5. *Gargial et al* Vs. *Somasunderam Chetty* 9 N.L.R. 26.

6. *Ceylon Hotels Corporation* Vs. *Jayatunga* 77 C.L.W 5.

7. *Fernando* Vs. *Dias* 1980 2 S.L.R. 80.

APPLICATION for Leave to Appeal from an Application in revision of the order of 7.12.1989 of the District Court of Colombo.

Lakshman Kadirgamar with *M.Y.M. Faiz* for 1st to 7 petitioners.

K. Kanag Iswaran, P.C. with *M.Y.M Faiz* for 8th petitioner company.

H.L. de Silva, P.C. for respondent.

Cur. adv. vult.

28 September 1990

PALAKIDNAR, J.

The executive director of the Freudenberg Shipping Agencies Company was the respondent Peiris (hereinafter referred to as respondent). The first to the seventh respondents are members of the Board of Directors of the said company. The 8th petitioner company is also a joint petitioner in this application before this Court for leave to appeal from an order of the District Court of Colombo dated 07.12.1989 and filed of record as P16. There is also an application in revision of this order. Both matters were heard together.

It would appear that Peiris (the respondent) was a duly appointed Director and functioned in an executive and managerial capacity in the petitioner Company. For reasons set out in the objections in the District Court the Board of Directors (petitioners) sought to convene an Emergency General Meeting of the Company to remove the respondent from his post of Executive Director. The respondent pre-empted this move by obtaining an interim order under section 213(1) of the Companies Act 17 of 1982 preventing his removal from the said directorship. The District Court order marked P4 dated 15.09.1989 was obtained ex parte as permitted by law under the said provision of this Act. In the petition presented to Court the respondent expressed his fears about the oppression by the Senanayake family in the Board of Directors. It is to be noted that five of the petitioners bear the Senanayake name.

The petitioners on 9.10.1989 filed their objections to the interim order and sought to vary or revoke the order made by the Court (P4) under section 213(3) of the Companies Act. The learned trial judge made an order on 12.10.89 (filed marked P11) restraining the respondent from exercising his rights as a director or performing his functions as an executive director or from entering the office of the 8th petitioner company. This order was to remain in effect till the final determination of the said application. But it is of great significance that this order P11 was also made ex parte although it was made within the scope of section 213(3) of the Companies Act. The order (P11) by itself made in that form could be construed only as an interim order under section 213(1) of the Companies Act. Thus sequentially two interim orders P4 and P11 were made by the Court under 213 (1) of the Companies Act which we would agree with counsel for the respondent had the effect of completely negating the effectiveness of P4. P11 in fact revoked the P4 order.

The petitioners for their part made an application under section 213 (2) on 6.11.89 to revoke or vary P4 and it is still not decided upon by the trial Court. In their objections the petitioners have raised many questions of substantive law relating to the power of a director to remain in office and removal under section 185 of the Companies Act. The question of specific performance and consequential damages as the proper remedies have been agitated. These matters do not concern this Court for the purpose of this application. It has to be properly inquired into under proceedings under section 213 (3) of the Companies Act by the trial Court itself to determine whether order P4 of 15.9.1989 should be confirmed, revoked or varied. This inquiry on notice is indisputably inter partes.

The respondent faced with the order of 12.10.89 (P11) applied to court for the revocation or variation of that order by an application on 5.12.89. The learned trial judge having made two interim orders P4 and P11 ex parte, made an order dated 7.12.89 also ex parte under section 213 (3) of the Companies Act. His order marked P16 in effect varied the order P11 of 12.10.89 and stated that the respondent could act as Executive Director so long as he acted reasonably. It is to be noted that the petitioners were present in Court and made submissions that this is an order which would have to be made on notice and to be made inter partes but the learned trial judge has stated on 7.12.89 in the order P16, "It appears to me that

an ex parte order can be given and I amend the order given by me on 12.10.89....." He ordered that the respondent could perform the duties of an executive director so long as he acts reasonably and fairly without obstructing the progress of the company in the affairs and administration of the company.

These sentiments contained in the order are salutary and well intentioned but it is the procedural legality of the order P16 that is challenged in this Court. The gravamen of the challenge is that it has been made ex parte in direct violation of the requirements of section 213(3) of the Companies Act. At the argument it was conceded by counsel for the respondent that a correct order can be made only after an inter partes hearing. To that extent the order P16 cannot stand. However the learned counsel for respondent argued in his submissions that the legality of the P16 order should be attacked in the lower Court itself where it was made. In principle this proposition is correct and could be sustained if the petitioners did not seek to challenge the order in the lower Court. But the record leaves no room for doubt that the petitioners wished to avail themselves of an inter partes inquiry before P16 was made but the learned trial judge has stated in explicit terms that an ex parte order can be given. In that impasse the petitioners were left with the only remedy to move in revision to this Court and seek leave to appeal. In these circumstances, it is not necessary to enter into much discussion or controversy to decide that P16 cannot be allowed to stand. It is an order made without hearing the petitioners who were respondents to that application and who were entitled under section 213(2) to seek to revoke or vary that order and therefore has to be set aside.

Now we are left with the legality of order P11 which gave rise to order P16 in the trial Court. The learned counsel for the respondent argued that by same reasoning the order made by the trial Court by P11 is a nullity in so far as it was made ex parte.

Although in the matter before this Court the order under review is the P16 order there is force in the submission that they are related proceedings as P16 arose out of P11 which in turn was begotten by P4 and in the colourful illustration of the learned counsel for petitioner all the orders "would tumble down like a set of dominoes."

On the question of the nullity of the P11 order the matter was examined in the light of several decisions of our Courts and English Courts. In the view of Lord Denning this has lead to a wearying debate on whether an order by reason of its faultiness is void or voidable, whether it stands till it is set aside or is to be regarded as never having existed at all. Vide *Lovelook v. Minister of Transport* (1). Our own Courts have examined this position in several cases. In *Garuhamy* Vs. *Gunatilake* (2) Gunawardana, J in a discussion on the matter of jurisdiction as distinguished from wrong exercise of jurisdiction held that when a Court has jurisdiction over the subject matter and the parties its judgment cannot be impeached collaterally for errors of law or irregularities in procedure.

In the instant case the order sought to be impeached was P16 and this order under discussion P11. However it cannot be argued that this Court did not have jurisdiction to make an order such as P11. The Court can enter into jurisdiction as the competent court to a matter (vide section 19 Judicature Act and the view expressed by Sharvananda, J. as he then was) in *Wimalasinghe* Vs. *Jayaweerasinghe* (3). It was held in the case referred to above that if a Court which has a general jurisdiction and has in addition local and personal jurisdiction exercises such jurisdiction in an unauthorised manner the wronged party can only take the course prescribed by law for setting matters right and if that course is not taken the decision however wrong cannot be disturbed.

Lord Diplock in *Isaacs* Vs. *Robertson* (4) observed that the contrasting legal concepts of voidness and voidability are inapplicable to orders made by a Court of unlimited jurisdiction. An order made in the course of contentious litigation is either irregular or regular. If it is irregular it can be set aside by the Court that made it upon application to that Court. If it is regular it can be set aside only by an appeal court to which an appeal lies.

We hold the view in the light of this discussion that P11 was an order made within jurisdiction of the court. By the same reasoning with regard to the P16 order it has to be made inter partes. But under the cloak of an interim order under 213(1) of the Companies Act it has been made ex parte and has come to stay. This irregularity can be set aside only by an application in the court that made it. The respondent did not make an application in the first instance to obtain the P11 order after an inter partes inquiry.

Leyard C.J., in *Gargial et al* Vs. *Somasundaran Chetty* (5) states that the "ordinary principle is that where parties are affected by an order of which they have had no notice and which had ben made behind their back they must apply in the first instance to the Court which made an ex parte order to rescind the order on the ground that it was improperly passed against them."

The same view was expressed by Sirimanne J in *Ceylon Hotels Corporation* Vs. *Jayatunga* (6). He stated "section 666 of the Civil Procedure Code would apply in cases where the Court grants an interim injunction in the first instance before the other party is heard".These opinions were considered in the case of *Fernando* Vs. *Dias* (7) by Rodrigo, J.

He states that, "The Civil Procedure Code makes provision for a remedy in situations in which the injunction had been improperly obtained. Where an injunction has been issued illegally, if that were the case, it is also the more reason why a court of first instance will grant relief to an aggrieved party when it is so moved in pursuance of a remedy provided." In the case referred to above the petitioner had not moved in the first instance to have the injunction set aside.

These reasons are valid in considering the legality and the effect of the P11 order. The respondent should have moved for an inter partes hearing for the revocation or variation of that order as the petitioners had done in the P16 order, in the trial Court itself. A repetition of errors which give rise to irregular orders cannot be remedied by a clean sweep of all the orders. The irregularity has to be remedied at some point of the successive erroneous decisions.

We therefore hold that the order P16 of 07.12.89 should be set aside and further direct that the trial court should inquire into the objections filed by the respondent to this application in regard to the P11 order of 12.10.89 inter partes. Objections to the order of 15.9.89 P4 have been filed by the petitioner on 09.10.89. The scope of the inquiry into the P4 & P11 orders is in our opinion of the same dispute. Therefore the trial court may hold an inquiry into both matters together as a method of a final disposal of this matter inter partes as required by Section 213(3). The respondent will pay costs of this

application in Rs. 1050/- to 1 - 7 respondents and Rs. 525/- to 8th respondent.

SENANAYAKE J. – I agree.

Order set aside.

JAYAWARDENA
VS.
CHAIRMAN, CEILING ON HOUSING PROPERTY BOARD OF REVIEW AND OTHERS

COURT OF APPEAL
K. VIKNARAJAH
C.A. NO. 1523/82
22 SEPTEMBER 1988.

Landlord and tenant - Ceiling on Housing Property Law, No.1 of 1973 sections 13, 17, 17 A, 39 (1) - Vesting Order - Purchase by tenant - Divesting - Right of appeal and review. - Writ of Certioari

Held:

Under Section 17(1) of the Ceiling on Housing Property Law the vesting in the Commissioner takes place after the Commissioner is satisfied that it is an appropriate case for vesting after considering the equities of the case. In fact under Section 17 (1) there has to be an application for the purchase of the house. For instance under section 13, a tenant can make an application to purchase a house let to him, provided the conditions set out in the section are satisfied. Under section 17(1) the Commissioner after holding an inquiry at which the landlord and tenant are present, and after hearing both parties, makes a determination whether he would recommend to the Minister to vest the house. This determination is notified to the parties and the party dissatisfied with the determination can appeal to the Board of Review. The party dissatisfied with decision of the Board of Review can seek his remedy by writ.

The Minister on being notified by the Commissioner that it is a fit case for vesting, may by order published in the Gazette vest such house in the Commissioner. Thereafter under subsection (2) the Commissioner shall enter into an agreement with the applicant for the sale of such house subject to the conditions set out therein.

There are several provisions under which houses are vested namely Section 8(4), 11(4), 14(3) and 17(1). The power to divest was given to the Commissioner by the amendment introduced by Law No. 34 of 1974.

Properties are vested under section 17 for the purpose of conveying them to the tenant and this is obligatory under the Law if the conditions mentioned in the agreement are complied with (Section 17(3) (a)). The power to divest under section 17(A) would generally be in respect of houses vested under provisions *other than section 17(1)* unless there are exceptional circumstances. eg. if the tenant after