1963 *Present:* **H. N. G. Fernando, J., and G. P. A. Silva, J.**

RICHARD PERERA and 4 others, Appellants, *and*
K. A. ALBERT PERERA, Respondent

S.C. 48/62 (Inty.) with Application 196—D. C. Colombo, 960/Z

Injunction—Prima facie case against applicant's claim for substantive relief—Effect on claim for interim injunction—Courts Ordinance, s. 86 (b)—Director of Company—Contract of loan with the Company—Inference of vacation of office—Companies Ordinance, Schedule I, Table A, Article 72 (g).

Where, in an application for an interim injunction, in terms of section 86 (*b*) of the Courts Ordinance, the material placed before the Court at the inquiry reveals information which justifies the *prima facie* view that the plaintiff is not entitled to the substantive relief claimed in the plaint, it would be wrong for the Court to ignore such information and issue the injunction.

Plaintiff sued for a declaration that he was the life Managing Director of the 5th defendant Company, of which the first three defendants were ordinary Directors and the 4th defendant Company functioned as the Agents and Secretaries of the Company. He sued also for an interim injunction restraining the defendants from removing him from the office of Managing Director and from interfering with his duties and functions in that capacity. The defendants averred that the plaintiff had obtained loans from the Company and had thereby vacated his office of Managing Director by virtue of the provisions of Article 72 (*g*) of Table " A " of Schedule I of the Companies Ordinance. At the inquiry the plaintiff admitted that he borrowed money from the Company, but the District Judge, thinking that the priviso to Article 72 operated to prevent vacation of office by the plaintiff, made order allowing the interim injunction.

At the hearing of the appeal filed by the defendants it was agreed that the power of the District Court to issue the interim injunction flowed only from paragraph (*b*) of section 86 of the Courts Ordinance.

Held, that although the trial Judge should not decide the substantive question in considering an application for an injunction, some consideration of the substantive question at this early stage is not irrelevant. In the present case, the form of the plaint and the admission that the plaintiff had in fact borrowed money from the Company operated against the plaintiff. Reference to the main provisions of Article 72 (*g*) of Table "A " of the Companies Ordinance should have sufficed to lead the Court to the *prima facie* opinion that the plaintiff had probably vacated office by reason of the contracts of loan. Accordingly, the plaintiff was not entitled to an interim injunction.

APPEAL, with application in revision, from an order of the District Court, Colombo.

H. V. Perera, Q.C., with *N. Nadarasa* and *K. Kandasamy*, for the Defendants-Appellants in the appeal and Defendants-Petitioners in the application.

H. W. Jayewardene, Q.C., with *C. D. S. Siriwardene, Bala Nadarajah* and *M. Underwood*, for the Plaintiff-Respondent in the appeal and application.

Cur. adv. vult.

December 4, 1963. H. N. G. FERNANDO, J.—

Plaintiff in this action sued for a declaration that he is the life Managing Director of the 5th Defendant Company, and also for an interim Injunction restraining the defendants from removing him from that office and from interfering with the duties and functionings of the plaintiff as the managing director. He stated in his plaint that he is the life managing director appointed as such by the Articles of Association of the Company and that the first three defendants are ordinary directors appointed by the shareholders.

In paragraph 6 of the plaint, it is alleged that the first three defendants by letter dated 3rd February, 1962, " purported to remove the plaintiff from membership of the Board of Directors and from office as life managing director ". A copy of the letter was attached to the plaint. In paragraph 9 plaintiff states that the defendants are acting in collusion to prevent the plaintiff from attending to his duties and functions as managing director and from attending meetings of the Board of Directors.

The letter of 3rd February 1962 referred to in the plaint is one written to the plaintiff by the 4th defendant, a Company functioning as the Agents and Secretaries of the 5th defendant Company and is in the following terms :—

" We have been instructed by the Board of Directors of Perera & Sons Ltd., to inform you that under Article 7 of the Articles of the Company and 72g of Table 'A' of the Companies Ordinance, you have vacated your office as Managing Director of the Company in terms of amending regulation 7(*b*) of the Company's Articles."

The notice of the application for the interim injunction was served on the defendants who filed a statement of objections in which it was averred that the plaintiff had obtained loans from the Company, and that upto date a sum of over Rupees 67,000 was due from the plaintiff to the Company on that account ; and that in consequence the plaintiff was directly or indirectly interested in contracts of the Company and has thus vacated the office of Life Managing Director. The matter was fixed for inquiry on the 9th of February 1962, and before evidence was recorded on that date, the Counsel for the plaintiff admitted that the plaintiff did borrow money from the Company free of interest. The plaintiff thereafter gave evidence (he was the only witness called on either side) in the course of which he admitted several times that he had taken loans from the Company.

The learned District Judge held upon the evidence that the plaintiff had in fact borrowed money from the Company upon an agreement to repay the money and that the plaintiff was accordingly interested in contracts with the Company within the meaning of paragraph (*g*) of Article 72 in Table 'A' in the Schedule to the Companies Ordinance. He thought accordingly that in terms of Article 72 the plaintiff would vacate his office as a Director, but he thought nevertheless that the Proviso to

Article 72 operated to prevent vacation of office by the plaintiff. It would be unwise for us at this stage to pronounce upon the correctness of the construction placed upon the Proviso by the learned Judge. But having regard to that construction, he made order allowing the interim injunction and this appeal is from that order. Counsel for both parties at the hearing of the appeal are agreed that the power of the District Court to issue the injunction prayed for in this case can flow only from paragraph (*b*) of section 86 of the Courts Ordinance. It is relevant to reproduce here the whole of the first part of section 86 :—

" In any action instituted in any District Court or Court of Requests—

(*a*) where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance the commission or continuance of which would produce injury to the plaintiff ; or

(*b*) where it appears that the defendant during the pendency of the action is doing or committing. or procuring or suffering to be done or committed, an act or nuisance in violation of the plaintiff's rights respecting the subject matter of the action and tending to render the judgment ineffectual ; or

(*c*) where it appears that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff,

it shall be lawful for such court, on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor, to grant an injunction . . . . . "

What the District Judge has done in the present case is in effect to decide the substantial dispute between the parties, i.e., the question whether or not the plaintiff was in law the Managing Director at the time when he instituted this action, and Mr. Jayewardene for the plaintiff, relying upon the judgment in 64 New Law Reports, p. 283, has argued that the judge should not have taken that course but should have restricted himself to considering whether there was a serious matter for decision and if so whether prejudice would be caused to the plaintiff if the defendants were not restrained by injunction. While adhering to the view that the trial judge should not decide the substantive question in considering an application for an injunction, I do not agree that some consideration of the substantive question at this early stage is necessarily irrelevant.

Although paragraph (*a*) of section 86 does not apply in the present circumstances, it is useful to examine it before considering paragraph (*b*). Under paragraph (*a*) the Court will consider the question of granting an injunction, where it appears from the plaint that " the plaintiff demands *and is entitled to a* judgment against the defendant restraining the commission or continuance, etc. . ". A basic condition therefore is that it must appear from the plaint that the plaintiff is entitled to the judgment

he seeks. Turning to paragraph (*b*) it must appear that the defendant is doing or committing . . . . . an act or nuisance *in violation of the plaintiff's rights* respecting the subject matter and tending to render the judgment ineffectual. It seems to me that in this context (as in the case of paragraph (*a*)) there must be some apparent violation of rights to which the plaintiff appears to be entitled and not merely of rights which he claims. Mr. Perera has also stressed the further point that the conduct of the defendant must be such as would tend to render the ultimate judgment ineffectual.

I have now to examine the circumstances of the present case in the light of the provisions of section 86. Although the plaintiff claimed in his plaint to be the managing director, he appended to his plaint the letters already quoted in which was set out the position of the defendants, that the plaintiff had vacated his office, under Article 72 (*g*) of Table ' A ' i.e. by reason of his interest in contracts with the Company. The affidavit filed by the plaintiff contains in paragraph 7 a statement of his knowledge and belief that there was no ground of disqualification, but after the defendants had in their objections informed the Court of the precise details of the contracts, plaintiff's Counsel (it seems to me quite properly) admitted to the Court that the plaintiff had in fact borrowed money from the Company.

The form of the plaint and the ultimate admission as to the loan in my opinion, operate against the plaintiff in two ways. Firstly, the Court was made aware by the plaint and the defendants' letter attached thereto of the defendants' position that the plaintiff had vacated his office. That being so, it was incorrect and even absurd for the plaintiff to ask for an injunction restraining the defendants from removing the plaintiff from his office. There was never any question of the defendants having removed, or proposing to remove, the plaintiff, and accordingly there was no justification for the interim injunction actually sought in the plaint. Secondly, the learned judge became aware before he recorded any evidence that the plaintiff had taken loans from the Company and that the defendants relied on Articles 72 (*g*) of Table ' A '. The admission of Counsel in my opinion was, for the purpose in hand at the time, sufficient proof of the fact admitted, and reference to Article 72 of Table ' A ' should in my opinion, have sufficed to lead the learned Judge to the prima facie opinion that the plaintiff had probably vacated office by reason of the contracts of loan. Where the plaintiff through his Counsel and his evidence reveals information which justifies the prima facie view that he is not entitled to the substantive relief claimed in his plaint, it would in my opinion be wrong for a Judge to ignore such information and issue the injunction. If the material actually placed before the Court reveals that there is probably no right of the plaintiff which can be violated, it would be unreasonable to issue the injunction.

In regard to the question whether an ultimate judgment in favour of the plaintiff would be rendered ineffectual if no injunction is granted in the interim period, it is not clear that such an ultimate judgment would be rendered thus ineffectual. For in the event of the judgment declaring

the plaintiff to be the managing director, for the future at any rate the judgment will be effectual. Moreover, this is not a case where the grant of an injunction would ensure the maintenance of the *status quo* at the time of the institution of the plaint. At that time according to the plaintiff himself, he was not the *de facto* Managing Director because his very complaint was that he was not being permitted to function as such.

Before parting with this case, I must take this opportunity to consider the decision in *Murgesu v. Northern Divisional Agriculture Producers' Union*[1], which was not referred to in my recent judgment in *Dissanayake v. Agricultural and Industrial Credit Corporation*[2]. In the former decision, L. M. D. de Silva J. was of opinion that " the material upon which the case rested was all relevant to the hearing of the application for an interim injunction ", and that " the parties had invited the Court not merely to hear an interim application but to try the case itself ". In those circumstances, he held that the District Judge must be presumed to have held a trial to which the parties were submitting. Despite the omission of the District Judge to record formally that he was trying the case, this Court upheld the order ultimately made, i.e., the dismissal of the plaintiff's action. With respect, I agree that the fact that a plaintiff applies for an interim injunction does not compel the Court to make a separate preliminary order upon such an application ; if the material relevant to the substantial dispute is also wholly or mainly relevant to the application for interim relief, it would be a waste of time for the Court to hold two sets of proceedings involving substantially the same facts and the same questions of law. Indeed, I indicated during the argument of the present appeal that the case before us appeared to be one in which the District Judge should have decided the substantive dispute and not merely the interim application.

Dissanayake's Case, however, was different in that the evidence relevant to the substantive dispute was not relevant to the interim application, although the Judge and the Counsel acquiesced in its reception. That case differs also from the case now before us, in that in *Dissanayake's Case* the material in the proceedings and affidavits was sufficient to establish that an ultimate judgment in favour of the plaintiff would be rendered ineffectual if interim relief was not granted, but was not sufficient to lead the Court to the *prima facie* opinion that the plaintiff was not entitled to the substantial rights which he claimed in the action. The present case is one, perhaps an unusual one, in which such an opinion could and should have been formed on the material actually placed before the Court by both parties before the preliminary inquiry commenced. In that situation, the most convenient and expeditious course would have been to proceed forthwith to trial of the substantive case, and thereby to avoid delays and duplication. The judgment of de Silva J. indicates that the same course should be adopted when it appears that the preliminary application cannot be decided except after consideration of the material relevant to the substantial case. The maxim *interest reipublicae ut sit finis litium* must be heeded if it appears that a preliminary

[1] *(1952) 54 N. L. R. 517.* [2] *(1962) 64 N. L. R. 283.*

hearing of an interim application will involve much the same proceedings as would a full-scale trial of the major issues in an action.

I would allow the appeal with costs and set aside the order for the issue of the injunction. In view of this order no order is necessary in the Application in revision.

G. P. A. SILVA, J.—I agree. *Appeal allowed.*