

STASSEN EXPORTS LIMITED
v.
HEBTULABHOY & CO. LTD.

COURT OF APPEAL

L. H. DE ALWIS, J. AND MOONEMALLE, J.

C.A. – L.A. 86/83–D.C. COLOMBO 2316/Spl.

DECEMBER 6 and 7, 1983.

Suit for permanent injunction to restrain use of a trade mark and application for interim injunction pending decision of suit – Application to suspend the interim injunction and/or clarify decision granting interim injunction ex parte – Sections 666 and 839 of the Civil Procedure Code – Inherent power of the Court to suspend an interim injunction.

The plaintiff-respondent filed this suit to restrain the 1st and 2nd defendants from using its trade mark "RABEA" in English characters or in any other language for the sale, distribution and/or export of tea and for an interim injunction to restrain the 1st and 2nd defendants in the same terms until the final determination of the action.

On 21.7.83 the District Judge made an order *ex parte* granting an interim injunction as prayed for subject to the plaintiff-respondent depositing a sum of Rs. 10,000 as security before the interim injunction issued.

On 11.8.83 1st defendant-petitioner filed petition and affidavit praying that the interim injunction be forthwith suspended and/or that the Court do clarify that the interim injunction does not apply to a proposed shipment of approximately 217.3 metric tons of tea by the 1st defendant-petitioner to Mr. Eneny of Egypt under the mark registered in Egypt transliterated in English as "CHAI AL RABIA" and that the interim injunction be dissolved. After hearing the Attorneys for both parties the District Judge made order on 26.8.83 rejecting the application for the suspension of the interim injunction and entering *Order Nisi* under section 377 (a) of the Civil Procedure Code in regard to the application for the dissolution of the interim injunction.

On 9.9.83 the 1st defendant-petitioner made an application to the Court of Appeal to have the order refusing to suspend the interim injunction revised. An application for leave to appeal from the said order of 26.8.83 was also filed.

On 27.9.83 the revision application was taken up in the Court of Appeal and an *ex parte* order was made suspending the interim injunction in respect of the shipment of approximately 217.3 metric tons of tea to Eneny of Egypt under the trade mark CHAI AL RABIA. On 30.9.83 the plaintiff-respondent moved Court to vacate its order of 27.9.83 on the ground that it had made this order *per incuriam* and/or in excess of jurisdiction and to grant a stay until the application was disposed of. The stay order was refused and the application rejected.

In the meantime the Supreme Court granted special leave to appeal in connection with the application for revision and directed the stay of the orders of 27.9.83 and 30.9.83 made by the Court of Appeal pending the disposal of the appeal. On 5.12.83 the Supreme Court directed that the appeal before it be taken up after the decision of the Court of Appeal on the application for revision and leave to appeal from the order of the District Judge of 26.8.83.

The main questions were whether the Order of the District Judge refusing to suspend the interim injunction could be set aside by the exercise of the inherent powers of the Court under section 839 of the Civil Procedure Code and whether the grant of an *ex parte* injunction was justifiable.

The plaintiff used the trade mark (registered) and trade name RABEA in exporting tea to the Middle East and the name RABEA TEA in English and the words SHAHI AL RABEA in Arabic characters on its bags and cartons.

Held –

{1} It is not proper that the exercise of the discretion vested in the District Judge to grant an interim injunction *ex parte* should be interfered with because of the following considerations :

- (a) The use on the wrappers of the 1st defendant of the transliteration in English of the Arabic words CHAI AL RABIA which translated into English is "RABEA TEA" is an infringement of plaintiff's trade mark and violates its rights.

- (b) The plaintiff became aware of the shipments of the 1st defendant only on the information of an anonymous telephone caller. There was therefore no acquiescence on the part of the plaintiff.
- (c) Though the plaintiff does not export tea to Egypt, Muslims from Egypt frequent Mecca which is in Saudi Arabia and there is easy access between the two countries. Therefore there is the likelihood of irreparable damage to plaintiff's good name if tea of poor quality is sold in Egypt under the trade mark and trade name RABEA.
- (d) The tea of the 1st respondent ready for export can easily be re-packed. Therefore the disadvantage to the 1st defendant if the interim injunction is issued is outweighed by the damage to the plaintiff if it is not.

(2) Section 666 expressly provides that the District Judge has power to discharge, vary or set aside an interim injunction but there is no provision which gives him the power to suspend it. Section 839 of the Civil Procedure Code gives the Court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. But this inherent power cannot be invoked to violate or override the express provisions of the Code. When a remedy already exists and whenever a remedy has been given by the Code, section 839 does not provide a collateral remedy. Hence the Court has no power to suspend an interim injunction in the exercise of its inherent powers.

Cases referred to

- (1) *Wimalasekera v. Parakrama Samudra Co-operative Agricultural Production and Sales Society Ltd.* (1955) 58 N.L.R. 298.
- (2) *Edward v. De Silva* (1945) 46 N.L.R. 342.
- (3) *Ramanathan Chetty v. Meera Saibo Marikar* (1930) 32 N.L.R. 193 (P.C.).
- (4) *Keel v. Asirwathan* (1935) 4 C.L.W. 128, 130.
- (5) *Graig v. Kanssen* (1943) 1 All E.R. 108.
- (6) *Paulusz v. Perera* (1933) 34 N.L.R. 438.
- (7) *Kamala v. Andris* (1939) 41 N.L.R. 71.
- (8) *De Silva v. De Silva* (1974) 77 N.L.R. 554.
- (9) *Jinadasa v. Weerasinghe* (1928) 30 N.L.R. 283.

APPLICATIONS for revision and leave to appeal from orders of District Court, Colombo.

H. L. de Silva, S.A., with *Lakshman de Alwis*, for 1st defendant-petitioner.

H. W. Jayewardene, Q.C., with *G. F. Sethukavaler, S. A.*, *K. Kanag-Iswaran* and *S. Mahenthiran*, for plaintiff-respondent.

January 23, 1984

MOONEMALLE, J.

The plaintiff-respondent Company instituted an action on 19.7.83 in the District Court, Colombo praying for a permanent injunction to restrain the 1st defendant-petitioner Company and the 2nd defendant and their servants and/or agents from applying or using its Trade Mark "RABEA" in English characters or in any other language in any form of packet or bag for sale, distribution and/or export of tea, and for an interim injunction to restrain the 1st defendant-petitioner Company and the 2nd defendant and their servants and/or agents from doing the above-mentioned acts until the final determination of the action.

On 21.7.83, the learned District Judge, after the application for an interim injunction was supported on behalf of the plaintiff-respondent made an *ex parte* order granting the interim injunction against the 1st defendant-petitioner and the 2nd defendant subject to the plaintiff-respondent depositing a sum of Rs. 10,000/- as security prior to the issue of the interim injunction.

Then on 11.8.83, the 1st defendant-petitioner filed petition and affidavit in the District Court and prayed that the interim injunction be forthwith suspended and/or that the Court clarify that the injunction issued does not apply to the proposed shipment of approximately 217.3 metric tons of tea by the 1st defendant-petitioner to Mr. Eneny of Egypt under the mark registered in Egypt transliterated to English as CHAI AL RABIA, and that the interim injunction be dissolved and /or discharged and /or set aside. On 22.8.83 this application was supported by an Attorney-at-law on behalf of the 1st defendant-petitioner. The plaintiff-respondent on whom notice had been served was represented by a Senior Attorney-at-Law. The learned District Judge after hearing submissions on behalf of both the 1st defendant-petitioner and the plaintiff-respondent delivered his order on 26.8.83 rejecting the application for the suspension of the interim injunction and entering *order nisi* under section 377 (a) of the Civil Procedure Code regarding the 1st defendant-petitioner's application and appointed a date to issue the *order nisi* on the plaintiff-respondent.

Then on 9.9.83 the 1st defendant-petitioner made an application in revision to this Court bearing No. 1052/83 praying for an order –

- (a) to issue notice on the plaintiff-respondent
- (b) to make order suspending the operation of the *ex parte* order dated 21.7.83 granting the interim injunction to the plaintiff-respondent.
- (c) to set aside the order of the learned District Judge dated 26.8.83 refusing the 1st defendant-petitioner's application to suspend the said interim injunction.
- (d) to make order directing that the inquiry into the 1st defendant-petitioner's application for a dissolution of the interim injunction be heard by another Judge.

An application for leave to appeal bearing No. L.A. 86/83 was also filed in this Court by the 1st defendant-petitioner. The present proceedings before us are in respect of this application for revision and the application for leave to appeal.

On 27.9.83 the revision application came up for notice on the plaintiff-respondent before another Bench of this Court. On that day, on the application made on behalf of the 1st defendant-petitioner the Court made an *ex parte* order suspending the interim injunction in respect of the shipment of approximately 217.3 metric tons of tea by the 1st defendant-petitioner to Enegy of Egypt under the Trade Mark CHAI AL RABIA. Notice also issued on the plaintiff-respondent.

On 30.9.83 the plaintiff-respondent moved by way of motion that the order of this Court dated 27.9.83 be vacated as the order had been made *per incuriam* and/or in excess of the jurisdiction of this Court. The Court made order to list the application as early as possible as it was an urgent matter. The Senior Attorney-at-Law who represented the plaintiff-respondent moved Court to stay the order made by the Court on 27.9.83. This application was refused.

On 4.10.83 this Court received the order of the Supreme Court in S.C. (Special) L.A. 59/83 which application had been made by the plaintiff-respondent in connection with the present revision application. The Supreme Court had made order to stay the orders made by the Court of Appeal on 27.9.83 and 30.9.83 pending the

grant or refusal of the Supreme Court application for special leave to appeal. On 22.11.83 this Court was informed by the Registrar, Supreme Court, that special leave to appeal had been granted to the plaintiff-respondent with the direction that the orders of the Court of Appeal of 27.9.83 and 30.9.83 be stayed pending the final determination of the Supreme Court appeal. On 5.12.83 the Supreme Court made order postponing the hearing of S.C. Appeal 43/83 till the Court of Appeal gives a decision in the application for revision 1052/83 and the leave to appeal application 86/83 which are presently before us.

The substantive relief prayed for by the defendant-petitioner in both the application for revision and the application for leave to appeal is to have the order of the learned District Judge dated 26.8.83 refusing to suspend the interim injunction granted on 21.7.83, set aside.

It is to be noted that learned Senior Attorney-at-Law appearing for the defendant-petitioner did not press the prayer for an order to direct that the inquiry into the defendant-petitioner's application for a dissolution of the interim injunction be heard by another Judge. Learned Senior Attorney-at-Law for the defendant-petitioner submitted that the plaintiff-respondent had not adduced any grounds or facts which justified or warranted the grant of an interim injunction *ex parte* without affording the defendant-petitioner an opportunity of being heard, and therefore the order made by the learned District Judge granting the interim injunction was an order made *ultra vires*. He submitted that the defendant-petitioner was entitled to notice under section 664 of the Civil Procedure Code before the *ex parte* order was made issuing the interim injunction. He further submitted that there were numerous suppressions of vital facts in the *ex parte* proceedings.

Learned Senior Attorney-at-Law for the 1st defendant-petitioner further submitted that the learned District Judge had inherent power to suspend the operation of the interim injunction that was issued by invoking the provisions of section 839 of the Civil Procedure Code.

Learned Senior Attorney-at-Law for the 1st defendant-petitioner submitted that the plaintiff-respondent acquired only very limited rights in the Trade Mark RABEA as evidenced by X1 in which the

single word RABEA in English was registered subject to the condition that that mark could only be used as depicted in the application and that its translation in any language will not be used. He submitted that the 1st defendant-petitioner had not used the word RABEA in English characters anywhere in the document X 9. He submitted that the use of the Arabic characters in X 9 which read SHAI AL RABEA did not violate the plaintiff-respondent's legal rights. He further submitted that the plaintiff-respondent designedly attached to the plaint an indecipherable photo copy of the certificate of registration X1 and also served on the 1st defendant-petitioner and the 2nd defendant and also tendered to this Court similar indecipherable photo copies of X 1 in order to conceal the weakness of its claim. He also drew our attention to two other registered Trade Marks of the plaintiff-respondent namely, Giraffe Brand (marked K) and Tea Mountain Brand (marked L). He submitted that X 1 did not give the plaintiff-respondent a right to restrain the use of the transliteration of the English word RABEA in any other language.

Learned Senior Attorney-at-Law for the 1st defendant-petitioner submitted that the plaintiff-respondent had drawn the attention of the District Court to letter X 8 dated 1.10.81 sent by the General Manager of the 1st defendant-petitioner to D. N. Thurairajah the then General Manager of the plaintiff-respondent, wherein he had admitted that the 1st defendant-petitioner had used the words SHAHI EL RABEA and had apologised for using those words and undertook not to use them any further. He further submitted that the plaintiff-respondent had wilfully withheld from the District Court the fact that the General Manager of the 1st defendant-petitioner had after ascertaining the correct position informed Mr. Thurairajah by telephone that X 8 was written upon an incorrect assumption of the facts and that there was no such violation in fact and that this was accepted by Mr. Thurairajah.

Learned Senior Attorney-at-Law for the 1st defendant-petitioner further submitted that the plaintiff-respondent had not disproved the averments in the affidavit dated 12.8.83 of the Managing Director of the 1st defendant-petitioner filed in the District Court that the 1st defendant-petitioner had shipped large quantities of tea under the Trade Mark CHAI AL RABIA to Egypt valued at several millions of rupees since 1980. He submitted therefore that the plaintiff-respondent's claim that it came to know of the exports

only recently could not be believed. He further submitted that the plaintiff-respondent did not disprove the facts set out in R 10 dated 4.8.83 which contains the names of 7 well known shippers in Sri Lanka who ship tea under the same trade mark CHAI AL RABIA to Egypt. He submitted that therefore the plaintiff-respondent had acquiesced in the use of the Trade Mark by these shippers and this action against the 1st defendant-petitioner is a *mala fide* act.

Learned Senior Attorney-at-law for the 1st defendant-petitioner further submitted that the plaintiff-respondent sought recourse to another cause of action namely, the unfair use of the Trade Name in respect of which the interim injunction was not asked for and was not issued. He submitted that there was no evidence that the plaintiff-respondent's tea was known in Egypt by the trade name RABEA. He submitted that the plaintiff-respondent had deliberately used a vague and general expression "in the Middle East" which covers a number of countries giving the impression that it dominated all these foreign markets. He further submitted that the plaintiff-respondent exported tea to Saudi Arabia and therefore no question of irremediable damage to the plaintiff-respondent could result by the use of the Trade Mark, CHAI AL RABIA by the 1st defendant-petitioner in its tea exports to Egypt. He finally submitted that the balance of convenience lay against the grant of an interim injunction restraining the 1st defendant-petitioner and was in favour of a refusal of such injunction.

Learned Queen's Counsel for the plaintiff-respondent submitted that section 664 of the Civil Procedure Code gave the power to the learned District Judge to grant an interim injunction in exceptional circumstances with or without notice. He submitted that the submission on behalf of the 1st defendant-petitioner that he was deprived of the right to be heard by reason of the *ex parte* order granting the interim injunction was based on a misconception.

Learned Queen's Counsel submitted that the only restriction that attached to the use of the Trade Mark RABEA in X 1 was that a translation of the English word RABEA in any other language could not be used and that the use of the transliteration of the English word RABEA in any other language was not restricted by X 1. Therefore, he submitted that the use of the English word RABEA in Arabic was the sole right of the plaintiff-respondent. He further submitted that apart from the Trade Mark RABEA it has a trade

name Rabea which was protected whether registered or not under section 140 of the Code of Intellectual Property Act. Learned Queen's Counsel further submitted that documents (K) and (L) are new documents which are not relevant to these proceedings. In any event he submitted that they do not affect the plaintiff-respondent's sole right to the use of the transliteration of the English word Rabea in any other language. Learned Queen's Counsel submitted that the plaintiff-respondent had not misled the Court or failed to observe the principle of *uberrimae fides*.

Learned Queen's Counsel also submitted that D. N. Thurairajah who was the General Manager of the plaintiff-respondent Company in 1981 had resigned on 7.6.82 and had no authority to make any statement or give any undertaking on behalf of the plaintiff-respondent without reference to the Board of Directors. He further submitted that Thurairajah's affidavit of 8.9.83 (H) was a new document and was not placed before the learned District Judge and therefore the defendant-petitioner could not rely on it for the purpose of this application. He submitted that the plaintiff-respondent had been exporting tea to the Middle East for the last seventy-five years and that the defendant-petitioner was surreptitiously attempting to make use of the good name of the plaintiff-respondent and trade under his Trade Mark. He submitted that if the Rabea Trade Name and Mark is used and poor quality tea is exported under that Trade Mark by the defendant-petitioner even to Egypt, irreparable damage would be caused to the plaintiff-respondent's tea trade with Saudi Arabia. Learned Queen's Counsel submitted that a District Judge had no power to suspend an interim injunction granted by him. Under the provisions of section 666 of the Civil Procedure Code a District Judge had the power only to discharge, vary or set aside an order for an interim injunction. He submitted that the inherent powers of the Court under section 839 of the Civil Procedure Code could not be invoked to violate the express provisions of the Code. He cited a number of authorities in support which I shall deal with later. He submitted that the learned District Judge had acted correctly in refusing to suspend the interim injunction and by entering order nisi.

The plaintiff-respondent has a statutory right under section 142 (3) of the Code of Intellectual Property Act, No. 52 of 1979, to institute proceedings to obtain an order from Court to prohibit the continuance of acts of unfair competition mentioned in section 142

(2) (a) to (e), and the provisions of section 179 of the said Act empower the Court to grant to the plaintiff-respondent an injunction to restrain any person who has infringed or threatened to infringe his registered industrial design, patent, or mark and shall apply *mutatis mutandis* to the proceedings under section 142 (3). By section 181 (4) the provisions of the Judicature Act, No. 2 of 1978, and of the Civil Procedure Code shall apply to every application for an injunction made to the Court under the Code of Intellectual Property Act. The procedure therefore to be adopted in an application for an injunction under the Code of Intellectual Property Act is as set out in section 664 of the Civil Procedure Code. Under section 664 a District Judge is entitled to issue an interim injunction *ex parte* when it appears to him that the object of granting the injunction would be defeated by delay. Learned Senior Attorney-at-Law for the 1st petitioner cited a number of cases, but these cases dealt with instances where under section 763 of the Civil Procedure Code an application for execution of a decree pending appeal had been made without making the judgment-debtor a party respondent. The cases cited were *Wimalasekera v. Parakrama Samudra Co-operative Agricultural Production and Sales Society Ltd.* (1), *Edward v. De Silva* (2), *Ramanathan Chetty v. Meera Saibo Marikkar* (3), *Keel v. Asirwatham* (4).

It was held in these cases, that it is imperative that, in an application for execution of a decree which has been appealed against the judgment-debtor should be made a respondent and that a writ which fails to comply with this requirement falls into the category of a writ issued without jurisdiction.

In *Keel v. Asirwatham (supra)* it was held that failure to comply with the terms of section 763 would vitiate a sale held in execution of a mortgage decree. Soertsz, J. in the course of his judgment stated "The intention of the Legislature appears clearly to have been to give the appellants an opportunity of maintaining things in '*Statu quo ante*' pending the appeal, on adequate terms as to the fixing of security". Learned Senior Attorney-at-Law also cited *Craig v. Kanssen* (5). In that case an order had been made giving the respondent, the successful plaintiff leave to proceed. The summons on which the order was made was not served on the appellant. It was held that the failure to serve summons upon which the order was made was not a mere irregularity, but a defect which made the order a nullity and therefore the order must be set aside.

These cases have no application to the present case where the Legislature has expressly given the Court the power of exercising its discretion in granting an interim injunction *ex parte* in exceptional circumstances under section 664 of the Civil Procedure Code.

It is clear that the learned District Judge had considered documents X7 and X8 with the other facts adduced, such as the fact that the plaintiff-respondent had been an exporter of tea from Sri Lanka to the Middle East for seventy-five years enjoying a high reputation in these markets, and the fact that the defendant-petitioner was taking action to export tea in violation of the plaintiff-respondent's trade mark rights and thereafter had come to the conclusion that unless the interim injunction issued the plaintiff-respondent would suffer irreparable loss. X7 is a letter by D. N. Thurairajah, the General Manager of the plaintiff-respondent to D. H. S. Jayawardena, Managing Director of the 1st defendant-petitioner stating that the 1st defendant-petitioner was infringing the registered trade mark Rabea of the plaintiff-respondent and requesting him to desist from using the word RABEA in respect of tea exports by the defendant-petitioner. X8 is a reply to this letter sent by D. H. S. Jayawardena to D. N. Thurairajah wherein he has admitted that his Company was using the Trade Mark "Rabea" in respect of its tea exports and he has given an undertaking that his Company will not be using the word "Rabea" in respect of its tea shipments. He had also apologised for having used the plaintiff-respondent's Trade Mark. The affidavit (H) of D. N. Thurairajah dated 8.9.83 was never placed before the learned District Judge, and this being a new document, the defendant-petitioner cannot rely on it for the purpose of this application. It was also the position of the plaintiff-respondent that D. N. Thurairajah had resigned from the plaintiff-respondent Company on 7.6.82. This affidavit (H) is dated 8.9.83. It is not possible for us in any event to decide on the truth of the contents of (H) by merely perusing its contents.

The registration of the plaintiff-respondent's Trade Mark is depicted as RABEA in English in X1. It must be noted that apart from the trade mark RABEA it has a trade name RABEA. Section 140 of the Code of Intellectual Property Act reads thus :

"(1) Notwithstanding the provisions of any written law providing for the registration of a trade name, such name shall be protected, even prior to or without registration, against any unlawful act committed by a third party.

(2) Any subsequent use of a trade name by a third party, whether as trade name or as a trade mark, service mark or collective mark or any such use of a similar trade name, trade mark, service mark or collective mark likely to mislead the public shall be deemed unlawful." By this section, the trade name RABEA of the plaintiff-respondent is protected whether registered or not.

There is a specific averment in paragraph 6 of the plaintiff-respondent's plaint (A1) that the plaintiff-respondent had been selling and exporting tea to the Middle East under the Trade Mark and Trade Name RABEA in English as well as in Arabic characters. Paragraph 16 sets out that a cause of action accrued to the plaintiff-respondent to sue for an interim and permanent injunction to restrain the defendant-petitioner from using the name RABEA in English or in any other language in its tea exports. This plaint (A1) was before the learned District Judge at the time he issued the interim injunction. So, it cannot be said that the plaintiff-respondent has in the present application sought recourse to another cause of action, namely, the unfair use of the trade name. In X1 no restriction attaches to the use of the transliteration of the English word Rabea in any language. What is restricted by X1 is the use of the translation in any language of the English word RABEA. So that the use of the transliteration of the English word RABEA in any language is the sole right of the plaintiff-respondent. The plaintiff-respondent's trade mark and trade name RABEA both in English and in Arabic characters have been applied on polythene bags and cartons, specimens of which are marked X2, X3, X4, X5 and X6, which have been used for tea exports to the Middle East by the plaintiff-respondent. According to the translator's affidavit (X10) with the English version (X10A) the name RABEA TEA in English and the words SHAHI RABEA in Arabic characters appear on X2, X3, X4, X5 and X6. X9 is a specimen of a printed wrapper used by the defendant-petitioner for its packeted tea for shipment. The English translation and transliteration of the Arabic words appearing on (X9) is marked (X9A). According to (X9A), the

transliteration of the Arabic words appearing on (X9) is "SHAI AL RABEA", and the translation in English of these Arabic words is "Rabea Tea". There can be no doubt that the use of the words Shai al Rabea by the defendant-petitioner in (X9) is to create confusion with the goods of the plaintiff-respondent and to mislead purchasers and others into the belief that the tea offered for sale, exported and/or sold by the defendant-petitioner is tea of the plaintiff-respondent known as Rabea Tea. The use of the words SHAI AL RABEA in Arabic characters in (X9) is an infringement of the plaintiff-respondent's trade mark and violates its rights and is an act of unfair competition. Therefore (X1) gives the plaintiff-respondent the right to restrain the use by the defendant-petitioner of the transliteration of the English word Rabea in Arabic characters, in its tea shipments. Documents (K) and (L) annexed to the defendant-petitioner's counter objections filed in this Court are new documents. In any event, the fact that the registration of these Trade Marks, Giraffe Brand (K) and Tea Mountain Brand (L) which are constituted by Arabic words in Arabic script, set out the English translation of the Arabic words and the transliteration of such words in English, does not affect the plaintiff-respondent's sole right to the use of the transliteration of the English word Rabea in Arabic. I do not think that the plaintiff-respondent intended to suppress any material facts or to mislead the Court by filing indecipherable and indistinct photo copies of (X1). However, when documents are tendered to Court by parties to litigation they should take note that the documents so tendered are distinct and decipherable.

I do not think that the plaintiff-respondent could have been aware either of the tea shipments of the defendant-petitioner under the trade mark CHAI AL RABIA which are alleged to have taken place since 1980 or that of the shipments of tea of the seven shippers mentioned in (R10). Even with regard to the present tea shipments of the defendant-petitioner, the plaintiff-respondent had become aware of it only on the information of an anonymous telephone caller. The affidavit dated 4.8.83 (R10) of Eneny of Egypt is a new document and has no relevancy to this application.

It is common ground that presently the plaintiff-respondent exports tea to Saudi Arabia, while the defendant-petitioner exports tea to Egypt. According to the plaintiff-respondent, it has been

exporting tea from Sri Lanka to the Middle East for the last seventy-five years which dates back to a period when there was no separate country known as Saudi Arabia. The Middle East countries such as Saudi Arabia, Iraq, Bahrain, Dubai, Yemen (North and South) Oman constituted with others one country known as Arabia. I do not think that the plaintiff-respondent deliberately used the expression, "in the Middle East" to give the impression that it dominated all the foreign markets in the Middle East. Though the plaintiff-respondent does not export tea to Egypt, Egyptian Muslims would be frequently visiting Mecca which is in Saudi Arabia on pilgrimages, and Egyptians have easy access to Saudi Arabia via the Suez Canal. So that there is every likelihood that as much as Egyptians drink CHAI AL RABIA Tea shipped by the defendant-petitioner to Egypt, they drink Rabea tea in Saudi Arabia which is shipped there by the plaintiff-respondent. So that there is every chance of the plaintiff-respondent's good name in the tea export trade to Saudi Arabia for a long period of years being subject to irremediable and irreparable damage if a poor quality of tea is sold in Egypt under its trade Mark and name "Rabea". The blending of the plaintiff-respondent's tea would be different from that of the defendant-petitioner's tea as the blending of tea of each tea exporter would be different. As regards the consignment of tea of the defendant petitioner which is ready for export in the harbour, the defendant-petitioner could have its tea repacked without surreptitiously using the plaintiff-respondent's trade Mark. The Court cannot be expected to assist the defendant-petitioner by turning a Nelsonian eye to its illegal acts. I do not think that any disadvantages that accrue to the defendant-petitioner by the grant of the interim injunction outweighs any conceivable damage to the plaintiff-respondent. I do not think it proper that the discretion exercised by the learned District Judge in granting the interim injunction ex parte should be interfered with.

Section 666 of the Civil Procedure Code reads, " An order for an injunction made under this chapter may be discharged, or varied, or set aside by the Court, on application made thereto on petition by way of summary procedure by any party dissatisfied with such order."

It is clear that section 666 expressly provides that a District Judge has the power to discharge, vary or set aside an interim injunction, but that there is no provision made in that section which

gives the District Judge power to suspend an interim injunction at any stage after its issue. The Legislature in its wisdom has decided to omit from section 666 the power of the Court to suspend an interim injunction. Under section 839 of the Civil Procedure Code the Court has inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. But the inherent power of the Court cannot be invoked to violate the express provisions of the Civil Procedure Code. This principle has been forcefully laid down in the cases I will now refer to.

In *Paulusz v. Perera* (6) a partition action was dismissed by the District Court upon a misconception regarding documents filed in the case. It was held that the Court had no power to set aside the order of dismissal.

In the course of his judgment de Silva, A.J. stated, "The appropriate remedy open to the parties in the partition case when the incorrect order of October 10 was made was to appeal from it to the Supreme Court. As this remedy has been very definitely provided by the Code it was not necessary for the District Court to revise its own order. A remedy already existed and whenever a remedy has been given by the Code, I do not think that section 839 provided a collateral remedy "

In *Kamala v. Andris* (6) it was held that where an action has abated, the Court has no power to grant leave to institute a fresh action—Section 839 of the Civil Procedure Code is not intended to authorise a Court to override the express provisions of the Code.

In *de Silva v. de Silva* (8) summons was served on the defendant in a divorce case. On the summons returnable date he was absent and ex parte trial was fixed. On a day before the date fixed for ex parte trial the defendant filed papers and moved that the order for ex parte trial be vacated. It was held that it was not open to the defendant to show cause for her defaults before ex parte trial was held and decree nisi entered. At page 558 Vythialingam, J. stated "the fixing of a date for ex parte trial is derived not from the inherent powers of Court, but from the imperative provisions of the Code as the next step and. . . .the inherent powers of Court cannot be invoked to violate the express provisions of the Code.So

that where the Code states that the next step shall be an ex parte hearing, the Court cannot in the exercise of its inherent powers take some other step". A remedy already exists under section 666 of the Civil Procedure Code for a party dissatisfied with the issue of an interim injunction ex parte.

The District Court cannot invoke its inherent powers under section 839 of the Civil Procedure Code to suspend an interim injunction as it cannot violate the express provisions of section 666 which empowers the Court to discharge, or vary or set aside an injunction. The defendant-petitioner's complaint to the District Court was that the plaintiff-respondent had obtained the interim injunction having suppressed material facts from Court. This question can only be gone into at an inquiry to be held after due compliance with the express provisions of sections 666 and 377 of the Civil Procedure Code. The District Court has first to enter an *order nisi* under section 377 (a) of the Civil Procedure Code and notice of it has to be issued and served on the plaintiff-respondent. Thereafter the plaintiff-respondent is entitled to file its objections and a date of inquiry fixed thereafter. At that inquiry the question whether the plaintiff-respondent had obtained the interim injunction by suppressing material facts could be inquired into and it would be open for the learned Judge to either discharge, vary or set aside the interim injunction. It is imperative that the express provisions set out in section 666 of the Civil Procedure Code are strictly complied with. There is also no power for a District Court to discharge or vary or set aside an interim injunction ex parte under section 666.

In *Jinadasa v. Weerasinghe (9)* an injunction was prayed for in the plaint. The injunction was granted and served on the defendant. He moved by way of petition and affidavit that the injunction be discharged. An order nisi or an interlocutory order in accordance with section 666 was not entered. Instead the defendant wanted the immediate determination of the matter in dispute. The plaintiff's proctor protested against the procedure and pointed out that sections 666 and 377 of the Civil Procedure Code should be complied with. The District Judge made order suspending the injunction and appointed a date of inquiry. It was held that the procedure to be followed by a person against whom an injunction has been issued and who desires to obtain a discharge of that injunction is clearly laid down in sections 377 and 666 of the Civil

Procedure Code. Since the procedure was not followed, the appellant was entitled to the relief of this injunction and the order relating to the suspension of the injunction and the date fixed for inquiry was set aside.

In the present case the learned District Judge was correct in refusing to order the suspension of the interim injunction and was correct in making the order to enter order nisi. But the procedure adopted on behalf of the defendant-petitioner in supporting an application for a suspension of the interim injunction even before order nisi was entered is unknown to the law.

I refuse the application to set aside the order of the learned District Judge dated 26.8.83 refusing the 1st defendant-petitioner's application to suspend the interim injunction. I also refuse the application to suspend the operation of the ex parte order of the learned District Judge dated 21.7.83 granting the interim injunction. I dismiss the application in revision and I refuse the application for leave to appeal. The defendant-petitioner will pay the plaintiff-respondent a sum of Rs. 525/- as costs in respect of both applications.

L. H. DE ALWIS, J. -I agree.

Applications for revision and leave to appeal refused.
