GULAMHUSEIN AND TWO OTHERS
v.
COHEN AND TWO OTHERS

COURT OF APPEAL.
S. N. SILVA, J. (P/CA)
RANARAJA, J.
C. A. 224/94 WITH CALA 90/94.
D.C. COLOMBO 3794/SPL.
MARCH 21, 30, AND APRIL 1, 1995.

Injunction – Dispute between two sets of shareholders – Interim Injunction – Rights of Parties – Matters to be considered in granting an Interim Injunction.

The 1st and 2nd Plaintiff Respondents, Nationals of United States of America established a Company called G. M. Inc. based in New York. (3rd Plaintiff Respondent). The 1st and 2nd Plaintiff Respondents established a garment factory in Sri Lanka in collaboration with the 1st and 2nd Defendant Petitioners. For this purpose a Company bearing the same Name as the U. S. Company of the 1st and 2nd Plaintiff Respondents was registered in Sri Lanka – G. M. (Pvt) Ltd., Colombo. The two sets of shareholders of the Sri Lankan Company are the 'Cohens' (1 – 2 Plaintiffs) from U. S. A. and Gulamhuseins (1 – 2 Defendants from Sri Lanka. The only other share holder is one W.

The 'Cohens' sought to pass a resolution to remove the 'Gulamhuseins' as Directors, and for this purpose an Extraordinary General Meeting was summoned. An Interim Injunction was sought and obtained by the 'Cohens' to restrain the Gulamhuseins from obstructing and interfering with the business operations of the Company.

Held:

(1) District Court has not considered the primary question whether the Plaintiffs have established *prima facie* that they can have the Defendants removed as Directors upon a resolution in terms of S. 185(2) of the Companies Act. In considering the question, whether the Plaintiff can have the Defendants removed as Directors, the matter of the respective share holdings is the material consideration. The Plaintiffs have taken a contradictory stand on this matter.

(2) The Plaintiffs came to court on the basis that they can have the defendants removed as Directors at the E. G. M. to be convened. If so, they should establish *prima facie* a right to have the Defendants removed on the basis of a superior shareholding or on other grounds, on the basis of which they can establish that the resolution for removal would probably be passed.

(3) The question with regard to balance of convenience and equitable consideration have to be considered in the light of the established fact that the Defendants have been Directors of the Company and have been in control of its affairs from the inception.

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

Cases referred to:

1. *Bandaranaike v. The State Film Corporation* – 1981 – 2 SLR 287.
2. *Hubbard v. Vosper* 1972 1 All ER 1023, 1029.
3. *Richard Perera v. Albert Perera* – 67 NLR 445.
4. *Gamage v. Minister of Agriculture and Lands* – 76 NLR 25, 43, 44.
5. *Yakaduwe Sri Pragnarama Thero v. Minister of Education* – 71 NLR 506, 511.
6. *Ceylon Hotels Corporation v. Jayatunga* – 74 NLR 443, 446.
7. *Dutches of Argyll v. Duke of Argyll* – 1967 1 Ch. 302, 331, 332.
8. *Monson v. Tussauds Ltd.*, – 1894 1 QB 671 CA.

Romesh de Silva, P.C., with *Harsha Amarasekera* and *Kushan de Alwis* for Defendant Petitioners.
K. Kanag Iswaran, P.C., with *Anil Tittawella* for Plaintiff-Respondents.

Cur. adv. vult.

July 01, 1995.
S. N. SILVA, J.

The above action has been filed by the three Plaintiff-Respondents in view of a dispute between the two sets of share holders of the 3rd Defendant-Petitioner Company (Giorgio Morandi (Pvt) Ltd. Sri Lanka). The 1st and 2nd Plaintiff-Respondents, being Nationals of the United States of America (U.S.A.) have established a Company by the name of Giorgio Morandi Inc. based in New York. The New York company is the 3rd Plaintiff-Respondent. This Company is engaged in the business of supplying readymade garments to business establishments in the U.S.A. The 1st and 2nd Plaintiff-Respondents decided to establish a garment factory in Sri Lanka in collaboration with the 1st and 2nd Defendant-Petitioners. For this purpose a Company bearing the same name as the U.S.A. Company of the 1st and 2nd Plaintiff-Respondents, was registered in Sri Lanka. The two sets of shareholders of the Sri Lanka Company are the "Cohens" (1st and 2nd Plaintiffs) from the U.S.A. and "Gulamhuseins" (1st and 2nd

Defendants) from Sri Lanka. The only other shareholder is one Wijekoon. The Company established a modern and well-equipped garment factory at Hanguranketha. It appears that the factory has been in production from early 1990.

The dispute in its essence is one as to the control of the Sri Lanka Company. From its inception, till 11.2.94, the date of the *interim injunction* granted in the above action, the "Gulamhuseins" were in control. The *interim injunction* effectively removed them from control and since then "Cohens" have been in control. Several suggestions for an amicable settlement were made but they did not materialize. In view of these attempts at settlement the hearing and disposal of this application and appeal has been delayed.

The above action (No. 3749) was filed by the "Cohens" on 14.7.93 and is the earliest in a series of actions now pending in the District Court of Colombo and appeals and applications pending before this Court. This action was filed on the basis that the "Cohens" and Wijekoon have a majority of shares in the company. A resolution will be moved to remove the 'Gulamhuseins' as Directors, in terms of section 185(1) of the Companies Act No. 17 of 1982. That, special notice has to be given of the resolution in terms of section 185(1) and under section 138, twenty-eight days should lapse from the date notice is given of the resolution for the Extraordinary General Meeting (E.G.M.) of the Company, to be convened. The principal relief is a declaration that the 1st and 2nd Defendant-Petitioners (Gulamhuseins) are not entitled to intervene in the business and operations of the Company till the conclusion of the E. G. M. requisitioned by the Plaintiffs to remove them as Directors. An *interim injunction* was sought to restrain the 1st and 2nd Defendants and their servants and agents from obstructing and interfering with the business operations of the Company till the final determination of the action. Learned District Judge by his order dated 11.2.1994 which is challenged in these proceedings has granted to the Petitioners the *interim injunction* referred to above on the basis that the Plaintiff-Respondents deposit a sum of Rs. 10,000/- as security.

The grounds of challenge of the Defendant-Petitioners are that the learned District Judge has not considered the rights of parties in

relation to the relief sought in deciding to grant the *interim injunction*. That, the *interim injunction* has been granted without a due consideration of applicable legal principles. The Plaintiff-Respondents based their arguments on the premise that the 3rd Defendant Company was set up with the dominant participation of the Plaintiff-Respondents and there have been fraudulent share allocations on the basis of which the Defendant-Petitioners gained effective control of the Company. That the *interim injunction* should be in force until the E. G. M. is held to remove the 1st and 2nd Defendant-Petitioners from the control of the Company.

The above action (No. 3749) has a narrow ambit. The final relief sought by way of a declaration and the *interim injunction* relate to what the 1st and 2nd Defendants are not entitled to do in the business and operations of the 3rd Defendant Company "until the conclusion of the Extraordinary General Meeting requisitioned by the Plaintiffs to remove the 1st and 2nd Defendants as Directors of the 3rd Defendant Company". The basis of the action is that a special notice of twenty-eight days should be given in terms of section 138 of the resolution to remove the directors under section 185(2). Therefore the entire span of the action should ordinarily be this period of twenty-eight days. However by a strange twist of events, the *interim injunction* has continued in operation without the E.G.M. being convened from 11.2.94 upto date and the affairs of the Company have been controlled by the Plaintiffs by virtue of the *interim injunction* during this period. It appears that these events are the result of a web of other cases filed by the parties and a deep seated dispute as to their respective share holdings. There are four other cases as far as I could gather from the papers filed. Case No. 3757 has been filed on 28.7.93 by the "Cohens" against the "Gulamhuseins" and certain others challenging the validity of the allotment of shares made on 15.7.93 to the "Gulamhuseins", the appointment of 3 new directors and the E. G. M. convened for 20.8.93 by the Company Secretary who is said to have been removed. Case No. 3758 has been filed by the "Gulamhuseins" against the "Cohens" on 29.7.93 challenging the validity of the appointment of the Company Secretary and the E.G.M. convened by that Secretary scheduled for 2.8.93. Case No. 3761 has been filed by the "Gulamhuseins" against the "Cohens" on 5.8.93 to restrain them

from selling, mortgaging and leasing the property of the company, in particular the land, buildings and equipment at Hanguranketha. Case No. 3800 has been filed by the "Cohens" against the "Gulamhuseins" and Wijekoon, by way of summary procedure for the rectification of the register of members of the company in terms of section 113 of the Companies Act.

It appears that Wijekoon who was with the "Cohens" when the above action was filed switched sides after summons was issued and sold his shares to the "Gulamhuseins". Then the "Cohens" alleged that Wijekoon had not paid for his shares. Learned District Judge in his order has referred to these matters but has finally arrived at a decision in favour of the Plaintiffs on the basis of the conduct of the Defendants. He has observed that if the Defendants were confident of defeating the resolution for their removal as directors, they would not have obtained an enjoining order in case No. 3758 restraining the E. G. M. being convened on 2.8.93.

Learned District Judge has also commented on the allocation of shares in a sum of Rs. 200,000/- each to the 1st and 2nd Defendants after summons was issued in the case. On this material he appears to have come to the conclusion that the Plaintiffs have established *prima facie* that the resolution for the removal of the 1st and 2nd Defendants as directors could be passed. Learned District Judge has relied on the averments in paragraphs 24, 25 and 26 of the plaint which state that damage has been caused to the company by acts of mismanagement of the Defendants. He has observed that the Defendants have not adduced any evidence to contradict these averments except to deny them. It is to be noted that these averments have not been supported with the evidence even by the Plaintiffs. In the result there are allegations of mismanagement by the Plaintiffs and a denial of these allegations by the Defendant. In the absence of evidence it would not be possible to make an observation against the Defendants on the basis of these allegation.

It is thus seen that the learned District Judge has not considered the primary question whether the plaintiffs have established *prima facie* that they can have the Defendants removed as directors upon a resolution in terms of section 185(2) of the Companies Act. Learned

District Judge has observed that there is conflicting evidence with regard to the respective shareholdings in the company. This conflict is apparent. The Plaintiffs came into Court on the basis that the Plaintiffs together with Wijekoon command a majority so as to remove the Defendants as directors upon a resolution in terms of section 185(2). When confronted with evidence of a transfer of his shares by Wijekoon, the Plaintiffs changed their position and contended that the share allocation to Wijekoon is wrongful. In considering the question whether the Plaintiffs can have the Defendants removed as directors the matter of the respective shareholdings is the material consideration. Plaintiffs have taken a contradictory stand on this matter. Therefore the learned District Judge was clearly in error when he came to a finding in favour of the Plaintiffs solely on the basis of the conduct of the Defendants as referred to above. The conduct of the Defendants in obtaining an *interim injunction* in case No. 3758 cannot be considered as evidence of a numerically higher share holding by the Plaintiff. It appears that the *interim injunction* has been obtained in case No. 3758 on the basis that the appointment of the Company Secretary is illegal and that such a Secretary cannot convene a E.G.M. The Plaintiffs have urged a similar ground with regard to the other Secretary and the E. G. M. convened by that Secretary, in case No. 3757 filed against the Defendants. Therefore learned District Judge could not have drawn an inference solely on the basis of one case and ignored another case filed by the other party. Similarly, the allocation of shares after summons was issued is not a circumstance on which an inference could be drawn in favour of the Plaintiffs as to their strength to remove the Defendants, as directors at the E.G. M.

The matters to be considered in granting an *interim injunction* have been crystalised in several judgments of this Court and of Supreme Court. In the case of *Bandaranaike v. The State Film Corporation* [1], Soza, J. summarised these matters as follows:

> "In Sri Lanka we start off with a *prima facie* case that is, the applicant for an *interim injunction* must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the plaintiff should be certain to win. It is

sufficient if the probabilities are he will win. Where however the plaintiff has established a strong *prima facie* case that he has title to the legal right claimed by him but only an arguable case that the defendant has infringed it or is about to infringe it, the injunction should not be granted (*Hubbard v. Vosper* [2]). If the probability is that no right of the plaintiff will be violated or that he will suffer no wrong such as the law recognises then the injunction will not issue – See for instance the case of *Richard Perera v. Albert Perera* [3] and *Gamage v. The Minister of Agriculture and Lands* [4]. The case as a whole should be taken into account and the relative strength of the cases of the plaintiff and the defendant assessed (*Hubbard v. Vosper* (*supra*)).

If a *prima facie* case has been made out, we go on and consider where the balance of convenience lies – *Yakaduwe Sri Pragnarama Thero v. Minister of Education* [5]. This is tested out by weighing the injury which the defendant will suffer if the injunction is granted and he should ultimately turn out to be the victor against the injury the plaintiff will sustain if the injunction were refused and he should ultimately turn out to be the victor. The main factor here is the extent of the uncompensatable disadvantage or irreparable damage to either party. As the object of issuing an interim injunction is to preserve the property in dispute in status quo the injunction should not be refused if it will result in the plaintiff being cheated of his lawful right or practically decide the case in the defendant's favour and thus make the plaintiff's eventual success in the suit if he achieves it, a barren and worthless victory – See Bannerjree.

Lastly as the injunction is an equitable relief granted in the discretion of the Court, the conduct and dealings of the parties *(Ceylon Hotels Corporation v. Jayathunga)* [6] and the circumstances of the case are relevant. Has the applicant come into court with clean hands? – See *Dutches of Argyll v. Duke of Argyll* [7]. Has his conduct being such as to constitute acquiescence in the violation of infringement of his rights as the Court of Appeal in England found in *Monson v. Tussauds Ltd.* [8] or waiver of his rights to the injunction?".

It is seen that the principal question to be considered is whether the plaintiffs have made out a *prima facie* case that there is a serious matter in relation to their legal rights to be tried at the hearing of the action and that they have a good chance of winning. In this case the plaintiffs have come into court on the basis that they can have the Defendants removed as directors at the E. G. M. to be convened. If so they should establish *prima facie* a right to have the Defendants removed on the basis of a superior share holding or on other grounds on the basis of which they can establish that the resolution for removal would probably be passed. The other questions with regard to balance of convenience and equitable considerations have to be considered in the light of the established fact that the defendants have been directors of the company and have been in control of its affairs from the inception. It is clear from the foregoing analysis that the learned District Judge has not addressed himself to these matters. In the circumstances I allow this application and set aside the order dated 11.2.94 granting to the Petitioners an interim injunction as prayed for in paragraph C of the prayer to the petition. The case is referred back for a fresh inquiry into the application for the *interim injunction* as made by the Plaintiffs. Considering the fact that the Plaintiffs have been in control of the affairs of the company and its business operations for a period of more than one year and four months and the need to avoid an undue change of the affairs of the company which may have an adverse impact on its business operations I grant to the Petitioners an enjoining order as prayed for in paragraph 'd' of the prayer to the plaint to be operative for a period of 14 days pending the conclusion of the inquiry into the application for the *interim injunction.* Any extension of the enjoining order may be considered according to law by the District Court. The application is allowed. I make no order for costs.

DR. RANARAJA, J. – I agree.

Application allowed.

Interim Injunction set aside.

Enjoining Order issued.