FINNEGAN
v.
GALADARI HOTELS (LANKA) LTD.

SUPREME COURT
H.A.G. DE SILVA, J.
BANDARANAYAKE, J., AND KULATUNGA, J.
S.C. APPEAL NO. 21/89
C.A. REVISION APPLICATION NO. 528/89.
D.C. COLOMBO NO. 3000/SPL.
SEPTEMBER 18,19,20, 21 &
OCTOBER 3, 4, AND 5, 1989.

Civil Procedure Code – Enjoining order – Inherent powers – Suspension of enjoining order – Civil Procedure Code, section 839 – Can enjoining order be suspended ex parte? – Inter partes order

A management agreement, A was entered into between the Galadari Hotels (Lanka) Ltd. the plaintiff and Societe Des Hotels Meredian (Meridien) – a Company resident not in Sri Lanka but in Paris – whereunder the 2nd and 3rd floors comprising 80 rooms (which as they were not commissioned as guest rooms) were allocated to the International Irrigation Management Institute (IIMI) for use as office accommodation. The defendant Paul Finnegan was the General Manager of the Galadari Meridien Hotel. The management and operation of the Hotel were entrusted to the Societe Des Hotels Meridien (Meridien). The plaintiff-respondent Galadari Hotels (Lanka) Limited filed action on 27.6.89 against the defendant – petitioner Paul Finnegan, praying for a declaration that defendant, is not entitled under the terms of the management agreement "A" to allocate the 2nd and 3rd floors of the Galadari Meridien Hotel or any portion thereof to the IIMI and for a permanent and interim injunction restraining the allocation and conversion of the furnished equipped guest rooms on the 2nd and 3rd floors into official accommodation or the making of structural alteration thereto. On the same day (27.6.89) on the application of Counsel an enjoining order was issued retaining the allocation, conversion alteration, along with notice of the application for an interim injunction. The enjoining order was not to apply to rooms 318 and 320 as they had already been converted. The enjoining order was served on the same day.

On 3.7.89 the defendant filed objections moving for a suspension of the enjoining order, refusal of the injunction and dismissal of the action. When Counsel moved to support the objections on the same day Mr. Balasubramaniam appeared for the plaintiff and moved that the matter be supported the following day as he had had no notice and did not have the papers. The Court held it was not obliged to hear the plaintiff and on the defendant's application suspended the enjoining order. The plaintiff moved the Court of Appeal in revision. The Court of Appeal stayed the suspension and later on 25.7.89 vacated the suspension order of 3.7.89. Against this order the defendant moved the Supreme Court.

Held –

(1) The Court has an inherent power under section 839 of the Civil Procedure Code to vacate or set aside or suspend an enjoining order, but it must be done inter partes in an appropriate case as it is an interference with a benefit already granted.

(2) An enjoining order in the first instance is in the nature of an immediate prohibition made against a person at the discretion of the Court pending the hearing and determination of the application for interim injunction. It is different to an injunction in the sense that normally an injunction may be granted only after the petition of application with the accompanying affidavit testifying to the truth of the averments is served on the opposite party. An exception is made only where the object of granting the injunction would be defeated by delay. The exercise of the Court's discretionary powers gives the Court, in a sense, a broad undefined jurisdiction to act fairly to prevent wrongs and its effect is immediate. Then it is imperative that accurate, complete and compelling grounds be adduced when praying for the exercise of such discretionary jurisdiction. If the grounds do not justify the exercise of such jurisdiction then even in the absence of express powers, inherent powers of the Court to make orders to meet the ends of justice and prevent abuse of the process of the Court would be in place and could properly be exercised.

(3) The order of the District Judge was based on the finding that the defendant is not a party to the agreement and cannot be injunct but this was the question to be argued and decided inter parts, at a later stage of the action and not to be decided ex parte by the Court. By deciding that the defendant was not rightly before Court the Judge has prejudged an issue to the prejudice of the plaintiff.

(4) Mr. Balasubramaniam appearing for plaintiff on 3.7.89 and stating that he came to know about the application only that morning and he had no papers with him and moving the matter be postponed for the following day does not make the proceedings inter partes. The proceedings of 3.7.89 were ex parte.

(5) There must be fair procedure and the plaintiff should have been heard on the allegation of non – disclosure of material facts.

(6) The plaintiff is impeaching the legality or propriety of the order of the District Judge of 3.7.89 on fundamental issues including the failure to hold a fair inquiry. Considerations of urgency and the balance of convenience demand an immediate review of the Judge's order. There were thus exceptional circumstances warranting the exercise of the revisionary jurisdiction of the Court of Appeal.

Cases Referred to:

1. *Thomas A. Edison Ltd.* v. *Bullock* (1912) 15 CLR 679, 682
2. *W.S. Alphonso Appuhamy* v. *L. Hettiarachchi* 77 NLR 131, 135, 139
3. *Rex* v. *Rensington Income Tax Commission* (vide 77 NLR 131)
4. *Seneviratne* v. *Abeykoon* (1986) 1 CALR 434, 440
5. *Sirinivasa Thero* v. *Suddassi Thero* 63 NLR 31
6. *Salim* v. *Santhiya* 69 NLR 490
7. *London City Agency* v. *Lee and others* (1969) 3 All ER 1376, 1379
8. *Duwearatchchi* v. *Vincent Perera* (1984) 2 Sri LR 94, 103
9. *Hounslow* v. *Twickenham Garden Development Ltd.* (1970) 3 All ER 326, 347
10. *Stassen Exports Ltd.* v. *Hebtulabhoy & Co.* (1984) 1 Sri LR 129

11. *Hotel Galaxy Ltd.* v. *Mercantile Hotel Ltd.* (1987) 1 Sri LR 5, 26, 27 - 30
12. *Fernando* v. *Dias* (1980) 2 Sri LR 48
13. *Andradie* v. *Jayasekera Perera* (1985) 2 Sri LR 204
14. *Cooper* v. *Wandsworth Board of Works* (1863) 143 ER 414
15. *Lewis* v. *Heffer* (1978) 3 All ER 354
16. *Wiseman* v. *Borneman* (1969) 3 All ER 275, 286, 287, 288
17. *R* v. *Wareham* Magistrates' Court (1988) 1 All ER 746
18. *Anisminic* v. *Foreign Compensations Commission* (1969) 1 All ER 208, 233
19. *Rasheed Ali* v. *Mohamed Ali And another* (1981) 1 Sri LR 262

APPEAL from order of the Court of Appeal

K. Kanag – Iswaran, P.C., with *M.S.M. Suhaid, Anil Tittawela, Ms. Jesmin Gafoor* and *Ms. Inoka Perera* for defendant – petitioner

Eric Amerasinghe, P.C., with *C. Manohara, R. Balasubramaniam* and *Eardley Seneviratne* for plaintiff – respondent.

Cur. adv. vult.

November 09, 1989

H. A. G. DE SILVA, J.

I have had the advantage of reading the judgments prepared by my brothers Bandaranayake, J., and Kulatunge, J. I agree with the conclusion arrived at by them that the District Court order of 3.7.89 should be set aside and the reasons therefor. I also agree with the order as to costs.

BANDARANAYAKE, J.

The Plaintiff-Respondent, Galadari Hotels (Lanka) Ltd., brought an action in the District Court of Colombo on 27.6.89 against the Defendant-Petitioner, Paul Finnegan, the General Manager of the Galadari Meridian Hotel praying for-

(A) an order and decree declaring that the Defendant is not entitled under the terms of Management Agreement marked 'A' to allocate the second and third floors of the said Galadari Meredien Hotel or any portion thereof to the International Irrigation Management Institute; (referred to hereafter as IIMI)

(B) a permanent injunction restraining the Defendant from

(i) so allocating, renting or leasing to the Institute the said second and third floors of the said Hotel,

(ii) placing the Institute in occupation of the said floors,

(iii) permitting the conversion of furnished equipped guest rooms on the said second and third floors into official accommodation,

(iv) causing structural alterations to alter or modify the structural form of the said guest rooms on the said floors etc.

(C) An interim injuction restraining the Defendant from doing any act sought to be prevented by the aforesaid permanent injunction pending final determination.

On the same day the Court having heard Senior Counsel for the Plaintiff, Mr. Eric Amerasinghe, P.C., ex parte issued an Enjoining Order restraining the matters referred to in prayer (C) above and also issued notice of application for an interim injunction to the Defendant. The order was declared not to apply to rooms 318 and 320 as they had already been so converted. Summons and notice of application issued returnable on 17.7.89. Defendant admits that the order and connected documents were served on the defendant the same day. It is common ground that the said Enjoining Order dated 27.6.89 was a lawful order made ex parte within jurisdiction in terms of s.664 of the Civil Procedure Code.

However, on 3.7.89 before the aforesaid notice returnable and summons returnable date, the Defendant-Petitioner filed his objections by petition and affidavit – S.C. 21 – praying for,

(a) suspension of the operation of the Enjoining Order or for its discharge and vacation;

(b) refusal of the application for an injunction;

(c) Dismissal of the action as having been instituted wrongfully and unlawfully and without a cause of action ex facie and without jurisdiction.

On the same date (ie) 3.7.89 the Court heard Senior Counsel for the Defendant-Petitioner, Mr. Kanag-Iswaran, P.C. In the course of the proceedings of that day – S.C. 25 – the Court has made this observation :– "At this stage Mr. R. Balasubramaniam appears instructed and states he has come to know about the application (of the Defendant) only this morning and he has no papers with him although it is an ex parte application ..... and makes submissions and wants the case to be heard tomorrow. Mr. Kanag-Iswaran for the

Defendant vehemently objects to the application on behalf of the Plaintiff. In the light of this situation I propose to make an order that the original order was made on an application made by the Plaintiff, and now the Defendant seeks by his submissions to vary, suspend or dismiss the Enjoining Order so given on the material facts placed before me by the plaintiff. In this connection it is my view that I am not obliged at this stage to hear the Plaintiff. I propose to make an order on the facts represented by the Defendant today." The Court then made the following order:– " Addressing my mind to the facts submitted by Mr. Kanag-Iswaran the agreement ... (marked A) ... appears to have been made by the Plaintiff and Meridien as evinced in the preamble to the Agreement A."

" In the first instance it is my view that the Defendant is not a party to this agreement."

" Secondly, flowing from this, it is my view that the Defendant cannot be injunct which the Plaintiff seeks to do. Adverting to matters of fact ..... the purported renting of the two floors has already been done by letter of 9th June ..... Further, though alleged by the Plaintiff that the 80 rooms in floors 2 and 3 .... are guest rooms they have not been commissioned which fact is borne by letter marked 'B' annexed to the plaint."

" In the light of these facts I suspend the Enjoining Order issued. Copy of this order to be served on the Plaintiff ..... Counsel for Plaintiff takes notice of this order made today. Call case on 17th July 1989."

The Plaintiff thereupon moved the Court of Appeal in Revision to set aside the order of the District Court made on 3.7.89 suspending its earlier order. The Court of Appeal then first made order staying the aforesaid order of suspension and proceeded to consider the legality of the said order of suspension. By its decision of 25.7.89 the Court of Appeal allowed the application made by the Plaintiff – Petitioner and vacated the suspension order of 3.7.89 and directed the District Judge to proceed to inquiry.

The Defendant-Petitioner then moved the Supreme Court to make an interim order staying the operation/execution of the judgment of the Court of Appeal; and for special leave to appeal against the judgment of the Court of Appeal. Special leave to appeal having been granted on the questions referred to in sub-paragraphs a-f of

paragraph 33 of the petition the matter now comes up for our consideration.

Learned President's Counsel for the Defendant-Petitioner made the following assertions among others by way of background facts:

(a) that the Management Agreement marked 'A' was between the Plaintiff Galadari Hotels (Lanka) Ltd and " Societe Des Hotels Meredian(Meridien)" and not between the Plaintiff and the Defendant. This fact was brought to the notice of the District Judge on 3.7.89.

(b) the Defendant was an agent of Meridien though employed and paid by the Plaintiff,

(c) Meredien was the foreign principal not resident in Sri Lanka with the power of dismissal over the Defendant.

(d) Meredien was the only party who could have sued and therefore a necessary party but not made a party.

(e) the 2nd and 3rd floors of the hotel comprising 80 rooms were never commissioned nor taken over as guest rooms – vide – para 1 of document 'B' and para 4 of document 'D' annexed to plaint but that fact was suppressed and not brought to the attention of the District Court in the first instance;

(f) that the said 80 rooms were in a bad state of repair from the outset and therefore never commissioned as guest rooms. These facts were not brought to the notice of the District Court.

(g) the letter 'C' indicated that as at 16.6.89 the 2nd and 3rd floors had already been let to IIMI which fact had been suppressed by the Plaintiff.

All these facts of suppression were brought to the notice of the District Judge on 3.7.89 by the Defendant. Upon the foregoing, Counsel for petitioner argued:

(i) that as the Agreement 'A' was not one entered into between the Plaintiff and the Defendant, the Defendant cannot be injuncted there being no cause of action;

(ii) that the renting of the two floors had already taken place;

(iii) that there was suppression and non-disclosure of material facts upon which Plaintiff obtained relief in the first

instance; that if on an ex parte application the Plaintiff does not make sufficient disclosure the application will be dismissed upon discovery of such non-disclosure and suppression. This was a rule based on Public Policy designed to prevent abuse of procedure of Court when Court was dealing with a matter ex parte. Thus uberrimae fidei is required. Counsel relied on paragraphs from the judgements in the cases of *Thomas A. Edison Ltd. v. Bullock* (1), *W.S. Alphonso Appuhamy v. L. Hettiarachchi* (2), *Rex v. Rensington Income Tax Commission* referred to in the 77 NLR case cited (3), *Seneviratne v. Abyekoon* (4), *Srinivasa Thero v. Suddassi Thero* (5), *Salim v. Senthiya* (6). Counsel also cited SPRY – Equitable Remedies, 3rd Ed. P.329, 476 et seq and FRIDMAN – Law of Agency, 5th Ed, pp.188,217.

(iv) that the rule of audi alteram partem, the absence of which was the complaint of the Plaintiff regarding the proceedings of 3.7.89 which made the suspending order, did not apply to those proceedings because that suspending order was itself an interim order which could be made ex parte depending on the imminent urgency of a matter in the discretionary opinion of the Court. The matter of the injunction is yet pending before the District Court.

In support learned Counsel relied upon the decisions in the following cases. *London City Agency v. Lee and Others* (7) *Halsbury's Laws of England,* 4th Ed, para 1111, *Duwearatchchi v. Vincent Perera* (8) *Hounslow v. Twickenham Garden Development Ltd* (9) per Hegarry, J., "Natural Justice" by Paul Jackson, 1979 2nd Ed, p. 104.

(v) the matter before the District Judge on 3.7.89 was in fact *inter partes* as is borne out by the record which refers to Mr. Balasubramaniam making submissions and wanting the case to be heard "tomorrow" (supra). It was submitted therefore that submissions were made and the request for a postponement until tomorrow was objected to and refused. The Respondent cannot contradict the record.

(vi) On the question whether an enjoining order can be suspended in the absence of express provision permitting such a course, it was submitted that it *can* on the twin

application of the principle of –

(a) inherent powers of Court and,

(b) the doctrine of uberrimae fidei - full disclosure. Counsel distinguished the case of *Stassen Exports Ltd v. Hebtulabhoy & Co.* (10) which it was submitted was authority only for the proposition that an interim *injunction* cannot be *suspended* in the exercise of inherent powers under s.839 of the Civil Procedure Code as there is express provision in s.666 for the *discharge, variation or setting aside* of an interim *injunction* with no provision to suspend; and inherent powers cannot be invoked to violate or override express provisions of the Code. It follows that power to suspend interim orders including enjoining orders stems from the Court's inherent powers secured under the provision of s.839 of the Code in the absence of provision to vary, set aside or discharge an enjoining order under s.666 aforesaid. It was further submitted that this principle was expressly reaffirmed and re-established in the *Galaxy* case – vide *Hotel Galaxy Ltd. v. Mercantile Hotels Ltd.* (11) and it extended to the exercise of such inherent powers ex parte.

(vii)that the Plaintiff-Respondent could not have moved the Court of Appeal in Revision :-

(a) without first seeking to have the order suspending the enjoining order canvassed before the District Court itself. The cases of *Fernando v. Dias* (12), *Andradie v. Jayasekera Perera* and *Hotel Galaxy Ltd v. Mercantile Hotels Ltd* (11) were cited.

(b) in any event the petition did not disclose any exceptional circumstances warranting the exercise of the extraordinary discretionary jurisdiction of revision. Such circumstances must be shown.

(c) where an alternate remedy exists - to wit: with leave first had and obtained from the Court of Appeal in terms of s. 754(2) of the Civil Procedure Code,

revisionary powers will not be exercised. This alternate remedy which should have been first sought was not sought.

(d) the petitioner had suppressed material facts and documents from the Court of Appeal, to wit: that the 2nd and 3rd floors had never been commissioned and never handed over by the contractor because of several defects in the rooms itemized in those documents. Wilful suppression is a violation of Rule 46 of the Supreme Court Rules – 1978 which have been held to be mandatory. The petitioner also had failed to produce at the time it supported the application before the Court of Appeal the order of the District Judge dated 3.7.89. Several authorities were cited in this regard.

It was also contended that there were grave errors and misdirections of law in the judgment of the Court of Appeal which warrants that it be set aside. Counsel for Petitioner submitted that the Court of Appeal has come to the following among other wrong conclusions and propositions.

(i) that there is no statutory authority to suspend an enjoining order before the decision on the application for injunctions;

(ii) that where express provisions of the Code request steps to be taken, inherent powers of the Court cannot be invoked;

(iii) that the course adopted by the District Judge was in violation of provisions of s.666 of the Code.

The Defendant-Petitioner seeks in this appeal to have –

(1) the order of the Court of Appeal set aside,

(2) the District Court's order of suspension dated 3.7.89 restored, and for any consequential orders.

The questions that arise for adjudication are –

(a) whether the enjoining order dated 27.6.89 having been lawfully made by the District Court ex parte within jurisdiction as provided for in s.664 of the Civil Procedure Code and normally operative until the hearing and determination of the application for interim injunction could be lawfully suspended by that Court.

(b) even if so, whether on the averments in the Defendant's petition dated 3/7/89 the District Judge had the judicial power to suspend its earlier enjoining order granted ex parte to the Plaintiff without hearing the Plaintiff.

(c) in any event were the grounds set out in the Order of suspension correct and were they matters upon which the District Court could have taken a decision at that stage of the application for interim injunction?

(d) should the judgment of the Court of Appeal be affirmed ?

Under the provisions of the Civil Procedure Code – ss.664 and 666 usually an enjoining order granted ex parte in the exercise of discretion is valid until the determination of the interim injunction application. There is no right of appeal from such an order or refusal to grant such order. A party aggrieved by the grant of such order usually abides the disposal of the application for interim injunction inter partes in due course. Similarly there is no right of appeal from an order granting or refusing to grant an interim injunction in the first instance ex parte. An aggrieved party must follow the express procedure laid down in s.666 for relief. In view of such express provision the District Court has no residual inherent powers to deal with the matter.

Then again, a District Court has no inherent power to vary its own order except to the extent permitted by s. 189. Section 404 and s. 408 of the Code may be relevant in such situations. Thus usually a District Judge has no judicial power to vary his earlier order upon a change of mind-even if he later thought that the earlier order was wrong. In this case it has been contended for the Defendant-Petitioner that the District Court had an inherent power in terms of s. 839 of the Code to make such orders as may be necessary for the ends of justice or the prevention of abuse of the process of the Court; that in the light of the suppression of material facts and the absence of a cause of action, the District Judge had in this case an inherent power, in the absence of express provisions to vacate, discharge, suspend or set aside an enjoining order made in the first instance under s. 664 of the Code. Indeed it has not been contended for the plaintiff-respondent that the Court had no inherent power in an appropriate case to vacate or suspend an enjoining order. For the purpose of this action, Counsel for the plaintiff-respondent has submitted that the Court did have such a

power. But it was contended for the plaintiff-respondent that the District Court could not have exercised such a power in the manner it did on 3.7.89 without hearing the plaintiff against the application of the defendant.

It was submitted that the order of suspension was therefore both illegal and void.

In the absence of any positive or express provision in the Code for dealing with an enjoining order before the stage of determination of an injunction application and in the absence of a prohibition one may consider situations and appropriate remedies where an enjoining order has been obtained on inadequate or incorrect or improper grounds. An enjoining order in the first instance is in the nature of an immediate prohibition made against a person at the discretion of the Court pending the hearing and determination of the application. It is different to an injunction in the sense that normally an injunction may be granted only after the petition of application with the accompanying affidavit testifying to the truth of the averments is served on the opposite party. An exception is made only where the object of granting the injunction would be defeated by delay. The exercise of the Court's discretionary powers gives in a sense the Court a broad undefined jurisdiction to act fairly to prevent wrongs and its effect is immediate. Thus it is imperative that accurate, complete and compelling grounds be adduced when praying for the exercise of such discretionary jurisdiction. If the grounds do not justify the exercise of such jurisdiction then it is my view that even in the absence of express powers, inherent powers of the Court to make orders to meet the ends of justice and prevent abuse of the process of the Court would be in place and could properly be exercised. The *Hotel Galaxy Ltd v. Mercantile Hotels Ltd* (11) and other cases cited there are on point. Incidentally the inherent power exercised disturbing the earlier ex parte order has been made inter partes in the *Galaxy* case.

One ground urged for the suspension or setting aside of the enjoining order was that the Plaintiff was in law not entitled to injunctive relief against the Defendant as the Management Agreement 'A'(301) was not between the Plaintiff and the Defendant but between the Plaintiff and a foreign company to wit: Meredien of France and that the Defendant in his capacity as General Manager was "managing agent and an instrument of Meredien". Therefore it

was contended that this 'agent' could not be sued vis a vis the agreement 'A'. It was contended for the Defendant that all acts done by the Managing agent were in terms of the Management agreement 'A'. Thus it was contended in the first place that there was no cause of action against the Defendant. The learned trial Judge has used this submission of Counsel for the Defendant as a ground for making his order of suspension. As already stated elsewhere in this judgment the District Judge in his order of 3.7.89 has stated ".... the agreement purported to have been made between the Plaintiff and the Defendant as stated by the Plaintiff appears to have been made between the Plaintiff and Meredien .... the Defendant is not a party to this agreement .... flowing from this .... the Defendant cannot be injunct which the plaintiff seeks to do..." Learned Counsel for the Plaintiff-Respondent has on the other hand submitted – relying on certain Articles in the agreement that the agreement 'A' does not authorise the Defendant to let guest rooms to the Institute as office space. Counsel has cited paragraph 5(1)(3) of the plaint where the Plaintiff relies on the provisions of Article 4.1 of the Agreement as permitting 'Meredien' to perform " those duties coming within the scope of the management and marketing of the hotel .... it shall not set up in the Hotel any other activities except for ancillary and complementary activities as normally connected with this type of operation or becoming so connected as a result of changes in the standard practices of the international hotel trade. Again Counsel referred to Article 4.5.1 of the agreement where it is stated that "Meredien shall perform successfully on behalf of and for the account of the Contracting Party (the plaintiff) all appropriate and necessary management services including ..... at Article 4.5.1(b) ... negotiating contracts which are normally entered into within the scope of the hotel operation ....." Thus it was Plaintiff-Respondent's Counsel's submission that the Defendant has acted outside the scope of his authority wrongfully in letting out two floors to the Institute to be used as office space in consequence of which the plaintiff suffers loss. In any event the plaintiff is entitled to establish a right which is disputed. Counsel thus submits that the Defendant is liable in tort. In support The Law of Agency by Raphael Powell, 2nd Ed, pp.277,283 was cited. At page 277 the writer deals with the Personal Liability of an Agent and states: "Any person who commits a tort is himself liable for that tort. It follows that an agent who commits a tort is liable whether he acted on behalf of a principal or not and even if he acted for his principal's benefit. He cannot escape liability by pleading that

he acted with the authority of his Principal, unless the existence of that authority means that the agent has not committed a tort at all.." At page 283 the author states "where the principal and agent are both liable for a tort committed by the agent, they are said to be joint tort feasors and their liability is joint and several. The Plaintiff can sue either principal or agent separately or he can sue both together jointly." Thus it was contended for the Plaintiff that there was indeed a cause of action against the Defendant in tort and that the Defendant has rightly been made a party to the action. It may be that the Defendant disputes the Plaintiff's position as to the nature and extent of the Agreement 'A'. Indeed the Defendant takes the position that letting of the floors to the Institute was warranted by the Agreement 'A' – vide – Article 4.5.1 (e). But it is the submission for the Plaintiff that this first ground upon which the District Judge's order was based was a question to be argued and decided inter partes at a later stage of the action and not to be decided ex parte by the Court as it did. It is my view that there is merit in the submissions of Plaintiff's Counsel that this is a question that must be determined at the inquiry inter partes into the application for injunction. The District Court was in error in coming to its conclusion on this question at this stage as to whether the Defendant is rightly before the Court. It has reached this conclusion at this stage no doubt because the Court only heard one party. By this process the Court has prejudged an issue to the prejudice of the Plaintiff. This can never be a proper exercise of inherent powers as it does not meet the ends of justice. The question as to whether the Defendant is properly before the Court can only be decided at a later stage inter partes and is therefore still open for decision. Thus it seems to me that a District Judge may in the exercise of inherent powers under s.839 of the Civil Procedure Code in the absence of express provision, suspend or set aside an enjoining order already made – vide *Hotel Galaxy Ltd* case cited but it must be done inter partes in an appropriate case as he is interfering with a benefit already granted to a Plaintiff by a Court having been satisfied on the averments in the petition and affidavit and it is therefore nothing but fair procedure in appropriate circumstances, before interfering with the earlier exercise of discretion, to give the Plaintiff a fair chance of meeting such grave accusations (eg) of wilful suppression of material facts or the lack of a cause of action as the suspension or setting aside of an earlier discretionary order remains the exercise once again of discretionary power.

There is the further ground whether there was wilful suppression by the Plaintiff of material facts when supporting his petition for injunction. The Defendant-Petitioner relies on documents SC 8 and 9. By SC 8 dated 1.6.89 the Defendant informs the Executive Manager of Galadari Hotels that the 2nd and 3rd floors are to be given out to IIMI as (the rooms) were never commissioned. SC 9 dated 9.6.89 is a copy of an agreement between the Defendant and IIMI.... "As of this date the hotel will rent to IIMI the entire 2nd and 3rd floors comprising 80 rooms for a period of 27 months. The occupancy of those rooms will commence today. Rental payment will commence from 1.9.89 for a rental of US$ 20833/33 per month." The Defendant-Petitioner states that these matters were communicated to the Plaintiff-Company by letter of 16.6.89 – SC 11, but the Plaintiff had failed to mention them in the plaint. Instead the Plaintiff averred that only 2 rooms had been rented when it applied for injunction relief from the Court on 23.6.89. The Plaintiff's answer is that the agreement SC 9 is not an agreement between Meredien and IIMI. SC 9 is merely signed by the Defendant and the General Manager of IIMI and is a private communication between them and the Plaintiff was unaware of the facts set out therein. It is not a notarially executed agreement and is of no force or avail in law to create any proprietory or real right in the Institute. The Plaintiff therefore does not need to take cognisance of SC 9 which has also been referred to as 'X3'. Hence it was submitted there was no suppression of a material fact. It is my view that this question of fact should have been considered at a later stage at the inquiry into the injunction application inter partes. The District Court has prejudged an issue that goes to the merits. This ground too for the exercise of discretionary power ex parte in this case is unsupportable.

The next contention of Defendant-Respondent was that the proceedings of 3.7.89 was *inter partes*. In aid of this submission reference was made to that part of the record – SC 25 (Supra) which stated "... Mr. Balasubramaniam appears instructed by Mr. Eardley Seneviratne and states he has come to know about the application only this morning and he has no papers with him although it is an ex parte application. Mr. Balasubramaniam makes submissions and wants case to be heard tomorrow."

This contention is unconvincing. It is apparent that the Counsel for Plaintiff Respondent was not informed of the application of Defendant-Petitioner that day. They have been taken by surprise.

The Attorney said he had no papers. He asks for a postponement. It may well be that this submission was that Senior Counsel for the Plaintiff had had no chance of considering the charges levelled against the plaint. The papers filed in this appeal clearly state on behalf of the Plaintiff that proceeding was ex parte. The record of the proceedings is to my mind quite consistent with that position. It is my view that the Plaintiff Respondent has satisfied this Court that the District Court proceedings of 3.7.89 was ex parte.

In deciding whether the Court of Appeal could have heard the application in Revision one has to consider the factual situation that had arisen before the District Court. An ex parte inquiry was held on 3.7.89 upon an application of the Defendant-Petitioner which had fully set out the objections of the Defendant to the issue of interim injunction in the course of which an application for a postponement of the inquiry made by the Plaintiffs was refused on the footing that the Court was not obliged to hear the Plaintiff. Order was made ex parte suspending the operation of the earlier enjoining order and an order made " call case on 17.7.89 ". There was no indication that the Court would hear the Plaintiff against the order of suspension on 17.7.89 or on a later date. Earlier, when the enjoining order was made the Court had given the summons and notice returnable date as 17.7.89. That date would in the ordinary course be a date on which objections are received and an inquiry date fixed. After the refusal by the Court to hear the Plaintiff in position to the Defendant's application for dismissal of the Plaintiff's case at an adjourned hearing and the act of the Court in suspending its earlier order ex parte there seems to have been little purpose in making the order for 'call case' that the Court did. This does not indicate whether the Plaintiff would be given a chance on 17.7.89 to meet the Defendant's allegations and have the enjoining order once again restored. The probabilities are that that would have been most unlikely. The Court had already reached findings of fact. The order for "Call Case" on 17.7.89 means just what it says. There must be fair procedure and the facts as stated above suggest that there was an end to the ex parte enjoining order matter. In this situation the justice of the case should relieve the Plaintiff from further pursuing the matter of the enjoining order before the same Court. There were thus exceptional circumstances which justified the course of action taken in this case thereafter.

Next, the fact that the order of 3.7.89 was before the Court of Appeal is supported by the reference to the District Court order in a sentence from the order of the Court of Appeal – viz: "I am not obliged at this stage to hear the Plaintiff". The Court of Appeal could have permitted it to be filed later. This matter must be considered in the peculiar circumstances of this case. It has been contended that there has been a violation of Rule 46 of the Supreme Court Rules in that the Petitioner failed to produce at the time it supported the application before the Court of Appeal the order of the Judge complained of with a certified copy of the proceedings of 3.7.89. The Court has dealt with the petition and disposed of it. The application in revision has been made the very next day (ie) 4.7.89 because of urgency. Taking the facts and circumstances into consideration the Court of Appeal was within jurisdiction in proceeding to hear the Plaintiff's complaint in the exercise of its revisionary powers.

There is left the question of the correctness of the findings of the Court of Appeal. That Court, dealing with the general question as to whether a District Judge could have in the exercise of discretionary power made order suspending an enjoining order held that it could not as (i) there is no statutory authority to suspend an enjoining order before the decision on the application for injunction, (ii) where express provisions regulate steps to be taken, inherent powers cannot be invoked and, (iii) that the course adopted by the District Judge was a violation of s.666 of the Code. These findings are wrong and are set aside.

It is my view as I have already stated that a District Judge could in the exercise of discretionary power make an order such as of suspension or vacation or setting aside of an earlier enjoining order provided that in a suitable case the proceedings are had inter partes. The contest before the District Judge on 3.7.89 went to the root of the case – whether there was a cause of action at all against the Defendant as well as a challenge that the Plaintiff had wilfully suppressed material facts and misled the Court earlier. In such a situation it was appropriate for the District Judge to have dealt with the Defendant's application inter partes before interfering with his earlier order.

The order of the District Court of 3.7.89 is set aside. The District Judge is directed to proceed to fix the inquiry into the interim injunction and the trial if parties so agree and conclude it expeditiously. Paragraph 2 of the order of this Court made on 21.8.89

requiring the District Court to conclude the inquiry into the interim injunction before 31.10.89 cannot be implemented as that date has passed. The Defendant-Petitioner is liable in costs fixed at Rs. 1500/- in the Court of Appeal and Rs. 1500/- in this Court.

KULATUNGA, J.

The principal issue in this appeal concerns the legality or propriety of an order of the District Court in the above action by which it suspended an enjoining order which had been issued for restraining the defendant, The General Manager of Galadari Meridien Hotel, Colombo owned by the plaintiff company from proceeding with certain proposals for allocating the entire 2nd and 3rd floors of the Hotel to the International Irrigation Management Institute for use as office space. The enjoining order had been issued on 27.06.89 ex parte in terms of Section 664 of the Civil Procedure Code until the hearing and determination of the application for an interim injunction. The notice of the said application was returnable on 17.07.89. However on 03.07.89 the defendant filed his objections alleging that –

(1) the action has been instituted without a cause of action against the defendant ex facie on the averments in the plaint;

(2) the enjoining order had been obtained by fraudulant suppression of material facts relevant to the plaintiff's right to sue the defendant and the acts sought to be restrained; and praying for:

   (a) suspension of the operation of the enjoining order or for its discharge or vacation;

   (b) refusal of the application for an injunction;

   (c) dismissal of the action instituted without a cause of action.

On the same day the District Judge heard the defendant's application ex parte despite an application by the plaintiff's junior Counsel to fix it for hearing the next day and suspended the enjoining order and directed that the case be called on 17.07.89 which is the date originally fixed for return to the notice of the application for an interim injunction.

On 04.07.89 the plaintiff made a revision application to the Court of

Appeal against the order of the District Judge. The Court of Appeal having stayed the operation of the impugned order proceeded to hear the matter and made order setting it aside inter alia on the ground that it had been made without giving a hearing to the plaintiff and directed the District Judge to proceed to hear the objections to the issue of the interim injunction. The defendant has appealed to this Court from the judgement of the Court of Appeal and seeks to have the order of the District Judge suspending the enjoining order restored.

Despite the lengthy submissions in support of the appeal and the numerous authorities cited, we have informed Counsel that specially in view of the fact that all the proceedings and orders in the District Court which constitute the subject of this appeal have been ex parte, we propose to determine this appeal without expressing any views which may prejudice the parties in the adjudication of their claims in the application for the interim injunction or the main action pending in that Court.

Mr. Kanag-Iswaran, PC for the defendant-appellant justifiably criticised the view expressed by the Court of Appeal that the implication of the provisions of Sections 664 and 666 of the CPC is that the District Court cannot in the exercise of inherent power suspend an enjoining order until the hearing and determination of the application for the injunction. This view is plainly erroneous in the light of the case law on the subject and in particular the decision of this Court in *Hotel Galaxy Ltd. v. Mercantile Hotels Ltd.* (11). The Court also appears to have entertained the erroneous view that the District Judge revising an enjoining order is always bound to hear the party affected. There can be no such restriction on the inherent power of the Court under Section 839 of the CPC. This power is very wide both as regards its content and the procedure the Court may adopt in a particular case. The scope and extent of inherent power was examined by this Court in *T.W.U. Seneviratne v. Francis Fonseka Abeykoon* (4). Tambiah J. cited the following passage from Chitaley and Rao Code of Civil Procedure 3rd Ed. Vol. 1 on the corresponding section in the Indian Civil Procedure Code.

> "Every Court, whether a Civil Court or otherwise, must therefore, in the absence of express provision in the Code for that purpose, be deemed to possess, as inherent in its very Constitution, all such powers as are necessary to do the right and to undo a wrong in the course of the Administration of

Justice" (p. 1199).

He also cited Sarkar (Code of Civil Procedure) Vol. 1 at page 842 where it is stated –

> "Where a contingency happens which has not been anticipated by the framers of the Civil Procedure Code, and therefore no express provision has been made in that behalf, the Court has inherent power to adopt such procedure, if necessary to invent a procedure, as may do substantial justice, and shorten needless litigation".

On the question of the duty of hearing the affected party in discharging or varying an injunction granted ex parte Counsel for the defendant-appellant cited *London City Agency (JCD) Ltd. and another v. Lee and others* (7). Megarry J. said –

> "The Court will grant an interlocutory injunction on an ex parte application if a case of sufficient cogency is made, and no reason has been suggested why, if an application ex parte to discharge or vary such an injunction is supported by sufficiently cogent grounds, the Court should not do what is sought. If time permits, it is plainly preferable that any such application should be made on due notice, but in a case of sufficient urgency, I do not see why an injunction granted ex parte should be immune from being varied or discharged on an ex parte application."

Mr. Eric Amarasinghe, PC for the plaintiff-respondent concedes that the Court has the inherent jurisdiction in an appropriate case to vacate an enjoining order but contends that in the circumstances of this case it could not have lawfully suspended the enjoining order without hearing the plaintiff. He also questions the propriety of the order in particular on the first ground i.e. the lack of a cause of action against the defendant and complains that the District Judge has pre-judged the main and sole issue in the action; and already formed an opinion ex parte on a question upon which the plaintiff had the right to be heard. On this and other grounds, he submits that the order of the Court of Appeal is right and ought to be affirmed.

On the other hand, the Counsel for the defendant-appellant whilst not denying the necessity for hearing the affected party in an appropriate case confidently contends that in the instant case the Court was not obliged to hear the plaintiff at that stage; that the plaintiff had, particularly in view of the suppression of material facts,

lost his right to be heard on the merits of the defendant's application; and that the Court had the jurisdiction to vary its order so soon as it discovered such suppression.

Thus the question whether the District Judge was right in suspending the enjoining order without hearing the plaintiff is crucial. There are two other issues namely whether the plaintiff could have maintained his application in the Court of Appeal without first having canvassed the order of suspension before the District Court and whether there were exceptional circumstances which warranted the Court of Appeal setting aside the order of suspension by way of revision. All these issues can be determined only after an examination of the facts of the case. In this connection, the Counsel for the defendant-appellant in his written reply contends that the *Galaxy* judgment is binding authority for the principle that a party seeking to canvass an ex parte order must first apply to the Court that made it; that this principle as affirmed in the *Galaxy* case is unqualified; the judgment cannot be distinguished; the principle cannot be restricted in any form; and if that is to be done, the matter ought to be referred to a fuller bench. Since the *Galaxy* case is being relied upon by Counsel on more than one issue it would be appropriate to first examine the facts of that case.

Counsel for the plaintiff-respondent does not deny the binding force of the principle affirmed in the *Galaxy* judgment that the District Judge had the power to vary the enjoining order. He however does not concede that the plaintiff was required in the circumstances of this case to apply to the District Judge before seeking to revise his order in the Court of Appeal particularly for the reason that the District Judge was not ready and willing and did not intend, to hear the plaintiff on the order of suspension. In the submission of the Counsel for the defendant-appellant the principle is unqualified and cannot be waived except perhaps in an extreme case where access to the original court is denied by Act of God, force majeure and such perils.

In the *Galaxy* case, the plaintiff company exercising rights of management, control and operation of a hotel on behalf of the owning company under a management agreement complained that the owning company had with the assistance of thugs interfered with their rights of control and management and forcibly ejected Samarakoon, The General Manager of the plaintiff from the hotel.

The plaintiff prayed, inter alia, for a declaration that it was entitled to operate and manage the hotel without interference by the defendants, their servants and agents; that its rights had been unlawfully interfered with by the defendants, their servants and agents; for an order for the ejectment of all persons who had no authority from the plaintiff; and for an interim and a permanent injunction restraining the defendants, their servants and agents from interfering with the plaintiff's rights.

The District Judge directed notice of the application for an interim injunction on the defendants and issued an enjoining order restraining them from committing the acts the commission of which the plaintiff sought to restrain by way of an interim injunction. Subsequently, the defendants applied to the Court to vacate the enjoining order, inter alia, on the ground of wilful suppression of a material fact namely an order of the Primary Court in proceedings instituted by the Police under Section 66 of the Primary Courts Procedure Act, No.44 of 1979 declining to make an interim order restoring to the plaintiff the rights of management of the hotel. The affidavit of Samarakoon filed with the plaint only stated –

> "I made complaint to the Police.... The Police have referred the matter to the Fort Magistrate's Court and the matter is pending therein"

After receiving the written objections of the plaintiff and hearing the parties the District Judge vacated the enjoining order on the ground of wilful suppression of a material fact without going into the merits of the defendant's application to vacate the enjoining order.

This Court affirmed the order of the District Judge on the following grounds:

1. That in view of the *Scott v. Avery* Clause in the management agreement, the plaintiff had no cause of action to sue; the action should fail in limine for want of a cause of action and the District Judge should have refused to entertain the plaint as disclosing no cause of action.

2. That the relationship between the defendant company and the plaintiff being that of principal and agent or master and servant the only remedy available to the plaintiff was damages and not specific performance. The plaintiff cannot sustain the reliefs of declaration and injunction prayed for by him. Hence the enjoining order was misconceived.

3. That the order of the District Judge suspending the enjoining order on the ground of a material fact was right; and there were no exceptional circumstances for the Court of Appeal to have exercised revisionary powers; the exercise of such power on the assumption that the plaintiff was in lawful possession of the hotel was untenable since it was the defendant company which was in possession of the hotel of which the plaintiff was only the managing agent on behalf of the defendant company.

4. That it was legally competent for the District Judge to vacate the enjoining order which was made by him ex parte.

Consequently, this Court set aside the judgment of the Court of Appeal and proceeded to direct the District Court to take further steps according to law in the light of the judgment of this Court.

I presume that pursuant to the direction of this Court, the District Judge would have dismissed the plaintiff's action. This was possible in view of the fact that the District Judge had held a full inquiry after hearing the parties; all the facts were before the Court of Appeal and this Court and the issues were exhaustively argued by Counsel; and in the end this Court was in a position to give a clear direction touching the rights of parties. In the case before us, there has been no such proceedings or determination of facts; as stated earlier we can only decide the limited question whether the ex parte order of the District Judge suspending the enjoining order is valid and any incidental issues but without causing prejudice to the claims of the parties pending before the District Court. In reaching a decision, I would have to refer to the salient facts and set out the contending positions advanced by the parties in relation to such facts. In the *London City Agency (JCD) Ltd. v. Lee* (Supra) Megarry J. in considering an application to discharge an interlocutory injunction said –

> "I therefore turn to the facts of the case. I propose to deal with them as briefly as possible, bearing in mind that there is an acute conflict of evidence, and that therefore it would be quite wrong for me to attempt to resolve this conflict at this stage"

In the instant case, affidavits and documents have been filed by both sides; the case has reached us before there had been any inter parte

hearings on evidence in the District Court; and Counsel have made diametrically opposed submissions touching the available evidence. The caution exercised by Megarry J. should therefore guide us with equal force.

Details of the dispute which culminated in the filing of this action can be gathered from the correspondence copies of which are annexed to the plaint. The entire correspondence commencing on 30.05.89 and ending on 16.06.89 relating to the proposed allocation of the 2nd and 3rd floors of the hotel as office space to the International Irrigation Management Institute (hereinafter called IIMI) has been produced. The plaintiff also produced with the plaint a copy of the agreement under which the management and operation of the hotel on behalf of and for the account of the plaintiff had been entrusted to a company called 'Societe des Hotels Meridien' (hereinafter called 'Meridien') situated in Paris. Admittedly Meridien has no place of business in Sri Lanka; and the plaint states that the powers and discretions granted to Meridien under the agreement were at all times material to this action exercised by the defendant as General Manager of the Hotel. Under the agreement the relevant provisions of which have been fully reproduced in the plaint, the selection, transfer and dismissal of the General Manager is by Meridien; and he shall be under Meridien's exclusive control but employed and paid by the plaintiff.

The two floors in question consist of 80 guest rooms. The correspondence shows that they are furnished and equipped. Thus in one of his letters the defendant states –

> "The furniture on the two floors in question will be suitably stored on another floor of the hotel. The client will be basically using his own office furniture".

The correspondence bears out the fact that these guest rooms will be converted for use as office space. Defendant's letter to IIMI containing the terms of the proposed lease shows that the use of the rooms by IIMI would involve alterations and damage. One such term states –

> "The cost of rehabilitating the rooms or corredors consequent to any breakage of or damage to furniture, furnishings, fittings and equipment must be borne by IIMI....".

A copy of this letter had not been furnished to the plaintiff at the

time of instituting this action. The only information in the possession of the plaintiff regarding follow up action on the proposal consisted of a letter from IIMI which states –

> ".... We reached an agreement with the General Manager of the Galadari Meridien Hotel whereby the Institute would rent offices on this hotel's second and third floors", and a letter from the defendant in which he states –
>
> "We have .... given out the 2nd and 3rd floors of the hotel to IIMI in the manner we mentioned to you by our earlier correspondence".

In one of the letters produced with the plaint the defendant states –

> "Space to be allotted consists of the 2nd and 3rd floors of the hotel. These floors never having been commissioned since the opening of the hotel and being presently in a very bad state of repair i.e. wall paper peeling off walls, carpets stained etc. etc."

The plaint alleges, inter alia, that the defendant has, in pursuance of his proposal allocated two of the guest rooms of the 3rd floor of the said hotel bearing numbers 318 and 320 as office space in the purported exercise of his alleged rights as General Manager of the hotel and states that the plaintiff reasonably apprehends that the defendant will, wrongfully and unlawfully and in violation of the management agreement, proceed to allocate the 2nd and 3rd floors; and that thereupon by such wrongful and unlawful allocation the Institute will use the said space for office purposes by converting the lay out of the guest rooms; effect structural alterations and modifications and cause the furniture fixtures, fittings and other amenities of the guest rooms to be shifted; and that in such event grave and irreparable loss and damage will be thereby caused to the plaintiff. The plaintiff prays for a declaration that the defendant is not entitled under the management agreement to allocate the 2nd and 3rd floors to the Institute for office space; for permanent injunction restraining the defendant from allocating, renting and/or leasing to the Institute the 2nd and 3rd floors or committing the other acts enumerated above; and for an interim injunction in the same terms. An affidavit from K. Abootty, Executive Manager of the plaintiff accompanied the plaint.

On the basis of this plaint, affidavit and documents and after hearing Counsel for the plaintiff, the District Judge issued an enjoining order but excluded from its operation rooms 318 and 320 in

view of the fact that the plaintiff's Counsel informed the District Judge that these rooms had already been converted into offices. His subsequent order reads –

> "Addressing my mind to the facts submitted by Mr. Kanag-Iswaran the agreement purported to have been entered between the plaintiff and the defendant as stated by the plaintiff appears to have been made by the plaintiff and Meridien as evinced in the preamble to the agreement 'A'.

In the first instance, it is my view that the defendant is not a party to this agreement.

Secondly, following from this it is my view that the defendant cannot be injuncted where the plaintiff seeks to do so.

(Advertising) to the facts of this case, it appears to me that purported renting of the two floors has already been done by the letter dated 9th June, reflected in the document marked 'C' annexed to the plaint. Further, though alleged by the plaintiff that the 80 rooms in floors 2 & 3 of this building are guest rooms they have not been commissioned which fact is borne by letter marked 'B'.

In the light of these facts, I suspend the enjoining order issued in this case.

> Copy of this order to be served on the plaintiff
> .... call case on 17th July, 1989"

According to this order, the plaintiff had stated that the management agreement was between the plaintiff and the defendant. Counsel for the plaintiff-respondent complains that this observation is based on the erroneous record of submissions made in support of the application for an injunction; that the agreement with Meridien was annexed to the plaint; relevant portions of the agreement were also cited in the plaint; and it is inconceivable that Counsel would have misrepresented the agreement. It is true that a party to a suit will not be permitted to contradict the record; but Counsel informed us that he had no opportunity of suggesting corrections to these proceedings. It is not possible for this Court to decide what submissions Counsel in fact made before the District Judge. I can only observe that had the District Judge held an inter partes inquiry into the defendant's application, there would have been no room for such complaint.

Counsel for the defendant-appellant confidently submits that this

being an action based on the agreement, Meridien who is the disclosed foreign principal of the defendant alone can be sued and not its agent the defendant. He has cited authority for this proposition. (Fridman – Law of Agency 5th Ed. pp.187-188; Chesire, Fifoot and Furmston's Law of Contract 11th Ed. p.510). Counsel for the plaintiff-respondent submits with equal confidence that the defendant can be sued for his acts which are not authorised by the agreement. He pointed out that the agreement prohibits the setting up of any other activities except for ancillary and complimentary activities, as normally connected with hotel operation according to normal practices of the international hotel trade; he submits that the question whether the proposed conversion of 80 guest rooms into offices is a permitted practice ought to be decided at the trial. To a question by Court he stated that this action is based on tort.

In his written submissions, he has cited authority in support of the principle that an agent who commits a tort is liable whether he acted on behalf of a principal or not, and even if he acted for his principal's benefit. He cannot escape liability by pleading that he acted with the authority of his principal. Where the principal and the agent are both liable for a tort committed by the agent, they are said to be joint tortfeasors, and their liability is joint and several. The plaintiff can sue either principal or agent separately, or he can sue both together jointly. (The Law of Agency by Raphael Fowell 2nd Ed. pp. 277,283).

The dispute relating to the classification of the cause of action is not an issue for our decision. It is an issue for the District Court. This Court will therefore not pursue the matter except to observe that a Court should not reach even a provisional decision on so serious a question without hearing the affected party.

The District Judge appears to have taken the view that the plaintiff had suppressed the fact that the renting of two floors had already been done by letter dated 9th June reflected in the document marked 'G'. The defendant had not furnished to the plaintiff the letter dated 9th; document 'G' is a letter wherein the defendant informed the plaintiff that he had 'given out' the 2nd and 3rd floors of the hotel to IIMI; it is vague. Besides, Counsel for the plaintiff-respondent strongly contends that on the face of it the letter of the 9th is not an agreement by Meridien acting for and on behalf of the plaintiff. On the basis of these facts and circumstances, I hold that the District Judge should have heard the plaintiff before forming his view in the matter.

The District Judge has also formed the view that the plaintiff suppressed the fact that the 80 guest rooms had not been commissioned. Counsel for the plaintiff-respondent submits that the question whether any facts were suppressed and whether they are material facts should be decided inter partes. I am in agreement with this submission. Incidentally, if the 2nd and 3rd floors were never commissioned and never handed over by the contract as submitted in SC 30 A, and "never taken over by the plaintiff-respondent" as stated in the petition of appeal, it is a moot question how Meridien or the defendant as their agent could have taken over and rented those floors under the management agreement. If dealing with such property is unlawful, how should such wrong be classified? Is it based on contract or tort? These are matters for decision in the pending action.

The enjoining order in question was issued upon a consideration of the plaint, the affidavit, the documents and submissions of Counsel. It is an order which is exfacie regular and made in the exercise of the ordinary jurisdiction of the Court, for maintaining the status quo until the hearing and determination of the application for an interim injunction. Section 664 of the CPC empowers its issue exparte in the discretion of the Court, upon considerations of urgency and the balance of convenience.

It is the plaintiff's position that the hotel was established with the approval of and with tax and other concessions by governmental authorities which would be forfeited if 80 guest rooms are converted into office space; this would result in irremediable loss and damage to the plaintiff. Even assuming that the letter of 9th June constitutes an agreement, the plaintiff's submission is that the enjoining order is a continuing restraint against further acts such as the physical occupation of the rooms except 2 rooms already occupied by IIMI, the conversion of the rooms, structural alterations, shifting of furniture and equipment etc., As against this, the defendant's ground for the suspension of the enjoining order is the hardship to the defendant and to IIMI. This is presumably the loss of rent money and the delay in providing office space to IIMI. As the lease is on behalf of the plaintiff the loss of rental is no loss to the defendant as much. Even if hardship to IIMI is relevant, it is nothing more than a delay in shifting its office to Colombo from Digana in Kandy where its centre is presently situated. Assuming that the plaintiff has a right of action,

urgency and the balance of convenience would therefore appear to be in favour of the plaintiff. This is relevant to the question whether the plaintiff should have been given a hearing before suspending the enjoining order.

The dissolution of the enjoining order was effected in the exercise of the inherent power on the ground that the plaintiff had no right of action, which fact the plaintiff has suppressed; and that in any event the lease had already been signed and the guest rooms given for occupation which facts had also been suppressed. The question is whether the District Judge had failed to exercise this power according to law by declining to hear the plaintiff. No such issues arises as regards the procedure for vacating an interim injunction for which there is express provision in Section 666 of the CPC. That section requires an application to be made by way of summary procedure with notice to the plaintiff. This procedure does not apply to an enjoining order; it may be discharged or varied ex parte. However, as Megarry J. said in *London City Agency (JCD) Ltd. v. Lee* (Supra)

> "If time permits, it is plainly preferable that any such application should be made on due notice."

Such applications should generally be on notice – Halsbury 4th Ed. Vol. 24 para 1111; The Principles of Equitable Remedies, Spry 3rd Ed. 490. Notice is dispensed with only where considerations of urgency and the balance of convenience would warrant such procedure.

The rule audi alteram partem or the principle of fairness is rooted in Common Law. In *Cooper v. Wandsworth Board of Works* (14) Byles, J. called it "justice of the Common Law". Principles of natural justice which are discussed in numerous cases reviewing the orders of administrative authorities exercising 'quasi judicial' powers were originally applied to the process by which Courts themselves made their decisions. Constitutional and Administrative Law, Hood Phillips & Paul Jackson 6th Ed. p. 602; that these principles apply to proceedings in a Court of Law "is hardly open to question". Natural Justice, Paul Jackson 2nd Ed. 104.

Counsel for the defendant-appellant submits that as the order suspending the enjoining order is a temporary order, the complaint of breach of audi alteram partem rule at this stage cannot be taken seriously. The decisions in *Lewis v. Heffer* (15) and *London Borough of Hounslow v. Twickenham Garden Developments Ltd.* (9) cited by

Counsel do not assist us. In the first case, an injunction to restrain the suspension by the Labour Party of certain officers and committees of a local branch pending inquiries was refused. In the second case, the plaintiff applied for an injunction to restrain a building contractor whose contract had been terminated from trespassing on the building site. This was refused mainly on the ground that the balance of convenience was in favour of the contractor. The dicta of Megarry J. on the principles of natural justice relied upon by Counsel before us were made in relation to the Architect's notice by which the contract was terminated which notice was attacked by the contractor inter alia on the ground that it was given in breach of the principles of natural justice.

In *Wiseman v. Borneman* (16) Lord Wilberforce said –

> ".... I cannot accept that there is a difference in principle as to the observance of the principles of natural justice, between final decisions and those which are not final...."

Lord Wilberforce continued

> "Secondly, in my opinion, a residual duty of fairness rests with the tribunal. I would, therefore, think them empowered, if in any case where they are exercising their functions under Sub S. (5) they consider exceptionally that material has been introduced of such a character that to decide on it ex parte would be unfair, to take appropriate steps to eliminate that unfairness. I do not think that rules need be formulated or procedures laid down...."

In *R. v. Wareham Magistrates' Court* (17) the transfer of an application for the revocation of an order for maintenance to a Court 300 miles from the recipient of maintenance resided was quashed on the ground that such transfer was without notice to her, even though the rule under which the Magistrate acted required no such notice to be given.

McCullough, J. said (at 753)

> "Thus the question is not one of the implication into the provision under consideration a rigid requirement applicable in every case. It is one of fairness. In some cases fairness will require steps to be taken which in other cases it will not require".

I am of the view that having regard to the complicated questions of

law and the serious allegation of fraudulent suppression of facts by the plaintiff including a suggestion that the plaintiff's Counsel himself had misled the Court in stating the case for an interim injunction, the District Judge should have heard the plaintiff before suspending the enjoining order. In the *Galaxy* case the enjoining order was vacated after hearing the plaintiff. In *Lee's* case although the application was ex parte, Counsel for the plaintiffs was present and considerably assisted the Court. It is significant that Megarry J. did not discharge the interlocutory order but varied it only to the extent of enabling the defendants to draw a sum not exceeding £625 from the bank account mentioned in the order.

I cannot see what serious mischief it would have caused to the defendant if the District Judge acceded to the request of the junior Counsel for the plaintiff to fix the matter for hearing on the next day. On the other hand, mischief to the plaintiff would appear to be irremediable. Besides the conversion of 80 guest rooms into offices the defendant had selected as a tenant IIMI which claims inviolability of premises and immunity from every form of legal process in Sri Lanka under Act No. 6 of 1985. If this is correct, in the absence of an order restraining the defendant from completing the transaction with IIMI, steps for converting two floors of the hotel would continue and IIMI would be installed there. In that event, any judgement which the plaintiff may obtain would become completely ineffectual.

Counsel for the defendant-appellant has placed much reliance on the rule that the complaint of a party found guilty of wilful suppression of facts will be dismissed on that ground alone and he would in particular be liable to have any ex parte order obtained by him vacated at once.

Counsel cited –
Spry Equitable Remedies 329, 476,
Thomas A. Edison Ltd. v. Bullock (1) Alponso Appuhamy v. Hettiarachchi (2) Galaxy case (Supra)
Halsbury 4th Ed. Vol. 24 para 1112.

These authorities are of no assistance in deciding whether the District Judge was wrong in suspending the enjoining order ex parte. In the decisions cited relief was refused or an order made was vacated after hearing the parties. The effect of suppression is to make the offender liable to have his claim thrown out of Court without going into the merits of the case. There is no authority for the

proposition that an allegation of suppression by itself forfeits to a party the right to be heard before his claim is rejected.

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. In *Anisminic v. Foreign Compensations Commission* (18) Lord Pearce said –

> "Lack of jurisdiction may arise in various ways.... or while engaged in a proper inquiry, the tribunal may depart from the rules of natural justice. Thereby it would step outside its jurisdiction".

It remains to decide the two incidental issues raised in this appeal, namely, whether on the authority of judicial decisions the plaintiff could not have maintained his application in the Court of Appeal without first seeking to have the order suspending the enjoining order canvassed before the District Court, and whether there were exceptional circumstances warranting the exercise of the revisionary powers of the Court of Appeal. On the first question, Counsel relies on the decisions in *Fernando v. Dias* (12) and the *Galaxy* case (Supra).

Fernando's case is authority for the proposition that a defendant cannot seek to have an interim injunction issued by the District Court revised in the Court of Appeal without first having recourse to the Court which issued it to have it set aside in terms of Section 666 of the CPC. In his judgment, Rodrigo, J. refers to certain other judgments in which it had been held that a party seeking to set aside an ex parte order not covered by any express provision for setting it aside must first apply to the Court which made it, which is always competent to set it aside. Atukorale J. in his judgment in the *Galaxy* case cites more decisions on this point for determining the question whether the District Judge was competent to vacate the enjoining order. These are cases in which a decree or an order had been made without due notice to the defendant. In one case, the Court without fixing a date for the answer of the defendant fixed the case for ex parte trial on the basis that the defendant was in default and entered decree nisi against her. Atukorale, J. said "these authorities clearly establish the principle that a Court which makes an ex parte order without notice to the party who is adversely affected by it is

entitled to set it aside on the application of such party in the same case".

In the instant case, the issue before us is not whether the District Judge is or is not entitled to suspend the enjoining order but the manner in which he made his decision to suspend it. The plaintiff concedes the inherent power of the Court in an appropriate case to vacate an enjoining order but contends that the Court did not in the circumstances of this case have the power to make such order without hearing him; that the Court formed an opinion ex parte on the fundamental issue of maintainability of the action by the plaintiff upon which he had the right to be heard; that the Court fixed the case to be called on 17.07.89, the date on which notice on the application for an interim injunction was returnable; that the Court was thus not ready and willing and did not intend to hear the plaintiff in the meantime against the order of suspension. I am of the view that the decisions relied upon by the defendant have no application to the issue before us and the plaintiff was entitled to seek to have the order of the District Judge revised by the Court of Appeal.

On the question whether there was exceptional circumstances for the exercise of revisionary powers of the Court of Appeal, Counsel cited several decisions in particular *Rasheed Ali v. Mohamed Ali and others* (19) and the *Galexy* case (Supra). In *Rasheed Ali's* case the applicant who was in occupation of the premises in suit resisted execution of the decree. This Court held that he was in possession on a sham transaction and was without a legal interest to prefer a bona fide claim to resist the judgment creditor; the District Judge had rejected his claim and directed that the judgment creditor be placed in possession of the premises; and his remedy was to institute action in terms of Section 329 of the CPC to establish his right of title to such property; there were no exceptional circumstances, and that the fact that the Judge's order may be merely wrong would not be a sufficient ground for the exercise of the powers of revision. It is apparent that this decision does not assist the defendant-appellant.

In the *Galaxy* case, the Court of Appeal took the view that the defendants had by employing thugs forcibly ejected the plaintiff who was in lawful possession of the hotel taking the law into their own hands and this constituted exceptional circumstances to exercise its revisionary powers. Atukorale J. held that the plaintiff was only the Manager of the hotel of which the 1st defendant as owner always

was and continued to be in possession through its Manager, the plaintiff and hence the approach of the Court of Appeal to the vital issue as to whether there were or were not exceptional circumstances to warrant the exercise of revisionary powers was untenable. It also failed to address its mind to the important question why the plaintiff, without pursuing the application for an interim injunction pending in the District Court invoked the revisionary jurisdiction to vacate the order of the District Judge setting aside the enjoining order.

The facts of this case are different. As discussed above, the plaintiff is impeaching the legality or propriety of the order of the District Judge on fundamental issues including the failure to hold a fair inquiry. Cosiderations of urgency and the balance of convenience demanded an immediate review of the Judge's order; there were thus exceptional circumstances warranting the exercise of the revisionary jurisdiction of the Court of Appeal.

For the above reasons, I dismiss the appeal and affirm the judgment of the Court of Appeal subject, however, to the rulings as regards the errors of law contained therein which have been enumerated earlier in this judgment; the defendant-appellant is directed to pay a sum of Rs. 1500/- as costs of this appeal and the sum of Rs. 1500/- which has been ordered in the judgment of the Court of Appeal, as costs in that Court.

Appeal dismissed.
Order of District Judge
set aside.