

MITSUI AND COMPANY LTD.
v.
AMERASEKERA AND ANOTHER

COURT OF APPEAL
PALAKIDNAR, J.,
PRESIDENT C.A. AND
GUNAWARDENA, J.,
C.A. LA NO. 206/91
C.A. LA NO. 208/91
17, 20, 21 AND 22 JANUARY 1992.

Appeal – Leave to appeal – Questions of law – Right to injunctive relief – Right to bring derivative action.

Held :

The right to obtain injunctive relief where the question whether a *prima facie* case has been made out and the *locus standi* of the plaintiff to bring a derivative suit where he is not qualified to seek relief under the Companies Act are in issue are fit questions of law to be decided in appeal.

Cases referred to:

- (1) *Wellersteiner v. Moir* No. 2 (1975) 1 All ER 849.
- (2) *Miriam Lawrence v. Arnolda* Bar Association Law Journal Reports (1984) Vol. 1, Part IV p. 136.

APPLICATION for leave to appeal.

Eric Amerasinghe, P.C. with *L. A. Wickramasinghe, H. Soza, Anil Silva and R. Abdeen* for petitioner.

K. Kanag-Iswaran, P.C. with *A. M. Illiyas, Anil Tittawela and H. Cabral* for plaintiff-respondent.

Nihal Fernando for 5, 6 and 7 defendants-respondents.

S. Aziz, P.C. A.S.G. with *A. R. Wickremanayake, S.C.* for 4th defendant-respondent.

Cur adv vult.

31st January, 1992.

PALAKIDNAR, J. (P/CA)

The plaintiff-respondent who is a shareholder of the 4th defendant-respondent Company (Hotel Developers (Lanka) Ltd.) has filed this

action in the District Court of Colombo. He has claimed that the said Company has acted in fraud of the shareholders, in accepting and making payments to the 1st, 2nd and 3rd defendants-respondents for the building constructed for the Hilton Hotel, when in fact the said building was not in conformity with building plans forming part of the building construction agreement entered into between the 4th defendant-respondent Company and the 1st, 2nd and 3rd defendants-respondents. The plaintiff-respondent alleged that, in effect, the 4th defendant-respondent Company was paying a larger sum of money for lesser amount of work done. Therefore he sought an injunction from the District Court restraining the 4th defendant-respondent Company making any further payments to the 1st, 2nd and 3rd defendants-respondents.

The District Court made an enjoining Order in the first instance, restraining the 4th defendant-respondent Company making any further payments to the 1st, 2nd and 3rd defendants-respondents. Thereafter an interim injunction was granted for the same purpose. This leave to appeal application is against the said Order.

According to the provisions of section 54 of the Judicature Act, the Court must satisfy itself, "that sufficient grounds exist" before injunctive relief is granted. It does not appear from the Order of the learned District Judge that he has addressed his judicial mind to the question whether the plaintiff-respondent has adduced sufficient evidence to make out a *prima facie* case, although reference to some documents by name has been made, in passing.

The Counsel for the 1st and 2nd defendants-respondents submitted that the plaintiff-respondent has no *locus standi* to bring this action. He contended that the facts urged by the plaintiff-respondent does not disclose a cause of action. He also submitted that plaintiff-respondent does not have a right to bring a derivative action. The Counsel for the 7th defendant-respondent submitted that right to bring a derivative action does not exist under the Sri Lankan law. He submitted that the Companies Act of Sri Lanka is comprehensive on the rights of the shareholders. He further argued that only rights available to a shareholder are those specified in sections 210 and 211 of the Companies Act, in this regard. Those rights he pointed out

could only be exercised by a shareholder having a minimum of five percent of shares of the Company. The learned Counsel for the plaintiff-respondent cited section 3 of the Civil Law Ordinance, and contended that law applicable in regard to this matter is the English Law. He pointed out that in the case of *Wallersteiner v. Moir (No. 2)*⁽¹⁾, this right has been recognized in England. Therefore he argued that a right to bring a derivative action exists in Sri Lanka.

In our view these are fit questions of law to be decided in appeal and we accordingly grant leave to appeal.

The parties in C.A.L.A. 208/91 agreed to be bound by the decision in this case. Accordingly the Order in C.A.L.A. 208/91 will be the same.

We make no order as to costs.

GUNAWARDENA, J. – *I agree.*

Leave to appeal granted.
