

**SADHWANI AND OTHERS**

v.

**SADHWANI AND OTHERS**

COURT OF APPEAL

TAMBIAH, J. AND H.A.G. DE SILVA, J.

C.A. L.A. 55/81.

D.C. COLOMBO 1982/SPL.

JULY 29, AND 30, 1982

*Appeal – Application for leave to appeal – Who are necessary parties to application? – Civil Procedure Code, chapter 24 and sections 666 and 670.*

Where leave to appeal was sought from an order refusing to discharge an injunction and the relief being sought affected only particular parties it was not necessary to make the other parties respondents if they will not be prejudicially affected by the result of the appeal. They were not necessary parties.

**Cases referred to:**

- (1) *Talavaratne v. Talavaratne* (1957) 61 N.L.R. 112.
- (2) *Ibrahim v. Babeer et al* (1916) 19 N.L.R. 289.
- (3) *Francin Fernando v. Kaiya Fernando and others* 7 C.L.W. 133.
- (4) *Seelananda Thero v. Rajapakse* (1938) 39 N.L.R. 361.
- (5) *Tambiah v. Seugarajah* (1937) 39 N.L.R. 282.
- (6) *Arichchey Chettiar v. Perera* (1937) 40 N.L.R. 65.
- (7) *H.L. Bolton (Engineering) Co. Ltd. v. T.J. Graham and Sons Ltd.* (1956) 3 A.E.R. 624, 630.

APPEAL from order of District Judge of Colombo – preliminary objections.

*K.N. Choksy, S.A.*, with *S. A. Paruthalingam* and *Miss. Rajepakse* for the defendants-petitioners-appellants

*H.W. Jayewardene, Q.C.*, with *K. Kanag-Iswaram* for the plaintiffs-respondents-respondents

September 24, 1982

**TAMBIAH, J.**

Esquire (Garments) Industry Limited was incorporated on 27th September, 1978. It is a private Company formed by a family. The 1st and 4th plaintiffs-respondents, the 3rd defendant-petitioner-appellant, and the 5th defendant are brothers. The 2nd plaintiff-respondent is the son of the 1st plaintiff-respondent; the 3rd plaintiff-respondent is the wife of the 1st plaintiff-respondent, and the mother of the 2nd plaintiff-respondent. The 2nd defendant-petitioner-appellant is the wife of the 1st defendant-petitioner-appellant and the latter is the son of the 3rd defendant-petitioner-appellant. The 3rd defendant is the wife of the 3rd defendant-petitioner-appellant.

The nominal capital of the Company was Rs. 1,000,000 shares of Rs. 10/- each. The issued capital of the Company was 400,000 shares of Rs. 10/- each. The 1st plaintiff-respondent had 26,082 shares; the 2nd plaintiff-respondent had 80,000 shares; the 3rd plaintiff-respondent had 53,918 shares and Sadhwani (Hongkong) Limited, 240,000 shares.

The original Directors of the Company were the 1st, 2nd, and 4th plaintiffs-respondents, the 1st and 3rd defendants-petitioners-appellants and the 5th defendant. The 4th plaintiff-respondent and the 5th defendant represented Sadhwani (Hongkong) Limited on the Board of Directors of the Company. The 3rd defendant-petitioner-appellant was the Chairman and the 2nd plaintiff-respondent was the Managing Director.

At a meeting of the Board of Directors, held on 18.8.80, the 2nd plaintiff-respondent was removed from the post of Managing Director and the 1st defendant-petitioner-appellant was appointed Joint Managing Director with his father the 3rd defendant-petitioner-appellant. At this meeting, the 2nd defendant-petitioner-appellant and the 3rd defendant were appointed Directors of the Company. The 1st defendant-petitioner-appellant was also appointed Deputy Chairman, the 3rd defendant-petitioner-appellant being Chairman at the time. The plaintiffs-respondents allege that this meeting was an illegally convened meeting; the defendants-petitioners-appellants, on the other hand, say that that it was a lawfully convened meeting.

At a later meeting of the Board of Directors of the Company held on 13.2.81, the unissued 600,000 shares of Rs. 10/- each were issued to the 3rd defendant-petitioner-appellant on the condition that he need pay Rs. 1/- per share and the balance was to be paid only

as and when called for. According to the plaintiffs-respondents, it was an illegally constituted meeting and the shares were unlawfully and wrongfully allotted; the defendants-petitioners-appellants however contend that it was a lawfully convened meeting and that the said shares were issued to the 3rd defendant-petitioner-appellant for the purpose of providing additional capital to the Company.

On 27.2.81, the 1st to the 3rd plaintiffs-respondents filed action in the District Court of Negombo against the three defendants-petitioners-appellants, and the 3rd, 5th and 6th defendants and obtained an interim order, inter alia, restraining, the 1st and 3rd defendants-petitioners-appellants from acting as Joint Managing Directors, the 1st defendant-petitioner-appellant from acting as Deputy Chairman of the Board of Directors and as Secretary of the Company, the 2nd defendant-petitioner-appellant and the 3rd defendant from functioning as Directors of the Company, the three defendants-petitioners-appellants and the 3rd defendant from interfering with the lawful exercise by the 1st plaintiff-respondent and other Directors of the rights, duties and obligations as Directors of the Company and restraining the 3rd defendant-petitioner-appellant from exercising any rights in respect of the 600,000 shares purported to have been allotted to him. Though an interim order was issued, later, on a preliminary objection raised by the 1st and 2nd defendants-petitioners-appellants, on 25.3.81, the action was dismissed and the interim order was revoked on the ground that the Court had no jurisdiction to hear the matter. Notice of appeal was filed on 26.3.81.

On 17.3.81, an emergency meeting of the Board of Directors was held at which the 1st, 2nd and 4th plaintiffs-respondents were present along with the 1st and 3rd defendants-petitioners-appellants and the 5th defendant. Decisions were taken that the 1st plaintiff-respondent be elected Chairman, that the 2nd plaintiff-respondent be elected Managing Director and acting Secretary, that the 3rd defendant-petitioner-appellant be removed from the office of Chairman and the 1st defendant-petitioner-appellant from the office of Deputy Chairman, that the 1st and 3rd defendants-petitioners-appellants be removed from the office of Joint Managing Directors and the 3rd plaintiff-respondent be elected Director of the Company.

An extraordinary general meeting of the shareholders was held on 21.3.81 and it was resolved to remove the 1st and 2nd defendants-petitioners-appellants and the 3rd defendant from the office of Directors and to cancel the allotment of 600,000 shares issued to the 3rd

defendant-petitioner-appellant. According to the defendants-petitioner-appellants, this meeting was invalid as the plaintiffs-respondents prevented the 3rd defendant-petitioner-appellant from attending the meeting and exercising his rights in respect of the 600,000 shares issued to him on 13.2.81.

According to the plaintiffs-respondents, an emergency meeting of the Board of Directors was held on 26.3.81 to consider the Order delivered by the District Judge of Negombo and the 1st to the 3rd defendants-petitioners-appellants unlawfully attempted to participate as Directors and they were refused participation. The next day, the 1st, 2nd and 4th plaintiffs-respondents visited the premises of the Company to notify the employees, inter alia, of the removal of the 1st and 2nd defendants-petitioners-appellants and the 3rd defendant from the office of Directors and they were informed by the Executive Manager that he had been instructed by the 3rd defendant-petitioner-appellant not to permit the plaintiffs-respondents to have access to the books and documents of the company, not to give information concerning the affairs of the Company in writing and to permit the plaintiffs-respondents only to go round the premises.

It was in this setting that the present action was filed by the plaintiffs-respondents. They named six persons as defendants – the three defendants-petitioners-appellants, as 1st, 2nd and 4th defendants; the wife of the 4th defendant-petitioner-appellant as 3rd defendant, and the Company as the 6th defendant. They averred in paragraph 25 of the plaint as follows:-

“The 5th defendant, a Director, though he supports the action of the plaintiffs, is made a defendant as he is now in Hongkong and could not subscribe to the proxy. The 6th defendant is made a party for purposes of notice only and in order that it may be bound by the Orders made. Likewise the 3rd defendant. No relief is claimed against her in these proceedings as she has in no way, up to date hereof, interfered in the affairs of the 6th defendant Company or obstructed or interfered with the rights of the plaintiffs, or asserted any rights as a Director of the Company.”

They sought the following reliefs:-

“(a) for a declaration that the 1st and 2nd defendants have ceased to be and are not directors of the 6th

- defendant Company by reason of their removal from the Office of Directors by the Company at the general meeting held on the 21st of March, 1982;
- (b) for an interim injunction restraining the 1st, 2nd and 4th defendants by themselves, their servants, workmen and agents or otherwise howsoever from obstructing and or interfering in any manner whatsoever with rights duties and obligations of the plaintiffs as Directors of the 6th defendant Company until the final determination of this action;
  - (c) for an interim injunction restraining the 1st, 2nd and 4th defendants by themselves, their servants, workmen and agents or otherwise howsoever from obstructing and/or interfering with the rights duties and obligations of the 1st plaintiff as the Chairman of the 6th defendant Company until the final determination of this action;
  - (d) for an interim injunction restraining the 1st, 2nd and 4th defendants by themselves, their servants, workmen and agents or otherwise howsoever from obstructing and/or interfering with the rights, duties and obligations of the 2nd plaintiff as the Managing Director and Acting Secretary of the 6th defendant Company, until the final determination of this action."

and for a permanent injunction in terms of paragraphs (b), (c) and (d).

The District Court of Colombo, on 30.3.81, issued an interim injunction in terms of paragraphs (b) to (d) of the prayer, returnable on 3.4.81 and ordered the plaintiffs-respondents to deposit a sum of Rs. 5000/- as security. The interim injunctions were to remain in force until the final determination of the action. In the course of his order, the learned District Judge stated:

"The 5th defendant a Director of the 6th defendant Company has been made a defendant as he is now living in Hong Kong and could not subscribe to the proxy tendered by the plaintiffs. No relief is claimed against the 3rd defendant as according to the plaintiffs she is in no way up to date interfered with the affairs of the 6th defendant Company or obstructed or interfered with the rights of the plaintiffs or asserted any rights as a Director of the Company."

It would appear from the proceedings that Mr. Eric Amerasinghe, Senior Attorney-at-Law, who was present in Court on the same day, asked the Court that "the interim injunction proposed to be issued by Court be suspended for a period of 24 hours – at least till tomorrow", and the Court requested him to make a formal application.

The next day, 31.3.81, the 1st, 2nd and 4th defendants, the present defendants-petitioners-appellants, filed petition and affidavit and moved for the discharge and or setting aside of the interim injunctions issued on 30.3.81. The Court heard submissions and on the same day made order suspending the operation of the interim injunction until the inquiry was concluded, and entered interlocutory order in terms of s. 377 (b) of the Civil Procedure Code, and fixed 3.4.81 as the date of inquiry. In the course of his order, the learned District Judge said –

"Mr. Amerasinghe points out to Court section 54 (1) (c) of the Judicature Act and stresses that no property is involved in this application of the plaintiffs. He also states this is only a declaration sought for by the plaintiffs and that the Company, the 6th defendant, is in no way directly involved."

The inquiry was taken up on 3.4.81. In the course of his submissions, learned Queen's Counsel appearing for the plaintiffs-respondents told Court that the validity or otherwise of the allotment of the 600,000 shares has nothing to do with the interim injunctions that were granted and that the plaintiffs' claim for interim injunctions relates to the office of Managing Director, the office of Chairman and the office of Directors, based on the decisions taken at the meeting of 17.3.81; the 1st, 2nd and 4th plaintiffs are only asking that they be permitted to exercise their rights as Directors; the prayers of the 1st and 2nd plaintiffs are that they be permitted to function as Chairman and Managing Director, and that the defendants be restrained from interfering with their rights as Chairman and as Managing Director. He further stated that the application is not made on the basis that there is mismanagement or loss to the Company; the application is made on the basis that the plaintiffs as Directors and Chairman have certain rights which are being interfered with.

Learned Senior Attorney, in the course of his submissions, stated that there is not a word in the affidavits of the plaintiffs that the Company was affected, that its interests are in jeopardy, or that its business is in peril.

After inquiry, on 10.4.81, the learned District Judge by his Order dated 10.4.81, refused to discharge the interim injunctions and directed that interim injunctions in terms of prayers (b) to (d) of the plaint be served on the three defendants-petitioners-appellants, who were the 1st, 2nd and 4th defendants and further ordered that the injunctions will be in force, until the determination of the action. The application for leave to appeal is against this Order issuing the interim injunctions prayed for.

When the matter came up for the purpose of obtaining leave, a preliminary objection was taken by learned Queen's Counsel for the plaintiffs-respondents that the appellants have failed to make the 3rd, 5th, and 6th defendants, respondents to the application and that the application was not properly constituted, inasmuch as the aforesaid defendants were also necessary parties to the application. He further submitted that this was a matter in which no relief could be given to the three defendants-petitioners-appellants under s. 770 of the Civil Procedure Code, as the very words of s. 770 excludes its applicability to leave to appeal proceedings; s. 770 applies only to final appeals against judgments and decrees.

Learned Senior Attorney for the appellants, contended that the 3rd, 5th and 6th defendants are not necessary parties and need not be made respondents. Alternatively he submitted, that s. 770 applies and this Court has power to issue notice on them under s. 770 of the Code.

It is common ground that the 3rd, 5th and 6th defendants who were defendants to the action have not been made respondents to the present application for leave to appeal.

The procedure for setting aside an order for an injunction is expressly laid down in s.666 of the Civil Procedure Code, read with Chapter 24. S.666 states that any party dissatisfied with such order may make an application on petition by way of summary procedure. S.374 sets out the form of petition. The petition must contain, inter alia, the name, description, and place of abode of the petitioner or petitioners, of the respondent or respondents, a short statement constituting the ground of the application and the relief which the petitioner seeks. The relief the defendants-petitioners-appellants prayed for, was that the Court discharge and set aside the interim injunctions obtained by the plaintiffs. They made all the plaintiffs, respondents to their application. They obtained an interlocutory order in terms of s.377 (b), fixing a day for inquiry into their application and

intimating the plaintiffs-respondents that they will be heard in opposition to their application. The defendants-petitioners-appellants have complied with the provisions of s. 666 read with Chapter 24 of the Code.

Interim injunction proceedings are incidental proceedings and the application for leave to appeal is from an incidental order, made in the course of incidental proceedings, refusing a discharge of the interim injunctions issued. It appears to me that the defendants-petitioners-appellants need only make the four plaintiffs-respondents, as respondents to their application for leave to appeal, as they are the only persons who would be affected, if the interim injunctions are discharged or set aside by this Court.

“The Civil Procedure Code does not require a party appellant to name as respondent to an appeal every party to the proceedings in the lower Court. A party against whom no order is sought by the appellant need not be named as respondent”.

(Basnayake, G. J. in *Talavaratne v. Talavaratne*. (1)).

Let me apply the test laid down by Basnayake, J. in the above case – that only those persons against whom an order is sought by the appellants need be made respondents. In the instant case, the defendants-petitioners-appellants are only seeking to set aside the order issuing the interim injunctions, obtained by the plaintiffs-respondents. They are asking for relief against the plaintiffs-respondents only. They are not seeking an order against the 3rd, 5th and 6th defendants. Judged by this test, the 3rd, 5th and 6th defendants are not necessary parties to the present application.

Let me apply another test which one can discern from the judgments in *Ibrahim v. Beebee et al* (2), *Francina Fernando v. Kaiya Fernando & others* (3), *Seelananda Thero v. Rajapakse* (4), *Tambiah v. Sengarajah* (5), and *Avichchy Chettiar v. Perera* (6). In these cases, a necessary party has been equated to a party who may be prejudicially affected by the result of the appeal.

This Court can make one of two orders at the hearing of the appeal – either to revoke the order issuing the interim injunctions or uphold the order. The question therefore to be asked is, whether the interests of 3rd, 5th and 6th defendants are likely to be prejudicially affected by the result of the appeal. Judged by this test also, it seems to me, that the 3rd, 5th and 6th defendants are not necessary parties to the application before us.



I shall consider each of the defendants separately. The 3rd defendant is the wife of the 4th defendant who is now the 3rd defendant-petitioner-appellant. She has not joined the three defendants-petitioners-appellants in the petition filed by them to have the interim injunctions discharged or set aside. She has not participated in the interim injunction proceedings. The plaintiffs-respondents themselves say in their plaint that no relief is claimed against her as she has in no way, up to date, interfered in the affairs of the Company or obstructed or interfered with the rights of the plaintiffs-respondents or asserted any rights as a Director of the Company. The relief claimed by the plaintiffs-respondents and which was granted is against the 1st, 2nd and 4th defendants only, restraining them from interfering with the plaintiffs-respondents' rights as Directors, with the rights of the 1st plaintiff-respondent as Chairman, and with the rights of the 2nd plaintiff-respondent as Managing Director and Acting Secretary of the Company. They did not seek to restrain the 3rd defendant also from doing such acts nor was such an order made. The result of the appeal either way, will not prejudicially affect her interests.

As regards the 5th defendant, the plaintiffs-respondents in their plaint say that he supports their action and has been made a defendant as he is now in Honk Kong and could not subscribe to the proxy. The 5th defendant is a Director of the Company. The relief claimed by the plaintiffs-respondents, and which has been granted, is to restrain the three defendants-petitioners-appellants from interfering with the rights of the plaintiffs-respondents as Directors and not also of the 5th respondent as Director. Whether the interim injunctions issued are discharged or upheld in appeal, the rights of the 5th defendant will not be affected.

The 6th defendant is the Company itself. The plaintiffs-respondents do not claim any relief in regard to the 600,000 shares which they say were wrongly issued to the 3rd defendant-petitioner-appellant. In the District Court, during the interim injunction proceedings, both learned Counsel stated that the interests of the Company are in no way affected and the proceedings were conducted on that basis. Neither side considered it necessary that the Company should be represented in these incidental proceedings. To the Company then, it matters not, whether the interim injunctions stand or are set aside.

This is a private family Company. The plaintiffs-respondents say, that they have on their side, the duly elected Chairman, Managing Director and the Secretary. On the other hand, the defendants-petitioners-appellants say, that the duly elected Chairman, Deputy Chairman

and Managing Director, come from their side. A Company must act through living persons, and in the words of Denning, L. J., in *H. L. Bolton (Engineering) Co., Ltd. v T. J. Graham & Sons Ltd.* (7) the Directors and Managers "represent the directing mind and will of the Company; and control what they do". In this view of the matter, the 6th defendant Company, if not actually present, at least was adequately represented in the District Court and in this Court.

Let me assume that the Company is a necessary party to the proceedings before this Court and has to be joined. There is in-fighting among the Directors of the Company. Each side claims that their side has the right to control and manage the affairs of the Company. Who is Chairman, who is Managing Director, who is Secretary, and who are the Directors, are all matters in dispute. Then, who will take steps to bring the Company into the proceedings before us? Who is to represent the Company? Who is to affix the Seal of the Company? Who will subscribe the papers to be filed? Who will give instructions to lawyers? and so on. There are numerous difficulties which stand in the way of the 6th defendant being joined as a party. If a party is to be joined, it must be in a position to effectively participate in the proceedings.

I take the view that the 3rd, 5th and 6th defendants are not necessary parties to the application before us. It is therefore unnecessary for me to decide the further question, whether their non-joinder is curable or not, under s. 770 of the Civil Procedure Code.

The preliminary objection is overruled. The application will now be set down for hearing, in order to decide the question whether leave to appeal should be granted to the defendants-petitioners-appellants or not, from the order of the learned District Judge, dated 10.4.81. The plaintiffs-respondents will pay costs fixed at Rs. 525/- to the defendants-petitioners-appellants.

**H.A.G. DE SILVA, J.** - I agree.

*Preliminary objections overruled.*