removal of the plaintiff-petitioner and the appointment of the 1st defendant-respondent were invalid by reason of the fact that the meeting of the Directors at which the said acts were done was "not duly convened."

I shall consider the above points in order, to consider whether on the material before me, as at this stage, one can say that there is a probability of the plaintiff being held entitled to a permanent injunction restraining the 1st-8th defendants-respondents from preventing the plaintiff-petitioner from exercising his rights and performing his functions as the managing director – that being the ultimate or final relief prayed for in the action. If that is so, that is, if there be such a probability or if there be a serious, as opposed to being frivolous or vexatious question or if there is a *prima facie* case on the point which is essential to entitle the plaintiff to complain of the "defendants' proposed activities" – then there is good reason why the *status quo* ie the position prior to the removal of the plaintiff-petitioner from the office of managing director should be preserved; if not, as Russel, LJ. had said: "that is the end of the claim to interlocutory relief." (1974 – F.S.R. 333).

Expanding on the point, viz that the said removal and appointment in question are bad inasmuch as it violates the preliminary agreement (P6) the learned President's Counsel for the plaintiff-petitioner at first submitted that the directors as provided for in article 120, had the right, from time to time, to appoint a managing director but at every turn or on every occasion that right was exercised – the directors must necessarily appoint the plaintiff-petitioner, and no one else, for the Preliminary Agreement had provided that the plaintiff-petitioner shall be the managing director. But, at a later point of time, in the course of his submissions, the learned President's Counsel introduced somewhat of an elegant variation to his earlier submission and took up the position that as the board of directors could not remove the plaintiff-petitioner at all from the office of managing director as he (the plaintiff-petitioner) had not been appointed by the directors, the question of making an appointment of a managing director did not arise until the plaintiff-petitioner Cornel Perera relinquished the office, of his own accord, or so long as the plaintiff-petitioner remained in that office (vide the submissions made on 12.12.1997). But, even the latter submission unmistakably carries with it the suggestion or the implication that the preliminary agreement (P6) is the source of the appointment of plaintiff-petitioner as the managing director and that in terms of the preliminary agreement (P6) the duration of that appointment is unlimited in point of time. In fact, the learned President's Counsel went to the length of saying thus : "Long and short of my submission is that article 120 is inoperative till Mr. Cornel Perera chooses to remain in office". The submission of the learned President Counsel for the plaintiff-petitioner that the board of directors had no right to remove the plaintiff-petitioner from the office of the managing director inasmuch as the plaintiff-petitioner had not been elected or appointed to that office by the directors seems to be belied, strangely enough, by the averment at paragraph 25 (*c*) of the plaint itself which is as follows :

" . . . The board of directors elected the plaintiff as its first chairman and managing director in conformity with the provisions in the said preliminary agreement . . . "

The position of the plaintiff-petitioner is that the appointment of the 1st respondent to the office of managing director is void inasmuch as that appointment offends against the preliminary agreement dated 30.01.1983 wherein it is stated : "The managing director of the new company shall be Mr. Cornel L. Perera".

The argument of the learned President's Counsel for the plaintiff-petitioner is that no one else other than plaintiff-petitioner (Cornel Perera) can be appointed to the office of managing director during the lifetime of Cornel Perera or so long as, to use the very words of the learned President's Counsel, "Cornel Perera does not disqualify himself or till he is removed by Court". One of the ways, enumerated by the learned President's Counsel for the plaintiff-petitioner, in which Cornel Perera would be disqualified was by becoming insane although the learned President's Counsel, to my recollection, stopped short of spelling out precisely the cirumstances in which Cornel Perera could be removed by the Court. But, it is to be observed that article 120 which provides for the appointment, amongst others, of the managing director reads thus : "Directors may, from time to time, appoint one or more of their body to the office of managing director for such period and on such terms as they think fit. . .". As is well-known it is mostly, if not, solely, by the articles that the internal management of any company is governed.

The argument put forward at the beginning, on behalf of the plaintiff-petitioner, was that although article 120 clearly contemplated one appointment or even more than one appointment being made concurrently, from time to time, from amongst the directors, to the office of the managing director, so that there can be in terms of the articles more than even one managing director, at any given time, if the directors so decide – yet during the lifetime of Cornel Perera there can be only one managing director, that is, Cornel Perera himself and no one else. The learned President's Counsel for the plaintiff-petitioner added, in the early stages of the argument that if directors, acting in pursuance of the said article 120 (reproduced above) appointed "from time to time" a managing director it must necessarily be no one else other than Cornel Perera, if the plaintiff-petitioner (Cornel Perera) chooses to remain in office in which case, I am afraid, the

appointment to the office of managing director is not, or ceases to be an appointment by the directors, as provided for in Article 120, but a self-appointment. This argument rested mainly on the basis that the article 120 which provides for the appointment of the managing director operates – in the argument of the learned President's Counsel for the plaintiff-petitioner subject to the preliminary argument, which as pointed out above, states thus : "The managing director of the new company shall be Mr. Cornel Perera". In the argument of the learned President's Counsel for the plaintiff-petitioner, the article 120 operates subject to the above mentioned provision or condition in the preliminary agreement (P6), viz that Cornel Perera shall be the managing director but it is stated in the article 120 thus: "The directors may, from time to time, appoint one or more of their body to the office of managing director for such period and on such terms as they think fit and subject to the terms of any agreement . . ." The learned President's Counsel had submitted that in the matter of the appointment of the managing director in terms of the Article 120, the condition that is operative or that has the principal relevance is that the appointment has to be made "subject to the terms of any agreement" – as had been stated in the aforesaid article 120 which means that the appointment has to be in conformity with the provisions in the preliminary agreement wherein it is stated that Cornel Perera shall be the managing director. In this context itself it would be germane to point out that this provision in the preliminary agreement stops short of saying that Cornel Perera is appointed for life; nor is it said so in the articles of the association, which, be it noted, were formulated subsequent to the preliminary agreement. If Cornel Perera is irremovable by the directors, as argued by the learned President's counsel, who appeared for the plaintiff-petitioner then article 120 which article was formulated subsequent to the preliminary agreement, wouldn't have provided, as in fact it had done, for even the revocation of the appointment of the managing director by the board of directors. If, as argued by the learned President's Counsel for the plaintiff-petitioner, the plaintiff-petitioner had been appointed for life and if no one else could be appointed during his lifetime or till he is disqualified or relinquished office of his own accord, or till the plaintiff-petitioner was removed by the Court provision wouldn't have been made, as in fact it had been done, in article 120 in the following manner: "The directors

may, from time to time, appoint one or more of their body to the office of managing director . . ." which is exactly what the directors did when they appointed the 1st defendant-respondent thereby ousting the plaintiff-petitioner.

And, if the plaintiff-petitioner is to be the sole managing director for life or so long as he chooses to remain in office as the managing director, which was the pith and substance of the argument of the learned President's counsel who appeared for him – one cannot divine nor explain why the relevant article 120 (reproduced above) governing the appointment of the managing director had not only provided in the said article, as pointed out above as well, for the appointment of a managing director "from time to time" but even provided for the appointment of more than one director to the office of managing director and the revocation of such appointment of managing director/ directors.

Thus, it is clear that the appointment at a meeting by 8 of directors – the other 3 being absent – of the 1st defendant-respondent as the managing director is, to say the least, *prima facie* valid for it had been done as provided for by the relevant article, ie article 120 of the association.

The initial argument of the learned President's counsel for the plaintiff-petitioner that although the said article 120 provided for the appointment of a managing director/directors "FROM TIME TO TIME" – yet directors had no choice, but at every time to appoint the plaintiff-petitioner (Cornel Perera) as the managing director only – savours of legerdemain – for if the plaintiff-petitioner had necessarily to be appointed at every turn although appointment was made, from time to time – then the appointment "from time to time" as provided in article 120, would border on ritualism, if in fact, it is not veritably so.

However, inasmuch as the appointment of the 1st respondent is challenged on the basis of what may be termed, "procedural impropriety" as well, it is incumbent on the Court to consider whether such alleged impropriety had affected the quality, if not the substance, of the appointment in question which appointment, as explained above,

is quite regular when tested with reference to the article applicable to or governing the matter. It is to be recalled, as pointed out at page 09 hereof, a submission was also made by the learned President's Counsel to the effect that section 120 of the articles of the association which provides for the appointment of a managing director "is inoperative till Cornel Perera chooses to remain in office". But, this argument is wholly unacceptable not only because it is invariably by the articles of the association that a matter such as the appointment of a managing director has to be dealt with or is governed but also because the investment agreement (P12) itself, on which the President's Counsel for the plaintiff-petitioner too placed much reliance, had in Article 10.01 provided thus: "The company shall be managed by the board of directors pursuant and subject to the provisions of the preliminary agreement, this agreement, the memorandum and articles of the association of the company and applicable laws and regulations of Sri Lanka".

So that, to say the least, it is impossible to wholly overlook the effect of the operation of article 120, as the President's Counsel for the plaintiff-petitioner had invited the Court to do, in the matter of the judging of the validity of the appointment of the managing director because, to repeat what has been stated above, the argument of the learned President's Counsel was that "article 120 is wholly inoperative till Cornel Perera chooses to remain in office".

Next to deal with alleged procedural irregularties in the matter of the appointment concerned which are enumerated in the plaint as follows:

(*a*) the said board meeting was convened by giving less than 24 hours' notice,

(*b*) was held at a place where the board meetings had never been held,

(*c*) was held at a place other than a place where all directors could freely attend,

(*d*) no notice that the meeting was being summoned to remove the plaintiff from being the chairman and managing director was given,

(*e*) no cause was stated showing urgency,

(f) no agenda whatsoever for the board of directors meeting was given for the meeting convened at such short notice.

Of the above alleged irregularities one that merits any or the most attention is the complaint that the length of the notice convening the meeting at which the 1st defendant-respondent was appointed displacing the plaintiff-petitioner was not adequate for inherent in that complaint is the suggestion that the plaintiff-petitioner was prevented from attending the meeting owing to the shortness of the notice. The plaintiff-petitioner resides at No. 16, Alfred Place, Colombo 03.

The meeting was also held in Colombo. It is interesting and even instructive to note that of the 11 directors only 3 directors had found the length of the notice to be inadequate and two of them were the plaintiff-petitioner and his wife (who was also a director). Of course, the counsel for the plaintiff-petitioner submitted that the other director who did not attend coudn't do so because of his professional engagements. In this regard, it is worth considering the submission made by the learned President's Counsel for the plaintiff-petitioner when questioned by the Court as to whether the appointment of the 1st respondent could have been prevented or avoided had the plaintiff-petitioner been given "sufficient" notice. In response, the learned President's Counsel submitted that had the length of the notice convening the meeting been longer or "adequate" – the appointment of the 1st defendant-respondent could have been prevented by an injunction from Court which submission inexorably carried with it the necessary implication that the plaintiff-petitioner couldn't have mustered the support of the majority of the directors to continue in office even if he (the plaintiff-petitioner) had attended the meeting irrespective of the length of the notice or couldn't have prevented the appointment of the 1st defendant-respondent and his own displacement by the majority vote

or support of the majority of directors – for there was no need to resort to an injunction from Court if he (the plaintiff-petitioner) had the support of the majority of the directors.

Insufficiency of the notice, assuming for the sake of argument, that it was so, would not make the Court feel inclined to invalidate an appointment when there is no material to even remotely suggest, let alone show, that the quality or the substance of the appointment or decision to appoint or revoke the appointment of the plaintiff-petitioner had been in the slightest degree affected thereby. Yet, even if longer period of notice had been given there is no reason to suppose that the decision of 8 directors out of 11 directors would have been any different as had been so vividly demonstrated not so much by the counsel for the defendant-respondents' but by the submission made by the learned President's Counsel, for the plaintiff-petitioner himself, for his above-mentioned submission betrayed, if not, highlighted the fact that the appointment of the 1st defendant-respondent and the revocation of the appointment of the plaintiff-petitioner could have been prevented only through intervention of the Court, ie by means of an injunction.

The 5 grounds of procedural unfairness (set out above) which are relied upon by the plaintiff-petitioner wouldn't in themselves persuade the Court to invalidate an appointment or a decision when the Court knows that, *prima facie*, the case is lost on its merits and that procedural points were being pursued as a lastditch means of invalidating the appointment – (if possible). In assessing or judging of the quality of a decision to make an appointment regard must be had to the basic principles of fairness. The crucial question is this: Had the alleged grounds of procedural unfairness resulted in serious injustice or prejudice to the plaintiff-petitioner or would preventing by an interim injunction the operation of the decision to appoint 1st defendant-respondent till (in the circumstances of this case) the final determination of the action, may well cause, injustice greater than leaving the said appointment in place. It is manifest that even if a longer period of notice had been given and the venue of the meeting of the board of directors had been some place other than the auditorium of the

Ministry of Finance where the meeting had, in fact, been held, still, I feel assured, on facts of this case, that the plaintiff-petitioner wouldn't have attended the meeting of the board of directors at which he was removed from the office of chairman and managing director and even if he had attended he would have been powerless to have prevented his removal inasmuch as 8 of the 11 directors were in favour of his removal. When one examines the letter (P36) sent by the plaintiff-petitioner to the 1st defendant-respondent (Suren Wickremasinghe) it becomes clear, to say the least, that the plaintiff-petitioner has had a forewarning of his impending removal and that the points that had been raised regarding the insufficiency of the notice of the meeting of directors, unsuitability of the appointed meeting place and so on, are a smoke screen to conceal the real reason which caused him to boycott the meeting which reason strangely enough, is apparent on the face of the letter P36 itself which was sent by the plaintiff-petitioner himself stating his inability to attend or explaining that he was "not obliged to attend" the meeting at which the 1st defendant-respondent was appointed in place of the plaintiff-petitioner. To quote from the said letter: "I am advised that in view of the foregoing any attempt on your part to act to my detriment . . . would not only be wrongful and unlawful but be of no force or avail in law". It is not difficult to put two and two together and infer that the plaintiff-petitioner had refrained from attending the meeting at which he was removed from the office of the managing-director, not for any other reason but that he had been "advised not to attend". Even the phraseology of the solitary paragraph from (P36) quoted above betrays the hand of the lawyer or the legal adviser in drafting the letter. Upon a perusal of P36 protesting so to speak, against the holding of the meeting (at which the removal and appointment complained of were made) the impression is irresistible that the plaintiff-petitioner was conscious of or knew for certain that something was afoot to his "detriment" and that he did not attend because he would be overwhelmed by superior numbers. The fact that only 3 directors were absent at that relevant meeting and 2 of them were the plaintiff-petitioner and his wife calls for repetition. Such excuses as that given in the letter (P36), viz to cite just one example: "that only the six directors nominated by the government would feel invited and comfortable", at the suggested venue for the meeting, and by implication that he (the plaintiff-peti-

tioner) would "feel uncomfortable" at the venue where the meeting of directors was held are manifestly lacking in candour and were merely trotted out for want of something better to say. One cannot boycott a meeting on advice, as the plaintiff-petitioner had evidently done, or deliberately refrain from doing so and complain of insufficiency of notice to attend. Such a view, ie that the plaintiff-petitioner advisedly kept away from the meeting is vindicated by the fact that the plaintiff-petitioner had virtually said so, in so many words, in his letter (P36) addressed to the 1st defendant-respondent. To quote the relevant excerpt of P36: "This is to inform you firstly that in all the circumstances the two purported notices are both invalid in law and cannot oblige me to be present". The plaintiff-petitioner had in his letter clearly said that he was "not obliged" to attend which meant that he couldn't be compelled to attend. This serves to show that he could have very well attended the meeting only if he chose to do so. The plaintiff-petitioner had found that the notice that the plaintiff-petitioner had received was long enough to enable him to have sufficient time to get advice as to whether he ought to attend or not and even send a communication to the 1st defendant-respondent purport of which communication was that he (the plaintiff-petitioner) had been "advised that he was not obliged to attend". It is instructive and even interesting to note that all the directors except 3 of them found the length of the notice was long enough to enable them to attend and 2 of such directors as found the notice inadequate, as pointed out above as well, were the plaintiff-petitioner and his wife. It is also to be pointed out that there is no legal requirement as such that directors ought to be apprised of the agenda for the meeting in advance. Anyhow, there is no such requirement in the relevant articles of the association. It is to be recalled that the fact that no agenda had accompanied the notice of the meeting was one of the points raised in proof of the fact that the "meeting of the board of directors had not been duly convened".

Facts considered above would serve to show, that the plaintiff-petitioner, as was his duty to have done being the party applying for an interim injunction, has failed to establish probability of ultimate success in the action. He has failed to establish a *prima facie* case which means that he has failed to show that, "if the evidence remains

as it is (as now) it is probable that at the hearing of the action he will get a decree in his favour" – *Challendar v. Royle*[1] per Cotton, LJ. A *prima facie* case can be said to have been established in favour of the plaintiff-petitioner only if "the case were to stop at this point the tribunal of fact could find for the plaintiff without being reversed in appeal for legal insufficiency of evidence". Vide "Practical Approach to Evidence" – Peter Murphy. The Court has to make this decision even in a criminal trial when a submission of no case to answer is made, very often at the end of the prosecution case. Of course, in the 2 types of case, ie Civil and Criminal, the required standard of proof varies. In a civil case *prima facie* proof connotes *prima facie* proof on a balance of probability whereas in a criminal trial the persuasive burden or the standard of proof required of the prosecution is *prima facie* proof beyond reasonable doubt although when the defence (in a criminal trial) bears a legal burden in respect of any fact or matter – the standard required is proof on the balance of probabilities. So that for the Court to hold that the plaintiff-petitioner has established a *prima facie* case, on the facts available to Court, as at this stage or point of time, the Court must be in a position to say that it is more probable than not that the plaintiff-petitioner will really suffer an injury to his right or rights if the application for an interim injunction is refused. As had been held in *Pishora Singh v. Smt. Lajo Bai*[2] per Muni Lal Verma, J. : "the lawful exercise of right vesting in a person cannot be said to be an injury and as such the same cannot furnish a ground for granting an injunction restraining such person from exercising it". It is not to be forgotten that the 1st defendant-respondent, is exercising the functions of the managing director, since the appointment of the 1st defendant-respondent to the office of managing director, displacing the plaintiff-petitioner, which appointment is, to say the least, *prima facie* valid inasmuch as the said appointment had been made by the majority of 8 directors out of the entire body of 11 in terms article 120 of the association as explained above and it is, to all intents and purposes – to restrain him (the 1st defendant-respondent) from functioning in the office of the managing director that this application is made for an interim injunction as against him and the other defendant-respondents. It is to be observed that an interim injunction is granted in aid of a legal

right and not in violation of it and to grant an interim injunction to the plaintiff-petitioner, against the background of matters explained above – would be tantamount to conferring or according a right to the plaintiff-petitioner to function in the office of managing director when, in fact, he is not *prima facie* entitled to any such right. Interest or right of the defendant-respondents, particularly that of the 1st defendant-respondent who has been appointed as the managing director – be it noted by 8 of the entire body of 11 directors – is as relevant and important as the interest of the party seeking the interim injunction.

To say the least, probabilities are not that the plaintiff-petitioner will succeed in getting the ultimate relief prayed for in plaint but rather that he will not. In fact, the nature of this case, rather of the evidence made available to Court by plaintiff-petitioner as at this stage, is such that one need not be backward in saying for certain that the plaintiff-petitioner will fail to obtain the ultimate relief, ie the permanent injunctions prayed for in the plaint, because one cannot possibly visualise the plaintiff-petitioner adducing any more evidence at the trial than he has already done at this stage. In fact, the learned President's Counsel on being directly questioned by the Court in that regard, at the hearing before me, expressly stated that he too cannot see what other evidence could possibly be led, as supplementary to what is on record, right now, in the form of affidavits and so on, but added that the plaintiff-petitioner, at the trial, would perhaps adduce evidence to show bias on the part of the directors against the plaintiff-petitioner – that being the solitary additional piece of evidence tentatively – in the contemplation of the learned President's Counsel for the plaintiff-petitioner.

It is an observation worn out by constant repetition that the Court, in making an interlocutory order as to whether an interim injunction ought to be granted or not should refrain from embarking on a detailed investigation on the relative merits of the case of either party for that, so it is sometimes said, would entail something like prejudging a case – a phrase which is often repeated parrot-like and had been much in vogue in the not too distant past. It is too well-known to need any emphasis that the rights of parties can be decided only at the trial and in the ordinary run of cases the Court, as at this stage, ie at

the stage of deciding an application for an interim injunction in fact does not have the means of forming any definite or firm opinion – apart from a tentative one – as to such rights because the whole of the relevant evidence, which would be forthcoming only at the stage of trial, would not be before the Court and it is upon the whole body of that relevant evidence that the determination has to be made as to rights in issue. But, this case, as remarked above, is somewhat of an exception to the generality of cases for in this case there is no further evidence in prospect – even at the trial. The learned President's Counsel, as pointed out above as well, gave a tentative indication that he may, at the trial, possibly adduce evidence in proof of bias on the part of 8 directors who acting in unison appointed the 1st defendant-respondent as the managing director thereby ousting the plaintiff-petitioner from that office. But, preconceived opinions or prejudice on the part of directors who are the electors, in a context such as this, cannot in the smallest degree affect the validity of the appointment of the 1st defendant-respondent. If prejudice on the part of electors will vitiate an election, then, election of all sorts will disappear from the face of this earth. The point I am seeking to make is this: as the Court, in the peculiar circumstances of this case, has access to virtually the entire body of evidence that would ordinarily be available to Court at the close of the trial, the Court can make the decision as to the improbability of ultimate success of the plaintiff-petitioner in this case with greater precision or assurance than if the evidence had been inconclusive or incomplete. No Court can be faulted for making this observation for it is an inescapable duty that devolves on any Court to make a pronouncement or assessment with regard to the degree of probability of success or otherwise (failure) of the party applying for an interim injunction. And when, as on the facts of this case, it is, for all practical purposes, almost certain that it is improbable that the plaintiff would get judgment as prayed for in the plaint – it would be an exercise in futility to preserve the *status quo* by means of an interim injunction for it is to prevent a threatened injury, as opposed to one that is imagined, to a right that a temporary injunction is granted and one cannot conceive of any such threatened injury when in fact, it cannot reasonably be anticipated that any such right will be established by the plaintiff-petitioner at the trial of the

action. Interim injunction should be refused when it is plain that the final relief cannot be granted as was held in *Raman Hosiery Factory v. J. K. Synthetics Ltd*[3]; *Abubucker v. Kunhamood*[4]. The reason why it has become plain or evident that the final relief cannot be granted in this case is that the whole of the relevant evidence that would be available to the trial Court (at the conclusion of the stage of adduction of evidence at the trial) is already before the Court even as at this stage and it has been explained above why on the whole body of that evidence, a permanent injunction cannot be issued restraining the 1st defendant-petitioner from functioning in the office of managing director which is the ultimate relief prayed for in the plaint. No doubt, it is an accepted rule that the Court at the stage of dealing with an application for an interim injunction ought to adopt somewhat of a gingerly approach without delving into matters too deeply and avoid reaching firm findings and make pronouncements with qualifications and mental reservations, so to say. But, every rule has an exception and principle valid within certain limits becomes false when it is applied beyond those limits and the Court, has to avoid the falsehood of extremes scrupulously particularly when it is exercising an equitable jurisdiction, as it does now, when considering the question whether or not to grant an interim injunction. The rule forbidding expression of definite opinions as to the outcome of the trial will not apply in all its rigour and the rationale of that rule will disappear when the entire body of evidence that can possibly be led at the trial is already before the Court even at the stage of dealing with the application for an interim injunction. In fact, it is impossible to express firm opinions and come to definite findings when there are serious issues to be tried in regard to which the available evidence as at the stage of dealing with an application for an interim injunction would be "incomplete, conflicting and untested" and it is mainly to avoid embarrassing the trial judge that one should refrain from expressing firm opinions on such inconclusive material as to the prospects of success of either party. But, in this case, the evidence as at stage of consideration of the application for an interim injunction, is almost complete as complete can be even at the conclusion of the trial which prompts and facilitates the Court to make a decision with greater certainty with regard to the prospect of success or otherwise of the plaintiff's action.

In any event, even if a party applying for an interim injunction succeeds in proving a *prima facie* case, which the plaintiff-petitioner in this case has signally failed to do – still a *prima facie* case of itself would not suffice or entitle the plaintiff-petitioner to the grant of an interim injunction. Further, it must be established that the plaintiff-petitioner would suffer irrevocable or irreparable injury. One wonders whether it can even be said that there is even a remote possibility of the plaintiff-petitioner suffering an irreparable injury when he has failed to establish, on the material on record, that he has *prima facie* a good right to the office of the managing director. Ordinarily any injury which would be a substantial one and which cannot be adequately atoned for by damages would come within the designation of an irreparable one. I think it is safe to conclude that damages would not be adequate when the plaintiff (the injured party) cannot be put in *status quo* in the event of his succeeding in the action. There are some injuries which in the very nature of things cannot be repaired by monetary consideration and it is obvious that interim relief by way of an interim injunction would be particularly appropriate in those circumstances. If, for example, a decision has been taken that will result in a person being deported, a TV or radio programme being broadcast, for instance of a defamatory nature or a building or something which is the subject-matter of the pending litigation being demolished or destroyed it will be too late to prevent irrevocable damage being done once the action is taken. Having regard to the circumstances, the interim injunction in such contexts would serve to prevent the execution of the decision until a full hearing has taken place. As pointed out above, damages would not be adequate and the injury ought to be treated as irreparable when the plaintiff cannot be put in the *status quo,* ie in the position he occupied previously. But, the nature of the case in hand is such that if the plaintiff-petitioner (Cornel Perera) succeeds in establishing a right to function in the office of the managing director he can be easily restored to that office and placed in that very position in which he formerly stood for the office is extant or still existing. In this context, perhaps, it is instructive to refer to an Indian case, where it was held that it was an illegal exercise of jurisdiction to grant an interim injunction to restrain the removal of a temporary servant as it amounted to granting the whole of the relief which the plaintiff-servant would be entitled to get in the event

of his success in the suit before its decision. Vide *State of Bihar v. Ganesh*[5]. In this case, ie the one before me, there is no scope to argue that the ultimate judgment which the plaintiff-petitioner (Cornel Perera) would get, in case he succeeds, is an inherently ineffective legal remedy as it would be possible to argue with greater conviction, or which greater prospect of acceptance for instance, in a case where there is a real threat of destruction of the subject-matter of the action, say a land or house, in which case the injury, in its very character is immeasurably, if not wholly irreparable. Several Indian cases are referred to in the Row's Law of Injunctions (6th edition) at page 277 where it had been held that where there was no difficulty of reimbursement or restoration in the event of a favourable decree – injunction should not be granted.

Final aspect that the Court has to go on to consider is as to whether the plaintiff-petitioner has made out a case that it is comparatively more inconvenient to him, than for the defendant-respondents, if the interim injunction is not issued or withheld thereby entitling him to the intervention of the Court to maintain the *status quo* through grant of interim or temporary injunction.

Even the balance of convenience as between the parties demand that the 1st defendant-respondent's continuity in office ought not to be broken or interfered with for the reason that the plaintiff-petitioner had failed to satisfy the Court that, on the balance of probabilities, the 1st defendant-respondent continuing to function in the office of managing director would involve any violation of any legal rights of the plaintiff-petitioner. That being so, in the end, ie at the conclusion of the trial there is no prospect or probability of the plaintiff-petitioner being reinstated in office consequent upon a permanent injunction being granted in his favour as prayed for in the plaint. When, on the material before the Court at this stage, the assured expectation is that, after trial of the action, no declaration will be granted by the Court to the effect that appointment of the 1st defendant-respondent is invalid – to grant an interim injunction restraining the 1st defendant-respondent from continuing to function as the managing director to which office – be it noted – the 1st defendant-respondent had been appointed by

8 of the entire body of 11 directors – would be such an act or order (on the part of the Court) as not showing commonsense let alone wisdom.

Disutility or lack of value of such an order restraining the 1st defendant-petitioner lies in the fact that it would for certain result in creating a state of things in which majority of the directors would be working at cross purposes with the managing director for the restoration of the plaintiff-petitioner would be contrary to the wishes of the majority which majority is irresistible, as explained above, by force of numbers – although more probably than not (for reasons stated above) the permanent injunction will be refused at the end of the trial thereby ousting the plaintiff-petitioner and reinstating the 1st defendant-respondent once again. Thus, the granting of an interim injunction, in the peculiar circumstances of this case would be to needlessly subvert the flow and continuity in the management and administration of affairs of the company and the granting of interim injunction, at this stage, restraining the 1st defendant-respondent from functioning in the office of managing director would be such an order as would be devoid of good practical sense. The granting of an interim injunction would have been beneficial and advantageous only if it is more probable than not that the plaintiff-petitioner would ultimately succeed in the action and not vice versa as it would be productive of inconvenience to the great majority of directors and mischief and harm to the company concerned as a whole. In the celebrated *American Cyanamid* case[6] Lord Diplock considering where the balance of convenience lay had this to say: "whereas to interrupt him in the conduct of an established enterprise would cause greater inconvenience to him since he would have to start again to establish it in the event of his succeeding at the trial". In the case in hand, too, one can say with the greatest assurance that it is overwhelmingly improbable that the plaintiff-petitioner, who is applying for an interim injunction, will ever succeed in the action. In short, when the Court is considering the question of the probability or otherwise of the plaintiff-petitioner eventually succeeding in the action, no Court can be blamed for striving to aim at and in fact, arriving at the most accurate assessment of probability or improbability of the success at the trial of the party applying for an interim injunction for that is the first test,

so to speak, that applying for an interim injunction has to pass or satisfy – particularly when the COURT IS ENABLED TO DO SO, ie to form an opinion with certainty BY THE AVAILABILITY OF THE WHOLE EVIDENCE THAT WOULD ORDINARILY BE BEFORE THE COURT ONLY AT THE CONCLUSION OF THE TRIAL. Against this background, it would be, as had been observed in *American Cyanamid* case (*supra*) a needless and vexations interruption to grant an interim injunction restraining the 1st defendant and thereby enabling the plaintiff-petitioner to function in the office of the managing director when the latter (plaintiff-petitioner) has no fair chance or no chance in the smallest degree of retaining the said office, at the conclusion of the trial, by means of a permanent injunction – that being the ultimate relief prayed for in the plaint.

The question of irreparable damage and the question of balance of convenience are, more or less, inextricably interwoven. In considering the question of balance of convenience the Court invariably takes into account what means it (the Court) has of putting the successful party (at the conclusion of the action) in *status quo*, that is, the position in which he would have stood had his rights not been interfered with. And, the Court, as a general rule, will go on to hold that the damage is irreparable if the final judgment cannot be enforced or given effect to. If, as in this case, as explained above, the plaintiff-petitioner can be easily restored to the office of managing director in event of his being successful in the action which, as illustrated above, is indeed a remote contingency, it is difficult if not impossible to take the view that the plaintiff-petitioner will suffer greater injury by the interim injunction being refused.

For the foregoing reasons I do hereby affirm the order of the learned District Judge dated 03.10.1997 refusing the application made by the plaintiff-petitioner for an interim injunction – although for somewhat different reasons – dictated, perhaps, by the difference in approach to the solution of the problem adopted at the two different levels.

Application refused.