ABEYWARDENA
V.
ABEYWARDENA AND OTHERS

COURT OF APPEAL,
WIJETUNGA, J. AND S. N. SILVA, J.
C. A. APPLICATION No. 445/87 -- D C GALLE 2567/SPL .
MARCH 21, 24, 1990 & AUGUST 3, 1990.

Company Law – Sections 210 and 211 of the Companies Act, No. 17 of 1982 – Mismanagement and conduct of Company in manner oppressive to the petitioner and prejudicial to the Company – Interim order under s 213 (1) and (2) – Application for suspension or revocation of interim order – Amendment of interim order ex parte *– Interpretation – Section 213 (3) meaning of "In like manner" – Section 441(1) – Inherent jurisdiction – Presence of Attorney for original petitioner in Court – Does it make the proceeding* inter partes ?

Section 213 (2) of the Companies Act provides for an application to be made for an interim order in a proceeding under Sections 210 and 211 Such application has to be made by petition and affidavit to which the party sought to be affected is made a respondent. The Court can make the interim order either ex parte or after notice to the respondent at its discretion.

Held:

(1) Sub-section (3) which deals with the revocation or variation of an interim order, flows from the contents of Sub-section (2). It provides for a respondent to make an application "in like manner" for such revocation or variation. The words "in like manner" have the effect of incorporating into Sub-section (3) only so much of the provisions of **Sub-section** (2) as relate to the making of an application. These words do not have the effect of incorporating into Sub-section (3), the provision of Sub-section (2) that empower the Court to make an order *ex parte*. Sub-section (3) is thus silent as to the nature of the proceedings that should be had before an interim order is revoked or varied.

Section 441 (1) of the Companies Act is a general provision that would apply in relation to all applications and references made under the Act in the absence of any specific provision that directs otherwise. With regard to an application in terms of Section 213 (3) for the revocation or variation of an iterim order, the first part of Section 441 (1) would not apply since the manner in which such an application should be made is expressly provided for in Section 213 (3) read with (2). But, the **second** part certainly applies and every person against whom such an application is made should be given notice of the application and be entitled to object to it. The construction of Section 213 (3) by reading it with Section 441 (1) is consistent with the general principle underlying our system of administration of justice that, orders affecting rights of parties should be made only in compliance with the rule of *Audi Alteram Partem*.

(2) The *Audi Alteram Partem* rule has two components-the party affected by the order should have prior notice of the matter against him and he should be heard in opposition.

recourse cannot be had to the inherent power of Court where there is express statutory provision.

(4) The Attorney-at-Law for the petitioner (on whom no notice was served) being present in Court and taking notice and asking for a postponement to obtain instructions from his client does not make the proceeding *inter partes*. It remains *ex parte*.

Cases referred to :

(1) *Finnegan v. Galadari Hotels (Lanka) Ltd.*, (1989) 2 Sri LR 272, 285, 286, 287, 302

(2) *In re U.P. Jayatillaka* 63 NLR 282

(3) *Stassen Exports Ltd. v. Hebtulabhoy and Co Ltd* (1984) 1 Sri LR 129

(4) *Hotel Galaxy v. Mercantile Hotels Management Ltd* (1987) 1 Sri LR 5

APPLICATION in revision of the orders of the District Judge of Galle

H L. de Silva P.C. with *S. Mahenthiran* for petitioner-petitioner
Dr. H. W. Jayawardene Q.C. with *K. Kanag-Iswaran, P C* for respondents

Cur adv vult

September 09, 1990.

S. N. SILVA, J.

The Petitioner has filed this application in Revision against the orders of the learned District Judge of Galle made in the above case on 9.3.1987 (A17) and 19.3.1987 (A20). The said orders were made in the course of an application made by the Petitioner in terms of Sections 210 and 211 of the Companies Act, No. 17 of 1982. It was agreed by the parties that the order made by this Court in the Revision application would be binding on the parties in the connected leave to appeal application CALA 52/87. Counsel made oral submissions with regard to the application and thereafter tendered written submissions. The final written submission was tendered on 3.8.1990 and judgment was reserved for 31.08.1990.

The facts relevant to this application are as follows :

In the year 1953 a private company was incorporated under the then Companies Ordinance by the name of Mussendapotta Estate Ltd., (5th Respondent). The main object of the 5th Respondent Company is to "acquire and take over all the agricultural undertakings and agricultural lands, buildings and property owned and carried on by Abraham Abeywardena of Poddala....." it appears that the said Abraham

Abeywardena owned an estate by the name of Mussendapotta Estate in extent about 125 Acres and that he founded the 5th Respondent Company to transfer the ownership and control of the estate to the Company of which his wife, two sons, two daughters and he, were members. After the first issue of shares of the company the distribution of shares was as follows :-

Abraham Abeywardena – father	2,150 shares
Agnus Abeywardena – mother	650 shares
Cyril A. W. Abeywardena – elder son	3,700 shares
L. H. Abeywardena – younger son	3,700 shares
Lily Agnus Senarat Yapa – elder daughter	2,150 shares
Theodora Grace Jayasinghe – younger daughter	2,150 shares

The share holding at the time material to the case in the District Court is as follows :-

1.	Estate of Mr. Cyril A. W. Abeywardena	5,250 shares
2.	Estate of Dr. L. H. Abeywardena	6,350 shares
3.	Lilly Agnus Senarat Yapa	3,085 shares
4.	Theodora Grace Jayasinghe	3,185 shares
5.	Nalini Damayanthi Abeywardena	1,000 shares
6.	Ravindra Julian Tissa Abeywardena	1,000 shares
		19,870 shares

As at 1960 Abraham Abeywardena, his two sons and two daughters were Directors of the Company. He died in 1965 and his shares devolved only on the two sons. In the same year the younger son Dr. L. H. Abeywardena left the Island and started residing in England with his family. He died in 1973 in England and his heirs are the Petitioner (being the widow) and a son by the name of Amal Jeewaka Abeywardena.

It appears that even during the lifetime of Abraham Abeywardena the elder son Cyril Abeywardena managed the Mussendapotta Estate. After the death of the father the said Cyril Abeywardena continued to manage the land and to administer the affairs of the 5th Respondent Company. He died on 12.9.1985 and his daughter and son are the 1st and 2nd Respondents. On the date of his death, it is stated that a meeting was held of the Directors of the Company at which certain decisions were taken with regard to the furture management of the Company. Admittedly the Petitioner and her son were not in the country at that

time. The 4th Respondent too did not attend this meeting. Pursuant to the decisions that are said to have been taken at this meeting the management of the Mussendapotta Estate effectively passed to the 1st and 2nd Respondents. At that time there appears to have been a division in the family with the 1st and 2nd Respondents together with the 3rd Respondent (the elder daughter of Abraham Abeywardena) being on one side. The Petitioner, her son and the 4th Respondent (being the younger daughter of Abraham Abeywardena) being on the other side. It is in the context of this division in the family that the aforesaid case was filed in terms of Sections 210 and 211 of the Companies Act.

The Petitioner's case before the District Court is that the 1st and 2nd Respondents have taken full control of the management of the Mussendapotta Estate and other assets of the 5th Respondent Company without any lawful right of authority. That their purported election as Directors is of no effect in law. That the affairs of the Company are being conducted in an oppressive manner to the Petitioner and in a manner prejudicial to the interests of the Company itself. The Petitioner has sought the following final orders :

(1) a declaration that the 1st and 2nd Respondents are not Directors of the Company ;

(2) that a new Board of Directors be constituted of four members with one member appointed by the share holders representing each of the four children of Abraham Abeywardena ;

(3) an order that Articles of Association be amended ;

(4) the removal of the 1st Respondent from the office of Secretary of the Company ;

(5) that the Board of Directors be required to file the annual accounts within six months of each accounting year.

The Petitioner also sought two interim orders as follows :

(i) restraining the 1st and 2nd Respondents from functioning as Directors of the 5th Respondent-Company in any manner whatsoever until the final determination of this action ;

(ii) restraining the 1st and 2nd Respondents from drawing and/or receiving in any manner whatsoever any payment or salary or drawings from the 5th Respondent-Company until the final determination of the action ;

(b) order entrusting the possession and management of the said Mussendapotta Estate to Magpek Agro Management Consultants Limited until the final determination of the action with directions that monthly accounts of the said management be filed in the Court subject to further orders of the Court.

The application for interim relief was supported by learned President's Counsel appearing for the Petitioner on 17.2.1987. Upon a consideration of the submissions and the papers filed, the learned District Judge expressed the view that the appointment of the 1st and 2nd Respondents does not appear to be lawful and that there appears to be mismanagement of the affairs of the Company. The learned District Judge on that day made an interim order in terms of Section 213 (1) and (2) of the Companies Act, granting the interim relief as stated in (a) (i) and (ii) above. Thus the 1st and 2nd Respondents were restrained from functioning as directors and were also restrained from drawing money from the Company. As regards the other interim relief, the learned District Judge entered an order *nisi* to be served on the 1st and 2nd Respondents returnable on 18.3.1987.

The 1st and 2nd Respondents filed a petition and affidavit on 27.2.1987, wherein they referred to certain discrepancies between the interim orders served on them in Sinhala and English. On that basis they sought a clarification of the interim orders. This application was supported on 27.2.1987 and put off for 2.3.1987 to be considered by the permanent District Judge. On that day the registered Attorney of the Petitioner was present in Court and took notice of the Application. The learned District Judge directed that notice be issued of this application on the 3rd, 4th and 5th Respondents returnable on 9.3.1987.

On 9.3.1987 the 1st and 2nd Respondents filed a petition and affidavit, that the interim order made be forthwith suspended, or revoked. On that day the 1st and 2nd Respondents were represented by a President's Counsel who appeared in support of the application. The registered Attorney of the Petitioner was present in Court and submitted that he came there in connection with the earlier application of the 1st and 2nd Respondents (filed on 27.2.1987) seeking a clarification of the interim order. He specifically submitted that he had no notice of the petition and affidavit dated 9.3.1987 and moved for time to obtain instructions from his client with regard to this matter. He moved that the hearing of the application be postponed by one day. Upon the said

application for a postponment, made by the registered Attorney of the Petitioner, learned President's Counsel appearing for the Respondents submitted that the proceedings should be considered as *inter partes* and that the District Court should recall the interim order in the exercise of its inherent jurisdiction.

The learned District Judge refused the application of the Petitioner's registered Attorney for a postponement and made a variation of the interim order, by permitting the 1st and 2nd Respondents to do all work necessary in connection with the Estate including its financial transactions but restrained them from receiving any emoluments from the Company. The learned District Judge specifically held that he was empowered to make this amendment to the interim order, *ex parte* It was also directed that a copy of the order be served on the Petitioner, the 3rd and 4th Respondents for 18.3.1987.

The Petitioner filed a motion dated 16.3.1987 stating that the order dated 9.3.1987 was made *per incuriam* since it was done without notice to the Petitioner and the other parties. The Petitioner by that motion moved that the said order be vacated.

When the case came up on 18.3.1987 all the parties were present and represented by Counsel. It was agreed that the motion of the Petitioner dated 16.3.1987 should be considered by Court. After hearing submissions of all Counsel the learned District Judge made order on 19.3.1987 holding that the order of 9.3.1987 was made within jurisdiction. The learned District Judge specifically held that an interim order made *ex parte* could also be amended *ex parte* without notice to the Petitioner. It was observed that there was no prohibition in the Companies Act against such a course of action. Thereupon the Petitioner filed this application against the orders dated 9.3.1987 and 19.3.1987 of the learned District Judge.

This application was supported for notice on 3.4.1987 on which day the Court made an interim order staying the operation of the orders dated 9.3.1987 and 19.3.1987 made by the learned District Judge On 8.4.1987 it was agreed by the parties that the stay order previously issued be vacated on condition that the 1st and 2nd Respondents furnish to the District Court a statement of accounts in respect of each month on or before the 15th day of each succeeding month.

At the hearing of this application, learned President's Counsel appearing for the Petitioner submitted that the interim order made in terms of Section 213 (1) and (2) of the Act could be revoked or varied in terms of 213 (3) only at an *inter partes* proceeding. In this connection Counsel relied on the provisions of Section 441 (1) of the Act.

Learned President's Counsel appearing for the 1st and 2nd Respondents submitted *inter alia* :

(i) that the proceedings had before the District Court on 9.3.1987 were in the nature of an *inter partes* proceedings ;

(ii) that in any event the *ex parte* interim order that was made could be lawfully amended by the District Judge in an *ex parte* proceeding in the exercise of the inherent jurisdiction of the District Court ;

(iii) that the Petitioner has willfully suppressed material facts in obtaining the interim order and that the interim order could not have been lawfully made in terms of Section 213 since in effect it brought the affairs of the Company to a standstill. As such it was submitted that this Court should set aside the original interim order itself in the exercise of revisionary jurisdiction.

The submissions made by learned President's Counsel for the Petitioner and for the 1st and 2nd Respondents lead to a consideration of the following matters :–

(i) whether the proceedings had in the District Court of Galle on 9.3.1987 were in the nature of an *ex parte* proceeding ;

(ii) whether the District Court acted within law in making the amendment on 9.3.1987 of the interim order that had been previously issued, in particular, whether the District Court was empowered to make such amendment in an *ex parte* proceeding without notice to the Petitioner ;

(iii) whether the original interim order itself should be vacated on the ground of suppression of material facts or illegality.

As regards the first matter which relates to the nature of the proceedings had before the District Court on 9.3.1987 I have to note that the learned District Judge himself acted on the basis that it was an *ex-parte* proceeding. The Petitioner had no notice whatever of the

application of the 1st and 2nd Respondents contained in the petition and affidavit dated 9.3.1987. It is clear that the registered Attorney of the Petitioner came to Court on that day in connection with the previous application of the 1st and 2nd Respondents seeking a clarification of the interim order. In these circumstances the mere fact that the registered Attorney of the Petitioner made an application for a postponement to obtain instructions from his client, does not convert the proceedings of 9.3.1987 to an *inter partes* proceeding. In the case of *Finnegan v Galadari Hotels (Lanka) Ltd.*, (1) the Supreme Court considered whether an order by the District Court suspending an enjoining order was made in an *inter partes* proceeding. The circumstances of that case are very much similar to that of the case before us. The registered Attorney of the Plaintiff who had no prior notice of the application to suspend an enjoining order made an application in Court that the matter be taken up the next day. The application for a postponement was refused and the District Court suspended the enjoining order. The Supreme Court held that the proceedings of that day were *ex parte* although the registered Attorney of the Plaintiff made an application for a postponement The contention that the proceedings were *inter partes* was found to be "unconvincing" (*vide* judgment of Bandaranayake, J., at page 285 and 286).

In the circumstances I hold that the proceedings had on 9.3.1987 were *ex parte* and that the Petitioner had no opportunity whatever, to show cause against the application of the 1st and 2nd Respondents dated 9.3.1987 for a suspension or vacation of the interim order

The second matter stated above involves a consideration of the provisions of Section 213 (2) and (3) and Section 441 of the Act. These two sub-sections read as follows :–

213(2) An application for an interim order under the provisions of sub-section (1), shall be made by petition supported by affidavit and every party who is sought to be affected by the order shall be named a respondent in the petition. Such order shall be made *ex parte* or after notice to the respondent at the discretion of the Court.

(3) A respondent to the petition referred to in sub-section (2) may in like manner make an application for an order of revocation or variation of the *ex parte* order.

It is seen that they provide for the making of an interim order and the revocation or variation of such an order. Sub-section (2) which deals with the making of an interim order consists of two parts. They are –

(1) the manner in which an application for an interim order could be made.

That is by petition supported with an affidavit. It is necessary that every party who is sought to be affected by the interim order be named as a respondent to the petition ;

(2) the procedure upon which such an interim order could be made.

That is either *ex parte* or after notice to the Respondents. The Court is thus vested with a discretion as to whether notice should be issued on the Respondents before the interim order is made.

Sub-section (3) which deals with the revocation or variation of an interim order, flows from the contents of sub-section (2). It provides for a Respondent to make an application "in like manner" for such revocation or variation. I am inclined to agree with the submission of learned President's Counsel for the Petitioner that the words *"in like manner"* have the effect of incorporating into sub-section (3) only so much of the provisions of sub-section (2) as relate to the making of an application. Therefore, an application for revocation or variation of the interim order that has been issued has to be made by a Respondent by petition supported with an affidavit. These words do not have the effect of incorporating into sub-section (3), the provisions of sub-section (2) that empower the Court to make an order *ex parte*. Sub-section (3) is thus silent as to the nature of the proceedings that should be had before an interim order is revoked or varied. It was submitted by learned President's Counsel for the Petitioner that in such a situation the general principle underlying procedure in Court, that all proceedings should be had *inter partes* (in the absence of an express provision enabling the Court to make an order *ex-parte*), should apply. It was submitted that the principles of natural justice with its Rule of *Audi Alteram Partem,* are ingrained requirements that should not be parted from in our judicial proceedings.

Learned President's Counsel for the Petitioner also relied on the provisions of Section 441 (1) of the Act. This is a provision which

applies to applications and references made to court under the provisions of the Act. Section 441 (1) reads as follows : –

> 441 (1) – Every application or reference to Court under the provisions of this Act unless otherwise expressly provided, or unless the court otherwise directs, shall be by way of petition and affidavit and every person against whom such application or reference shall be made shall be named a respondent in the petition and shall be given notice of the same and be entitled to object to such application or reference.

It is seen that this Section also consists of two parts. The first part specifies the manner in which an application or reference should be made to Court. The second part which is linked up to the first by the word "and" provides for the procedural steps to be complied with before the order sought by the application or reference is made. This part, in effect incorporates the Rule of *Audi Alteram Partem*. It provides that every person against whom the application or reference is made should be named as a Respondent, have notice of the application or reference and be entitled to object to it.

I am of the view that Section 441 (1) is a general provision that would apply in relation to all applications and references made under the Act, in the absence of any specific provision that directs otherwise. With regard to an application in terms of Section 213 (3) for the revocation or variation of an interim order, the 1st part of Section 441 (1) would not apply, since the manner in which such an application should be made is expressly provided for in Section 213 sub-section (3) read with sub-section (2), as noted above. But, the second part certainly applies and every person against whom such an application is made should be given notice of the application and be entitled to object to it. My view that Section 213 (3) should be read with Section 441 (1) and construed as stated above is consistent with the general principle underlying our system of administration of justice that, orders affecting rights of parties should be made only in compliance with the Rule of *Audi Alteram Partem*. This Rule has two components ; that the party affected by the order should have prior notice of the matters against him and that he should be heard in opposition, before the order is made. As noted above, both components are effectively incorporated in Section 441 (1). In this case, the Petitioner who inherited shares in the Company was permitted by law to make an application in terms of

sections 210 and 211. She complained of oppression and of mismanagement by the 1st and 2nd Respondents and obtained an order from Court restraining them from so functioning. Therefore, it is clear that the Petitioner is the person against whomthe 1st and 2nd Respondents made their application on 9.3.1987. The Petitioner was entitled in law to have notice of that application and to object to it. It is seen from the proceedings of 9.3.1987 that the Petitioner was deliberately denied this opportunity she was entitled to in law. The learned District Judge has stated that he was empowered to make that order "according to equity, justice and good conscience". These are indeed nice words steeped in legal literature and pregnant with meaning in relation to judicial and quasi judicial proceedings. But, of no significance to a person who is denied the basic right to a hearing, as required by law and the principles of natural justice.

It was submitted by the Counsel for the 1st and 2nd Respondents, both in the District Court and in this Court that the interim order could be varied by the District Court in the exercise of its inherent jurisdiction. This submission is clearly without basis. As noted above, the revocation or variation of an interim order is specifically regulated by the provisions of Section 213 (3) read with 213 (2) and 441(1). It is a basic principle of law that *recourse could not be had to the inherent power of Court where there is express statutory provision. (In re U. P. Jayatillake*[2] *Stassen Exports Ltd. v. Hebtulabhoy and Co. Ltd.*[3] *Finnegan v. Galadari Hotels (Lanka) Ltd. (Supra)* at page 281).

Both Counsel have referred to the judgment in *Finnegan v. Galadari Hotels (Lanka) Ltd.* (Supra). In that case the Supreme Court held following the earlier decision in *Hotel Galaxy v. Mercantile Hotels Management Ltd.*,[4] that the District Court has the power to suspend an enjoining order that had been previously issued, in the exercise of its inherent jurisdiction. It is seen that there is no provision in the Civil Procedure Code regulating the suspension or revocation of an enjoining order. It is in the absence of such provision that the Supreme Court held that there could be recourse to inherent jurisdiction. As noted above, there is specific provision with regard to the revocation or variation of an interim order made in terms of Section 213 (2). Therefore, the question of invoking inherent jurisdiction does not arise. However, it is significant that even if there be recourse to inherent jurisdiction, it was specifically held by the Supreme Court in the case of *Finnegan v. Galadari Hotels*

(Lanka) Ltd., that such jurisdiction should be exercised in an *inter partes* proceeding. (page 287 and 302). Kulatunga, J. observed as follows (at pg. 302) :

> "I am of the view that whilst the District Judge has the power to vacate or suspend the enjoining order, he has on the facts and circumstances of this case failed to properly exercise his power by declining to hear the Plaintiff. In other words, the particular order he made lacks jurisdiction...."

Therefore even if it is assured that the District Court exercised its inherent jurisdiction on 9.3.1987, in making variation in the interim order, that exercise lacks jurisdiction because the petitioner was deliberately deprived of an opportunity of showing cause against it. I use the word "deliberate" to distinguish the facts of this case from a situation where a Court on sufficiently cogent grounds, in view of the urgency of the matter and considering the delay involved in issuing notice on the other party makes a variation of an *ex parte* order that it had previously issued. Here, the registered Attorney of the Petitioner took notice of the application and wanted a postponement of only one day to get instructions from his client. Surely, there would have been no damage to the affairs of the 5th Respondent Company if the interim order in that form remained in force for one more day. The interim order had been in force for almost 3 weeks and the 1st and 2nd Respondents initially thought it fit only to make an application for a clarification of the order Ironically the learned District Judge thought it fit to issue notice of that application on the other parties. But when an application of more serious import was made, he acted in great haste and deliberately denied the other party a hearing.

In the circumstances, whether the matter is looked at from the point of statutory provisions as contained in the Companies Act or from the point of an exercise of inherent jurisdiction, the order made by the learned District Judge on 9.3.1987 is bad in law and without jurisdiction. I accordingly exercise the revisionary power of this Court to set a side the said order and the consequential order made on 19.3.1987. The learned District Judge of Galle is directed to afford an opportunity to the Petitioner to object to the application made by the 1st and 2nd Respondents for the suspension or revocation of the interim order. Thereupon it is further directed that the application for interim relief, as prayed for in prayer *(b)* to the petition dated 14.2 1987, the

objections thereto, the application for the revocation or suspension of the interim order that has already been issued and the objections thereto, be heard and determined without delay.

The final submission made by learned President's Counsel for the Petitioner relates to the original interim order itself. It was submitted that this order should be set aside in the exercise of revisionary jurisdiction because the Petitioner suppressed material facts and the Court did not have the power in law to make that order. Both these matters should in my view be first considered in the District Court with an adequate opportunity being afforded to the Petitioner to show cause against them. Since this has not happened, it would not be proper to exercise revisionary jurisdiction on the basis of these two grounds. However, there is one matter with regard to the initial interim order that has engaged my attention. It restrains the 1st and 2nd Respondents from functioning as Directors in any manner whatsoever. It is clear from the papers filed in this Court that the 2nd Respondent has been managing the Mussendapotta Estate and that the 1st Respondent has functioned as the Secretary of the Company. Pending a determination by the learned District Court Judge of the application for interim relief, as directed above, I would clarify the interim order that has been made by stating that it does not prevent :

(1) the 2nd Respondent from managing the Mussendapotta Estate and entering into transactions that are necessary for that purpose ;

(2) the 1st Respondent from functioning as Secretary of the 5th Respondent Company ;

(3) the 1st and 2nd Respondents from performing such statutory duties that are necessary to be performed by the Company ;

(4) any person who is presently authorised to operate on the bank account of the 5th Respondent Company from so doing.

The 1st and 2nd respondents will furnish a statement of accounts to the District Court in respect of each month on or before the 15th day of succeeding month, as agreed to in this Court on 8.4.1987.

These clarifications will be operative only till the learned District Judge makes an order in the matter of the interim relief. It is to be noted

that these clarifications should have no bearing whatever on a full consideration of the matter by the learned District Judge. The application is accordingly allowed, but I make no order as to costs.

WIJETUNGA, J. – I agree.

Application allowed.