HOTEL GALAXY (PVT) LTD. AND OTHERS

v.

MERCANTILE HOTELS MANAGEMENT LTD.

SUPREME COURT.
SHARVANANDA, C.J. ATUKORALE, J. AND H. A. G. DE SILVA, J.
S.C. APPEALS 26/85 AND 27/85.
C.A. 1379/84.
D.C. COLOMBO 4806/Z.
JUNE 16, 17, 18, 19 AND 20 AND JULY 7, 8, 9 AND 10, 1986.

Arbitration–Arbitration agreements–Scott v. Avery clause–Arbitration Ordinance ss. 4 and 7 – Discretionary power of court – Waiver – Contract of employment or agency – Specific performance – Possession – Injunction – Enjoining order – Section 666 of C.P.C. – Ex parte order – Vacation of enjoining order – Interim order under s. 67 of the Primary Courts Procedure Act – Suppression of material facts.

The 1st defendant, Hotel Galaxy (Pvt) Ltd., owned premises No. 388, Union Place, Colombo 2, where it was in the process of completing the construction of a hotel. By agreement P1 of 7.7.1983 the 1st defendant appointed the plaintiff, Mercantile Hotels Management Limited, as Managing Agents of the hotel for six years to manage and operate the hotel on its behalf engaging the necessary staff who too were to be in the sole employ of the 1st defendant. The plaintiff would receive a percentage of the gross annual profits of the hotel. In pursuance of the agreement P1 the plaintiff commenced commercial operations of the hotel about 24.8.1983. About 30.8.1984 the 2nd and 3rd defendants who were the only Directors of the 1st defendant with the aid of about 30 thugs ejected the 1st defendant's General Manager and took over the hotel. The General Manager complained to the Police who on 31.8.1983 instituted proceeding in the Primary Court under section 66 of the Primary Courts Procedure Act. An application was made on 31.8.1983 for an interim order (under s. 67 of the Act) but the court deferred consideration of the matter for later. Thereafter on 3.9.1982 the plaintiff filed a plaint in the District Court seeking inter alia specific performance of the agreement P1 and restoration of possession of the hotel and an interim injunction restraining the defendants from interfering with the plaintiff's management of the hotel. When the application for the interim injunction was supported the 1st defendant was represented and objected to the jurisdiction of the court on the ground that the agreement P1 stipulated arbitration as a condition precedent to any right of action but made no representations on the application for interim injunction. The court then issued an enjoining order but on representations being made by the defendants suspended its operation. The plaintiff then filed an application in the Court of Appeal to have order suspending the operation of the enjoining order revised and also an application for leave to appeal. The Court of Appeal acting in revision set aside the order suspending the operation of the enjoining order. The 1st defendant and the 2nd and 3rd defendants appealed to the Supreme Court.

Held–

(1) Arbitration clauses in contracts are of two main kinds, namely:–

(*a*) bare arbitration agreements where the provision for arbitration is a mere matter for procedure and does not include right of action on the contract itself but here the party against whom an action is brought can invoke the exercise of the discretionary power of the court to stay proceedings until an arbitration is held.

(*b*) agreements making an arbitrator's award a condition precedent to any right of action which will then be bound not on the original contract but on the arbitral award. Such a provision known as a *Scott v. Avery* clause bars the institution of a suit without prior recourse to arbitration culminating in an award. In England however the courts are vested with discretionary jurisdiction to override a *Scott v. Avery* clause in suitable cases and to treat it as a mere arbitration clause.

(2) The arbitration clause is not displaced or abrogated by repudiatorv breaches of the contract unless the contract itself or arbitration clause itself is invalid or not binding on the parties or the parties have waived it or are estopped from relying upon it.

(3) In the instant case clause 10 of the agreement P1 is a *Scott v. Avery* clause making arbitration a condition precedent and as there was no recourse to prior arbitration the District Court had no jurisdiction to entertain the suit.

(4) The relationship between the 1st defendant and the plaintiff was that of principal and agent or master and servant. Hence the remedy which the plaintiff can have is damages and not specific performance.

(5) Possession can be immediate or direct or it can be mediate that is by an agent or servant or licencee. In all cases of mediate possession two persons are in possession of the same thing at the same time. In the instant case legal possession, construction it may be, has been with 1st defendant and never left it. The 1st defendant possessed the hotel through the plaintiff who was its Managing Agent.

(6) The defendant could not in law have been restrained or enjoined.

Per Sharvananda, C. J.

"As ex-parte enjoining orders and orders for interim injunctions may work grave hardship and injustice to parties who have not been heard, grave responsibility rests on a judge to exercise the discretion vested on him, judicially having due regard to the law..."

(7) The operation of an enjoining order can be suspended.

(8) A party seeking to canvass an order entered ex-parte against him must apply in the first instance to the court which made it. This is a rule of practice which has become deeply ingrained in our legal system.

(9) It is settled law that the exercise of the revisonary powers of the appellate court is confined to cases in which exceptional circumstances exist warranting its intervention.

(10) The order of the Primary Court Judge was in the nature of a temporary refusal of the interim order and was a material fact which should have been disclosed by the plaint in his application for the interim injunction.

A Primary Court Judge has jurisdiction to make an interim order under s. 67 at any time after proceedings are instituted until conclusion of the inquiry and not only at commencement of the inquiry.

Cases referred to:

(1) *Scott v. Avery–(1865) 5 H.L. Case 811.*

(2) *Bristol Corporation v. John Aird & Co.–1913 A.C. 214, 259.*

(3) *Heyman v. Darwing Ltd.–1942–1 All E.R. 337 & 347 & 349.*

(4) *Preshwater v. Western Australia Assurance Co. Ltd.–1933, 1 K.B. 515, 523.*

(5) *Dennehy v. Bellamy–1938, 2 All E.R. 262, 264.*

(6) *Soysa v. Ranasinghe–(1917) 16 N.L.R. 222.*

(7) *Radford v. Hair–1971, 2 All E.R. 1089.*

(8) *Toronto Rly. Co. v. National British and Irish Millers Insurance Co., Ltd.–(1914) 111 L.J. 553.*

(9) *Hickman & Co. v. Roberts–1913 A.C. 229.*

(10) *Englesham v. Macmaster–1920, 2 K.B. 169.*

(11) *Jureidini v. National British & Irish Millers Insurance Co., Ltd.–1915, A.C. 499, 505.*

(12) *Johnson v. Shrewbury Railway Co.–(1853) 3 De G[illegible] G 914 at 926.*

(13) *Stocker v. Brocklebank–3 Mac. & G. 250.*

(14) *Frances v. Municipal Councillors of Kuala Lumpur–1962 3 W.L.R. 633, 637.*

(15) *Vine v. National Dock Labour Board–1957 A.C. 488, 500.*

(16) *Jinadasa v. Weerasinghe–(1928) 30 N.L.R. 283.*

(17) *Stasen Exports Ltd., v. Hebutulabhoy & Co. Ltd.–1984 1 S.L.R. 129.*

(18) *Gordon Frazer & Co. Ltd. v. Jean Marie Losio and Martin Wenzel–1984 2 S.L.R. 85.*

(19) *Loku Menika v. Selenduhamy–(1947) 48 N.L.R. 353.*

(20) *Habibu Lebbe v. Punchi Etana–(1894) 3 C.L.R. 85.*

(21) *Caldera v. Santiagopulle–(1920) 22 N.L.R. 155, 158.*

(22) *Weeratne v. Secretary D.C., Badulla–(1920) 2 C.L. Rec. 180.*

(23) *Dingihamy v. Don Bastian–(1962) 65 N.L.R. 549.*

(24) *Bank of Ceylon v. Liverpool Marine & General Insurance Co. Ltd.–(1962) 66 N.L.R. 472.*

(25) *Nagappan v. Lankabarana Estates Ltd.–(1971) 75 N.L.R. 488.*

(26) *Bambarakelle Estates Tea Co. v. Goonewardena–2 Browne's Rep. 78.*

(27) *Alphonso Appuhamy v. Hettiaratchi–(1973) 77 N.L.R. 131.*

(28) *Moosajees Ltd. v. Eksath Engineru Saba Samanaya Kamkaru Samithiya–(1976) 79 (1) N.L.R. 285.*

(29) *Muthukumarasamy v. Nannithamby–C.A. Re. Appln. 1551/52, C.A. Mins. of 3.3.1983; 1983 1 Sri Kantha's Rep. 55.*

Dr. Colvin R. de Silva, with *Faiz Mustapha, G. G. Arulpragasam* and *D. Phillips* for 1st defendant-appellant in S.C. Appeal No. 26/85.

Eric Amerasinghe, P.C. with *Faiz Mustapha* and *Miss D. Guniyangoda* for the 2nd and 3rd defendant-appellants in S.C. Appeal No. 27/85.

Dr. H. W. Jayewardene, Q.C. with *Chula de Silva, Miss Meevanapalana, Ravi Algama* and *I. K. Sivaskantharajah* for plaintiff-respondent in S.C. Appeal No. 26/85.

H. L. de Silva, P.C. with *Chula de Silva, Miss Meevanapalana, Ravi Algama* and *I. K. Sivaskantharajah* for the plaintiff-respondent in S.C. Appeal No. 27/85.

Cur. adv. vult

October 30, 1986.

SHARVANANDA, C.J.

I gratefully adopt in its entirety the reasoning in the judgment of Atukorale, J., as leading to the conclusion that the two appeals should be allowed. I only add in my own words additional grounds for allowing the appeals.

The learned District Judge erred in issuing an enjoining ordr in the first instance. However, he later correctly vacated the enjoining order.

Arbitration clause 10 of P1 (the agreement between the parties) provides as follows:

"10. If during the continuance of this agreement or at any time after the termination thereof any difference or dispute shall arise between the parties hereto whether in regard to the interpretation of any of the provisions herein contained or any matter or thing in regard to this agreement such difference or dispute shall be forthwith referred to the final award of a single arbitrator in case the parties can agree upon one and otherwise to two arbitrators one to be appointed by each party and in the event of disagreement between such arbitrators thereto an umpire to be appointed by the arbitrators in writing. If either party shall refuse or neglect to appoint an arbitrator after the other party shall have appointed and shall have served or posted under registered cover written notice upon such refusing or neglecting party requiring such party to make such appointment or shall appoint an arbitrator who shall refuse to act, then the arbitrator appointed as

aforesaid shall at the request of the party appointing him proceed to hear and determine the matter in difference or dispute as if he were an arbitrator appointed by both parties. The decision of the arbitrator or arbitrators or their umpire (as the case may be) shall be binding upon each of the parties hereto and the cost of the reference and award shall be in the discretion of the arbitrator/arbitrators or umpire who may direct to and by whom and in what manner the same or any part thereof shall be paid. The making of an award upon a reference to arbitration shall be a conditionedent to any right of action against any of the parties hereto in respect of any or all disputes or differences arising or pertaining to this agreement."

Arbitration clauses in contracts are of two main kinds, namely:–

(1) bare arbitration agreements, when the parties agree that disputes arising out of the contract **shall** be referred to arbitration, here; the provision for arbitration is a mere matter of procedure for ascertaining the rights of parties with nothing in it to exclude a right of action on the contract itself but leaving it to the party against whom an actin may be brought to apply to the discretionary power of the court to stay proceedings in the action in order that the parties may resort to the procedure to which they have agreed.

(2) agreements making an arbitrator's award a condition precedent to any right of action under the contract based not upon the original contract but upon the award made under the arbitration clause.

The parties to a contract may agree that any dispute arising out of it, including the question of liability as well as that of the amount of damages shall be referred to arbitration and that the obtaining of an award shall be a condition precedent to the right to bring an action on the contract. Where such an agreement has been made, no right of action arises on the contract until the amount of the liability has been ascertained by arbitration. In such a case, the cause of action is not complete until arbitration has taken place in accordance with the clause and an award has been made. *Scott v. Avery* (1).

Under the English Arbitration Act 1889, section 4, the court is given a discretionary power to stay an action brought in breach of a bare arbitration clause Section 7 of our Arbitration Ordinance No. 15 of 1866 (Cap. 98, Vol. IV, L.E. at 134) similarly vests our courts with similar discretionary power to stay an action instituted in breach of a bare arbitration clause. Such a clause, therefore, though absolute in terms is qualified in the sense that it is subject to the overriding discretion of the court. It is prima facie the duty of the court to enforce the agreement of the parties to resort to the tribunal that they themselves have chosen. Accordingly, once the party applying for a stay has shown that the dispute falls within a valid and subsisting clause, the onus of showing that a stay should be refused is on the other party. *Bristol Corporation v. John Aird & Co.* (2). A bare agreement to arbitrate cannot be pleaded in bar of an action on the contract. But under an agreement with *Scott v. Avery* clause, the right to bring an action depends upon the result of the arbitration; arbitration followed by an award is a condition precedent to an action being instituted. Where a dispute is governed by such a condition an action in respect of that dispute cannot succeed. On such an arbitration clause, arbitration is not a mere matter of procedure, but the proceeding to arbitration is essential to a right of action in the plaintiff. But there is statutory provision in English Law vesting the court with discretion to override a *Scott v. Avery* clause.

Section 25(4) of the English Arbitration Act, 1950 re-enacting Arbitration Act 1934, section 3(4) states that –

> "Where it is provided...that an award under an arbitration agreement shall be a condition precedent to the bringing of an action with respect to any matter to which the agreement applies, the High Court may order that the provision making an award a condition precedent to the bringing of an action shall cease to have effect as regards that dispute."

Thus English Law gives the court a discretion in suitable cases, to treat the *Scott v. Avery* clause as a mere arbitration clause. But our law has remained static with section 7 of the Arbitration Ordinance of 1866. There is in our law non statutory provision vesting the court with any such discretion to treat the *Scott v. Avery* clause as a mere arbitration clause; thus our courts are bound to give effect to the agreement of the parties that no cause of action should accrue until liability under the contract is determined by an arbitral award. This

mandatory reference to arbitration is not a matter of procedure but a question of the liability to perform the promise which is contained in the arbitration clause. The argument that the plaintiff could bring an action without first resorting to arbitration may be quite effective if the relevant clause of the contract between the parties is a mere arbitration clause but it is not effective in the case of a *Scott v. Avery* provision by reason of the fact that the contract provides for one liability for breach of the contract, viz. liability stemming from the arbitral award. The *Scott v. Avery* provision is a condition precedent to the creation of liability rather than an exception to a liability which has accrued independently of the clause. It is not displaced by repudiatory breaches of the contract. It survives for determining the mode of settlement of the claims arising out of the breaches. Where such an arbitration clause is provided for by the parties as a method of settling disputes between them. A repudiation of the contract does not vitiate such a clause. The arbitration clause remains in force to settle all claims that fall within its ambit:

> "What is commonly called repudiation or total breach of a contract...does not abrogate the contract, though it may relieve the injured party of the duty of further fulfilling the obligation, which he has, by the contract, undertaken to the repudiating party. The contract is not put out of existence. It survives for the purpose of measuring the claims arising out of the breach and the arbitration clause survives for determining the mode of their settlement." Per Lord Macmillan *Heyman v. Darwing Ltd.* (3).

In its plaint dated 3.9.84, the plaintiff states inter alia, in paragraph 6 as follows:

> "On or about 7.7.83 the plaintiff and the 1st defendant entered into an agreement with respect to the said hotel under construction, a true copy of which is annexed herewith marked P 1 and pleaded as part and parcel of this plaint. The said agreement provided as follows:–
>
> (*a*) The plaintiff was appointed as Managing Agents for a period of 6 years from the date of commencement of commercial operations or until the recovery of the profits or income accruing to the plaintiff which shall be paid by the 1st defendant whichever is greater.

(*b*) The plaintiff shall operate the said hotel at the expense of the 1st defendant and the 1st defendant shall warrant the plaintiff the uninterrupted control over the operations of the said hotel and the 1st defendant shall not in any way interfere with the day to day running of the said hotel.

(*c*) The 1st defendant shall be entitled to terminate this agreement after the commencement of commercial operations if the hotel fails to operate towards a profit margin necessary to meet the required commitments in relation to the payment of presently existing loan instalments and interest.

(*d*) To recruit and train staff and other personnel.

(*e*) To arrange for the working capital to commence operations of the said Hotel."

Para 13– "On or about 30th August 1983 the 2nd and 3rd defendants abovenamed acting together and in concert and in collusion and the 1st defendant acting through its directors the 2nd and 3rd defendants wrongfully and unlawfully brought into the said hotel premises nearly 30 thugs disrupting the operations of the said hotel and caused disorder therein. On learning of the aforesaid the General Manager of the plaintiff, Mr. J. Y. Samarakoon, visited the said hotel and the said thugs acting on the instructions of the 2nd defendant forcibly ejected the aforesaid General Manager."

Para 16– "Since the said date the defendants acting together and in concert and in collusion are wrongfully and unlawfully interfering with the management and control of the said hotel by the plaintiff. The 2nd and 3rd defendants abovenamed and the 1st defendant acting through its directors the 2nd and 3rd defendants, have placed in the said hotel hirelings/thugs for the aforesaid wrongful purposes."

The reliefs prayed for in the plaint are, inter alia:–

(*a*) For a declaration that the plaintiff is entitled to operate and manage the said hotel without interference by the defendants their servants and agents.

(*e*) For an interim injunction restraining the defendants their servants/agents:

(i) from interfering with the plaintiff's management and/or control and/or operation and/or administration of the said hotel;

(ii) from interfering with any of the plaintiff's rights in relation to or with respect to the said hotel;

(iii) from interfering with plaintiff, plaintiff's employees/representatives/agents in any manner whatsoever;

(iv) from obstructing the plaintiff, the plaintiff's employees/representatives/agents and licencees in any manner;

(v) from preventing/obstructing the plaintiff's servants/agents/representatives and licencees entering the said hotel or any part thereof or exercising or discharging any functions or powers of management or control of the said hotel or any part thereof;

(vi) from using any force or show of force on any of the plaintiff's representatives/agents/employees/licencees.

(*f*) For a permanent injunction restraining the defendants their servants/agents:

(i) from interfering with the plaintiff's management and/or control and/or operation and/or administration of the said hotel;

(ii) from interfering with any of the plaintiff's rights in relation to or with respect to the said hotel;

(iii) from interfering with plaintiff, plaintiff's employees/representatives/agents in any manner whatsoever;

(iv) from obstructing the plaintiff, the plaintiff's empoloyees/representatives/agents and licencees in any manner;

(v) from preventing/obstructing the plaintiff's servants/agents/representatives and licencees entering the said hotel or any part thereof or exercising or discharging any functions or powers of management or control of the said hotel or any part thereof;

(vi) from using any force or show of force on any of the plaintiff's representatives/agents/employees/licencees;

Though the plaintiff has not sued for damages for the alleged interference with its management and control of the hotel, a *Scott v. Avery* clause is sufficient to bar, in the absence of an award, not only the right to sue for damages, but also any claim for ancillary relief, such as injunctions, interlocutory or permanent. According to the terms of the contract P 1, the making of an award upon a reference to arbitration is a condition precedent to any right of action against any of the parties in respect of any dispute or difference arising under the contract. A right of action can come into existence only after the said condition–precedent has been performed. That is not a matter of practice or procedure, but a question of the liability to perform the promise which is contained in the arbitration clause. Since the effect of the condition precedent is to prevent any cause of action from arising until an award has been obtained, there is no ouster of the jurisdiction of the court, since there is nothing to oust. "Such a clause postpones but does not annihilate the right of access to the court." Per Lord Hanworth, M. R. in *Preshwater v. Western Australian Assurance Co., Ltd.* (4). I agree with Dr. Colvin R. de Silva's submission that, in view of the *Scott v. Every* clause 10 in P 1, the plaintiff has no cause of action to sue, in respect of its claim on which the action is founded. Since the plaintiff had not had recourse to arbitration and thus had not fulfilled the precondition for recourse to court, the present action should fail in limine for want of a cause of action. The District Judge should, far from issuing an enjoining order in the first instance, have refused to entertain the plaint as disclosing no cause of action. The present action cannot succeed and no purpose will be served by allowing it to continue–*Dennehy v. Bellamy* (5).

Senior Counsel for plaintiff-respondent relied on *Soysa v. Ranasinghe* (6), in support of his submission that where a serious charge of fraud or violence is made against the defendant, the court

will in general refuse to send the dispute to arbitration especially where plaintiff prays for the grant of an injunction, as the prayer deals with matters beyond the competence of arbitrators and can only be satisfactorily disposed of by the ordinary courts. That case dealt with an application, under section 7 of the Arbitration Ordinance No. 15 of 1866 for a stay of proceedings and to compel a reference to arbitration in terms of the clause in the partnership agreement. Under that section in question, the court has a discretion with regard to compelling the parties to resort to arbitration–the court is not obliged to take this step if it is satisfied that there is sufficient reason why such matters should not be referred to arbitration. In the case referred to by Counsel, the partnership agreement does not appear to have incorporated a *'Scott v. Avery'* clause and hence there is no discussion of the impact of such a clause on an application for stay of action under section 7 of the Arbitration Ordinance.

In *Radford v. Hair* (7) (relied on by counsel for plaintiff) too, the arbitration clause in question was a bare arbitration and was not a *Scott v. Avery* clause, and it was properly held that defendant's allegations imputing to the plaintiff actual dishonesty and impugning his professional reputation were akin to allegations of fraud and against such allegations a plaintiff was entitled to have his case tried by a judge in open court. As stated supra, our courts do not have any jurisdiction to override a *Scott v. Avery* clause while courts in England have been vested by section 25(4) of the Arbitration Act 1950, re-enacting section 3(4) of the Arbitration Act of 1934, with a discretion in suitable cases to treat the *Scott v. Avery* clause as a mere arbitration clause. Thus courts in England have, unlike our courts, statutory power to annul the clause. The resulting position, is that under our law a party may rely on a *Scott v. Avery* clause as affording a substantive defence, viz. no cause of action had accrued to the plaintiff and the court is obliged to give effect to such a clause and put the plaintiff out of court when he institutes action for breach of contract, without prior reference to arbitration as contemplated by the contract.

Queen's Counsel submitted that the defendants had by their conduct waived the condition making arbitration followed by an award a condition to any legal right of recovery on the contract and are now

disentitled from relying on clause 10 of the agreement P 1. He sought support in the following statement of the law by Lord Wright in *Heyman v. Darwing Ltd. (supra)* (3) at paragraph F of page 349–

> "The contract, either instead, or along with a clause submitting differences and disputes to arbitration, may provide that there is to be no right of action save upon the award of an arbitrator. The parties in such a case make arbitration followed by an award a condition to any legal right of recovery on the contract. This is a condition of the contract to which the court must give effect *unless the condition has been "waived", i.e. unless the party seeking to set it up, has somehow disentitled himself to do so."*

Case law show that a *Scott v. Avery* clause is not available as a defence:

(*a*) Where the defendant had waived reliance on the clause, for example, by defending the action without relying on the clause or by himself instituting proceedings in breach of it–*Toronto Rly. Co. v. National British and Irish Millers Insurance Co., Ltd.* (8).

(*b*) Where the defendant, by improper interference with the arbitrator in the discharge of his duties or hindering the progress of the reference, deprived the claimant of a proper opportunity to fulfil the condition precedent–*Hickman & Co. v. Roberts* (9); *Englesham v. Macmaster* (10); or by waiver by course of conduct *Toronto Railway Co. v. National British and Irish Millers Insurance Co., Ltd. (supra)* (8).

(*c*) Where the dispute is as to whether the contract which contains the clause has ever been entered into at all that issue cannot go to arbitration under the clause for the party who denies that he has ever entered into the contract is thereby denying that, he has gained in the submission. Similarly if one party to the alleged contract is contending that it is void ab initio (because the contract is illegal), the arbitration clause cannot operate, for on this view, the arbitration clause which is part of the contract, is also void. If the dispute is as to whether there has even been a binding contract between the parties such a dispute cannot be covered by an arbitration clause in the challenged contract. If there has never been a contract at all, there has never been a part of an agreement to arbitrate–Vide *Heyman v. Darwing Ltd. (supra)* (3).

Conditions precedent may be waived by a course of conduct inconsistent with their continued validity, even though the contracting party does not intend his conduct to have that result.

"When by conduct or inaction, a party represents to the other party litigant his intention to adopt one of two alternatives and inconsistent proceedings or positions with the result that the latter is thereby encouraged to adopt or persevere in a line of conduct which he otherwise would have abandoned or modified, or as the case may be to change tactics from which he would otherwise have never deviated, the first party is estopped, as against his antagonist from resorting afterwards to the course or attitude which of his free choice he has waived or discarded" Spencer Bower on Estoppel by Representation (2nd Ed.) at page 305.

There is nothing in the correspondence between the parties marked of record or in the affidavits filed by the plaintiff to suggest or to show that the 1st defendant has by his conduct or action waived its right to insist on arbitration as a condition precedent. Far from waiving such a right, its counsel had insisted on such a right at the first available opportunity, viz. when plaintiff moved ex parte for the issue of interim injunction.

The record does not show that the defendants by their conduct represented to the plaintiff that they had waived the 1st defendant's right to insist on arbitration as a condition precedent. There is no factual basis for the plea of waiver or estoppel. From the alleged repudiation of its obligations under the contract it does not necessarily follow that the 1st defendant had waived its rights under the arbitration clause.

Counsel in his written submissions, referred to the following observation of Lord Haldane, L.C., in *Jureldini v. National British & Irish Millers Insurance Co., Ltd.* (11):

"When there is a repudiation which goes to the substance of the whole contract, I do not see how the person setting up the repudiation can be entitled to insist on a subordinate term of the contract, (i.e. arbitration) still being enforced."

With reference to this observation, Lord Macmillan said in *Heyman v. Darwing Ltd. (supra)* (3) at 346 that:

"These dicta, in view of their high authority are entitled to the most careful consideration, but, with all respect, I do not think they constitute pronouncements in law by this House such as to be binding upon Your Lordships."

The other Lordships also did not accept Lord Haldane's aforesaid enunciation as a general proposition of the law. Lord Haldane's statement cannot be accepted in the light of the subsequent decision of the House of Lords in *Heyman v. Darwing Ltd. (supra)* (3) where it was held that where there had been a total breach of a contract by one party so as to relieve the other of the obligations under it, an arbitration clause, if its terms are wide enough, still remain effective. I respectfully adopt the later House of Lord's decision as setting out the correct legal position with respect to arbitration clauses surviving total breach of the contract.

Clause 1 of the recital in the agreement P1 states that the 1st defendant is in the process of completing construction of a hotel called and known as Hotel Galaxy (Pvt) Limited on an allotment of land owned by it. Clause 2 states that the 1st defendant will complete the construction and furnish and equip the hotel with all amenities and requirements required of a luxury hotel. Clause 3 further states that the 1st defendant has agreed to appoint the plaintiff as the Managing Agents of Hotel Galaxy (Pvt) Limited for a period of six years for the mangement, control and operations of the hotel on the terms and conditions of the agreement.

Clause 1 of the operative part of the agreement states that the 1st defendant is hereby appointing the plaintiff as the *Managing Agents* of its hotel for a period of six years. Clause 2 stipulates that the plaintiff as Managing Agents of the hotel shall undertake *on behalf* of Hotel Galaxy the duties and responsibilities enumerated therein, one obligation being to be responsible for the effective organisation and operation of the hotel and the discipline of the staff. Clause 2(*h*) expressly provides that though the plaintiff was to recruit, pay the salary of and train the staff and other personnel necessary for the proper and efficient conduct and operation of the hotel, plaintiff would in these matters be acting as 1st defendant's agent and all personnel so hired or employed shall be in the sole employment of the 1st defendant and not in the employment of the plaintiff. Clause 3 provides that the plaintiff shall operate the hotel at the expense of the 1st defendant which shall warrant the plaintiff the uninterrupted control over the operations of the hotel and the 1st defendant shall not in any way interfere with the day to day running of the hotel. Clause 8 states that the 1st defendant shall indemnify the plaintiff against any loss whatsoever or against any claim or liability of any nature as

plaintiff may become liable to, in acting as agent of the 1st defendant, in the normal course of business. In the face of these clauses, it is preposterous for plaintiff to claim in its plaint that it established the hotel and that the servants working in the hotel are its employees. The several clauses in the agreement P1 underscore the fact that the 1st defendant is the proprietor of the hotel and that it has engaged the services of the plaintiff to manage the hotel and that whatever the plaintiff did to the hotel was as agent or servant of the 1st defendant for and on behalf of the 1st defendant. It cannot be gainsaid that the relationship of the parties is basically that of master and servant or principal and agent. The plaintiff has not invested any capital on the hotel; its stake n the hotel is only the remuneration payable by the 1st defendant in the shape of a percentage of the gross annual profits of the hotel for the services provided by it. In the light of this identification of the relationship of the parties the question arises whether reliefs of specific performance and injunctions are available to plaintiff in the events complained by it in the plaint.

Under the common law the remedy of an employee who has been wrongfully dismissed is an action for damages. The court will not decree specific performance of a contract of employment. Similarly it will not grant an injunction for the fulfilment of a contract of employment. In Halsbury's Laws of England (3rd Ed.) Vol. 31, at page 268, paragraph 366, it is stated that:

> "A judgment for specific performance is not pronounced either at the suit of the employer or the employee in the case of a contract for personal work or service. The court does not seek to compel persons against their will to maintain continuous personal and confidential relations. This principle applies not merely to contracts of employment, but to all contracts which involve the rendering of continuous services by one person to another as for instance, a contract to work a railway line. Contracts of agency came under the same principle."

Fry on "Specific Performance" 6th Ed. Sec. 110 says:

> "The relation established by contract of hiring and service is of so personal and confidential a character that it is evident that such contracts cannot be specifically enforced by the court against an unwilling party with any hope of ultimate and real success and accordingly the court now refuses to entertain jurisdiction in regard to them."

"We are asked", said Knight Bruch, L.C., "to compel one person to employ against his will another as his confidential servant, for duties with respect to the due performance of which the utmost confidence is required. Let him be one of the best and one of the most competent persons that ever lived, still if the two do not agree, and good people do not always agree, enormous mischief may be done"– *Johnson v. Shrewbury Railway Co.* (12).

In *Stocker v. Brocklebank* (13) where an indenture was held to constitute the relation of master and servant and not of partner, Lord Truro dissolved an injunction, restraining the defendant from excluding the plaintiff from management of the business. An employer could not be forced to employ a servant in whom he has lost confidence.

Bowstead on Agency, 12th Ed. Art. 10 says–

> "No action is maintainable at the suit of either principal or agent to compel the specific performance of a contract of agency. It is inconsistent with the confidential nature of the relationship of master and servant that it should continue contrary to the will of one of the parties thereto. Therefore the court will not grant specific performance of a contract of employment nor will it grant an injunction for the fulfilment of a contract of employment."

The management agency constituted by P1 can work only so long as the parties have confidence in each other. The correspondence between the parties culminating in the letter dated 2nd August 1984 (A18) written by the Chairman of the plaintiff-company to the 1st defendant stating "we must have positive evidence of the party who is empowered on behalf of Hotel Galaxy Ltd., (Pvt) and who can contractually bind the company. Until this evidence is provided we are not prepared to entertain any communication from your Company" was bound to induce apprehension in the minds of the defendants that the plaintiff was not going to honour its obligations and that it was not safe to continue to place confidence in it. In the consequent estranged relationship mutual confidence had ceased to exist. In such a situation the parties should not be compelled to maintain the confidential relationship contemplated by the agreement P1.

In *Frances v. Municipal Councillors of Kuala Lumpur* (14) Lord Morris, delivering the judgment of the Privy Council said:

> "In their Lordships' view, when there has been a purported termination of a contract of service a declaration to the effect that the contract of service still subsists will rarely be made. This is a consequence of the general principle of law that the courts will not grant specific performance of contracts of service."

Further a contract of employment is said to be terminated by wrongful dismissal even where the employee refuses to accept the dismissal as a termination of the contract. As Viscount Kilmuir, D.C., said in *Vine v. National Dock Labour Board* (15):

> "If the master wrongfully dismisses the servant, either summarily or by giving insufficient notice, the employment is effectively terminated, albeit in breach of contract."

Accordingly the servant cannot claim specific performance of the contract of employment nor an injunction restraining the employer from dismissing him and from taking consequential steps. The remedy of an employee who has been wrongfully dismissed is an action for damages. In the present case, the acts of misconduct on the part of the defendants, alleged by the plaintiff, manifest a repudiation of the agency agreement by the defendants: the plaintiff has been summarily dismissed. Whether the plaintiff accepts the repudiation or not the agency agreement P1 has thereby been terminated. The defendants have resumed the management of their hotel and the agreement P1 has come to an end: the plaintiff can no more claim to have access to the hotel or to be entitled to the management of the defendant's hotel. If the plaintiff has been wrongfully dismissed, his remedy is damages and not declaration or injunction or specific performance as defendant's repudiation has determined the contract P1. On the facts pleaded by the plaintiff, the plaintiff cannot sustain the reliefs of declaration and injunction prayed for by him. Hence the enjoining order was misconceived.

In law, one person may possess a thing for and on account of another. In such a case the latter is in possession by the agency of him who so holds the thing on his behalf. The possession thus held by one man through another may be termed mediate, while that which is

acquired or retained directly or personally may be distinguished as immediate or direct– Vide Salmond on Jurisprudence (10th Ed) at page 282. In all cases of mediate possession two persons are in possession of the same thing at the same time. Every mediate possessor stands in relation to a direct possessor through whom he holds. In this case in terms of the agreement P1, the plaintiff is the Managing Agent of the 1st defendant for the purpose of conducting the hotel. The plaintiff possessed the hotel for the 1st defendant-company of which the 2nd and 3rd defendants are the Directors and the 1st defendant possessed the hotel through the plaintiff. Legal possession, constructive though it may be, has always been with the 1st defendant and never left it. The plaintiff could not claim to possess the hotel on its own right as against the defendants. The plaintiff was put into occupation of the hotel by the defendants for the purpose of managing their hotel business, and the defendants could at any time resume management of their business and occupation of the hotel. If in the process of resuming the management of their business, the defendant committed a breach of the agreement P1, the remedy of the plaintiff was an action for damages only. Since the defendants were always in possession of the hotel through the plaintiff, they cannot be dispossessed by an injunction, as they are in possession on their own right. Hence, the prayer for interim and/or permanent injunction in the plaint is untenable. The prayer cannot be validly granted by court. Hence, the enjoining order in question cannot be supported.

As Dr. Colvin R. de Silva submitted, the judgment of the Court of Appeal setting aside the order of the District Judge vacating the earlier enjoining order results in upholding an enjoining order which should never have been issued. It is regrettable that the District Judge did not address his mind to the legal question whether on the facts pleaded by the plaintiff, the defendants could, in law, be restrained by an injunction or enjoining order. As exparte enjoining orders and orders for interim injunctions may work grave hardship and injustice to parties who have not been heard, grave responsibility rests on a Judge to exercise the discretion vested on him, judicially, having due regard to the law, before he grants an ex parte application for the issue of an interim injunction or enjoins the defendant in terms of section 662 of the Civil Procedure Code. Such reliefs should be granted only after being satisfied that both the facts averred by the plaintiff and the law applicable therto call urgently for them.

I set aside the judgment of the Court of Appeal and allow both the appeals and restore the order of the District Judge vacating the enjoining order which he had ex parte issued earlier. I direct the District Court to take further steps according to law in the light of the judgment of this court.

The plaintiff-respondent will pay the costs of the defendants-appellants in the District Court, Court of Appeal and in this court.

ATUKORALE, J.

There are two appeals before us, both arising out of the same judgment of the Court of Appeal which, acting in revision, set aside the order of the learned District Judge vacating an enjoining order which he had issued until the hearing and decision of the plaintiff's application for an interim injunction. The two appeals were by agreement of parties consolidated and heard together. In appeal No. 26/85 the appellant is the 1st defendant in the action, Hotel Galaxy (Pvt) Ltd., a company duly incorporated in Sri Lanka. In appeal No. 27/85 the appellants are the 2nd and 3rd defendants in the action. They are two brothers and are respectively the Chairman and the only other Director of the 1st defendant-company whose shares they own and control. The contesting respondent in both appeals is the plaintiff in the action, Mercantile Hotel Managements Ltd., also a company duly incorporated in Sri Lanka. This judgment is in respect of both appeals. To avoid any confusion the respective parties will hereinafter be referred to as the plaintiff, the 1st defendant, the 2nd defendant and the 3rd defendant as designated in the plaint.

The 1st defendant owned premises No. 388, Union Place, Colombo 2 and was in the process of completing the construction of a hotel thereon called and known as Hotel Galaxy (Pvt) Ltd. On 7.7.1983 the plaintiff and the 1st defendant entered into agreement P1 whereby, inter alia, the 1st defendant appointed the plaintiff as Managing Agents of the hotel for the management, control and operation of the hotel in accordance with the terms contained therein for the duration of a specified period of time. As Managing Agents of the hotel the plaintiff undertook on behalf of the 1st defendant to perform certain duties which were enumerated in P1. The operation of the hotel by the plaintiff was to be at the expense of the 1st defendant which in turn warranted to the plaintiff the uninterrupted control over the operation of the hotel and undertook not to interfere in any manner

with the day to day running of the hotel by the plaintiff. The agreement also made provision for the remuneration of the services provided by the plaintiff including the computation and the manner of payment of such remuneration. The plaintiff was also entitled to reimbursement from the 1st defendant of all costs, charges, disbursements and other expenses properly incurred by it in the discharge of its duties and functions under the agreement. Clause 9 of the agreement stipulated that if at any time during its operation the plaintiff was prevented from managing the hotel due to no fault on the part of the plaintiff but due to any acts of commission or omission on the part of the 1st defendant, then the plaintiff will be entitled to terminate the operation of the hotel under the agreement and the 1st defendant would be liable to pay the plaintiff as damages a sum to be calculated as provided for in that clause. Clause 10 is the arbitration clause the relevant portions of which, in so far as these proceedings are concerned, read as follows:

"10. If during the continuance of this agreement or at any time after the termination thereof any difference or dispute shall arise between the parties hereto whether in regard to the interpretation of any of the provisions herein contained or any matter or thing in regard to this agreement such difference or dispute shall be forthwith referred to the final award of a single arbitrator in case the parties can agree upon one and otherwise to two arbitrators one to be appointed by each party and in the event of disagreement between such arbitrators thereto an umpire to be appointed by the arbitrators in writing.....The decision of the arbitrator or arbitrators or their umpire (as the case may be) shall be binding upon each of the parties hereto....The making of an award upon a reference to arbitration shall be a condition precedent to any right of action against any of the parties hereto in respect of any or all disputes or differences arising or pertaining to this agreement."

In pursuance of the said agreement P1 the plaintiff commenced commercial operations of the hotel on or about 24.8.1983. About a year after the commencement of such operations on 3.9.1984 the plaintiff instituted the present action in the District Court against the three defendants. The cause of action set out in the plaint is that on or about 30.8.1984 the 2nd and 3rd defendants acting jointly and in concert and the 1st defendant acting through them wrongfully and unlawfully brought into the hotel premises nearly 30 thugs disrupting

the operation of the hotel and causing disorder therein; that when Samarakoon, the General Manager of the plaintiff, went to the hotel the thugs at the instance of the 2nd defendant forcibly ejected him from the hotel and that since then the defendants are wrongfully and unlawfully interfering with the plaintiff's management and control of the hotel for which purpose the defendants have placed hirelings/thugs at the hotel. The plaint further averred that Samarakoon made a complaint to the Police (a copy of which was annexed to the plaint) and the "Police have referred the matter to the Fort Magistrate's Court and the matter is pending therein." The plaint was accompanied by an affidavit of Samarakoon affirming to the facts set out therein. The plaintiff prayed for a declaration that it was entitled to operate and manage the hotel without interference by the defendants, their servants and agents; for a declaration that the defendants, their servants and agents have wrongfully and unlawfully interfered with the operation and management and control of the hotel by the plaintiff on 30.8.1984 and thereafter; for an order prohibiting the defendants from interfering with the rights of the plaintiff in respect of the hotel and for an order on the defendants directing them to remove from the hotel premises all persons who have no authority from the plaintiff and for an order ejecting them forthwith. The plaintiff also prayed in the plaint for an interim and a permanent injunction restraining the defendants, their servants and agents from interfering with the plaintiff's rights, particularly the right of operation, management and control of the hotel and from obstructing the plaintiff, its employees and agents in the exercise or discharge of powers and functions of management and control of the hotel.

The application for an interim injunction was sought to be supported in court by plaintiff's counsel without notice to any of the defendants on 4.9.1984. On that occasion counsel appeared on behalf of the 1st defendant and submitted that the court had no jurisdiction to entertain the said application inasmuch as the arbitration clause in agreement P1 was in the nature of a *Scott v. Avery* clause and that therefore the court lacked jurisdiction to entertain the action or the application for an injunction in the first instance. The learned District Judge, however, directed that notice of the application for an interim injunction be served on the defendants and issued an enjoining order restraining them from committing the acts the commission of which the plaintiff in the plaint sought to restrain by way of an interim injunction. On 12.9.1984 the defendants moved court by way of a petition and affidavit to vacate the enjoining order on the ground, inter alia, that the

plaintiff had obtained the enjoining order by wilful suppression and/or non-disclosure of a material fact. The suppression and/or non-disclosure relied on by the defendants related to an order made in proceedings instituted in the Fort Primary Court by the Police under S.66 of the Primary Courts Procedure Act, No. 44 of 1979, upon the complaint made by Samarakoon on 30.8.1984 referred to above. The position of the defendants was that in those proceedings Samarakoon, the plaintiff's General Manager, on 31.8.1984 (prior to the institution of the present action in the District Court) had moved the Primary Court to obtain an interim order restoring to the plaintiff the rights of management to the hotel; That the learned Primary Court Judge had declined to make such an order and that this fact had been suppressed from the District Court at the time the plaintiff obtained the enjoining order. This was one of the grounds upon which the application to vacate the enjoining order was made. The plaintiff filed objections to this application. The matter was then fixed for inquiry and on 4.10.1984 the learned District Judge after hearing the submissions of parties made order vacating the enjoining order. He held that apart from a bare reference to the proceedings in the Primary Court contained in the plaint and the accompanying affidavit of Samarakoon, the plaintiff had failed to disclose to court the fact that the Primary Court Judge had refused to make an interim order asked for by Samarakoon. This was a concealment of a material fact which the learned Judge held was sufficient to warrant the vacation of the enjoining order.

Against this order of the learned District Judge the plaintiff filed two applications simultaneously in the Court of Appeal—a revision application (No. 1379/84) and an application for leave to appeal (No. 118/84). After the filing of objections by the defendants and counter-objections by the plaintiff, the revision application was heard and decided by the Court of Appeal. The court held that although it was desirable that the plaintiff should have disclosed the fact that an interim order had been refused by the Primary Court Judge, its failure to do so did not amount to a wilful suppression of a material fact warranting the vacation of the enjoining order. The Court also took the view that the affidavits and exhibits filed by the plaintiff disclosed a very high handed act on the part of the defendants in that the plaintiff who was in possession of the hotel had been forcibly ejected by the defendants who had taken the law into their own hands and conducted themselves in a manner causing grave prejudice to the

plaintiff. The court held that there was material placed by the plaintiff showing exceptional circumstances warranting the court's intervention in the exercise of its revisionary powers and set aside the order of the learned District Judge vacating the enjoining order. The present appeals have been preferred by the defendants from this judgment of the Court of Appeal.

At the hearing before us learned Queen's Counsel for the plaintiff submitted to us that the District Court was powerless to vacate an enjoining order and that it is not open for a party to invite the court to vacate the same. He contended that whilst there was express provision in the Civil Procedure Code enabling the court to discharge, vary or set aside an interim injunction–vide s.666, there was no similar provision in the Code to vacate an enjoining order. In support of his contention he relied on the decision of the Supreme Court in *Jinadasa v. Weerasinghe* (15) and the decisions of the Court of Appeal in *Stassen Exports Ltd. v. Hebtulabhoy & Co., Ltd.* (17) and *Gordon Frazer & Co., Ltd. v. Jean Marie Losio and Martin Wenzel* (18) which followed the Supreme Court decision. In the first case cited above an interim injunction granted in favour of the plaintiff was suspended by court on an application made by the defendant by way of petition and affidavit without resorting to summary procedure. The Supreme Court held that since the procedure prescribed by s.666 of the Code had not been complied with by the defendant the order for suspension must be set aside. In the second case the District Judge issued ex parte an interim injunction against the defendants who then moved by way of petition and affidavit to have the same suspended forthwith. The judge refused to do so and entered an order nisi in terms of s.377(*a*) of the Code. This order of refusal was sought to be reviewed by the defendants in the Court of Appeal. On their behalf it was contended that the District Court had an inherent power under s.839 of the Code to suspend an interim injunction. The court rejected this contention for the reason that no court can claim to have an inherent power which would override the express provisions of a statute. To hold that the District Court had such an inherent power would be contrary to the express provisions of s.666 of the Code which empowered the court only to discharge, vary or set aside but not to suspend an interim injunction. In the last case cited above it was held, following the decision in *Stassen Exports Ltd. v. Hebtulabhoy & Co., Ltd. (supra)* (17) that s.666 of the Code did not empower a court to suspend the operation of an interim injunction. In each of the above

cases the order granting the interim injunction was made ex parte. The decisions hold that s.666 read with s.377 of the Code confers on a court the power of and prescribes the procedure for discharging, varying or setting aside of such an injunction. It was urged before us by learned Queen's counsel for the plaintiff that in the absence of similar provision in the Code in respect of enjoining orders a court was powerless to set aside or vacate such orders.

In the instant case there is little doubt that the enjoining order was one made ex parte by the learned District Judge. The learned Judge himself assumed and proceeded on the basis that it was one made ex parte. As rightly pointed out by the Court of Appeal the appearance entered by counsel on behalf of the 1st defendant on that day was not for the purpose of objecting to the application for an interim injunction but for the purpose of inviting the attention of court to the fact the court lacked jurisdiction to entertain the plaint in view of the arbitration clause contained in the agreement and referred to above. No submission was made by counsel for the 1st defendant at that stage in regard to the merits of the application for an interim injunction and/or enjoining order. Under the circumstances I agree with the Court of Appeal that the enjoining order was one made ex parte. The question then arises whether a court, in the absence of any specific provision in the Code, has the power to set aside its own ex parte order on the application of the party against whom it is made. There is in my view ample authority to show that a court does have such power. In *Loku Menika v. Selenduhamy* (19) a hypothecary decree was entered against the first respondent who had been appointed legal representative in place of the deceased mortgagors. It later transpired that the notices for the appointment of a legal representative had not been served on any of the respondents and that no summons in the mortgage action was served on the first respondent. On an application by the respondents to have all the proceedings in the case vacated the Commissioner of Requests held that all proceedings culminating in the hypothecary decree and thereafter were void and set them aside. In appeal Dias, J., following several earlier decisions referred to by him in his Judgment, observed as follows:

> "It is clear that the learned Commissioner of Requests held this inquiry under a rule of practice which has become deeply ingrained in our legal system – namely, that if an ex parte order has been made behind the back of any party, that party should first move the Court

which made that ex parte order in order to have it vacated, before moving the Supreme Court or taking any other action in the matter. If authority is needed for this proposition it is to be found in the following cases. In *Habibu Lebbe v. Punchi Etana* (20) Bonser, C.J. said:

> 'I am informed by my learned brother that it has long been the practice, and a practice which has been expressly approved by this court, that in cases like the present one, application should be made in the first instance to the court which pronounced the judgment; and if the court which pronounced the judgment refuses to set it aside, then, and only then should there be an appeal from that refusal. . . . Therefore, if the judgment was given in the absence of one of the parties, I think that under the practice laid down by this Court, it was competent for the District Judge to deal with the case, and that the plaintiff adopted the proper course in applying first to the District Judge before coming to this court.'. . . . . .

In *Caldera v. Santiagopulle* (21) Betram, C.J. following *Weeraratne v. Secretary, D.C., Badulla* (22) said:

> 'The order was made ex parte behind the back of the defendant, and in accordance with the authorities cited in a very recent case . . . a person seeking to set aside such an order must first apply to the court which made it, which is always competent to set aside an ex parte order of this description.'"

In *Dingihamy v. Don Bastian* (23) the court without fixing a date for the answer of the defendant fixed the case for ex parte trial on the basis that the defendant was in default and entered decree nisi against her. She then made an application to court to have the decree nisi set aside which was refused. On an appeal preferred by her Tambiah, J. said:

> "The defendant quite properly made an application to the learned Commissioner of Requests to rectify an order, made ex parte, without proper notice to her. Indeed, the ordinary principle is that, where parties are affected by an order of which they have had no notice, and which had been made behind their back, they must apply in the first instance to the court which made the ex parte order to rescind the order, on the ground that it was improperly passed against them."

In *Bank of Ceylon v. Liverpool Marine & General Insurance Co., Ltd.* (24) the District Court, acting ex mero motu, made order abating the action under s.402 of the Civil Procedure Code. The plaintiff then filed papers in court to set aside the order of abatement which was refused by the District Judge. On an appeal filed by the plaintiff it was contended on behalf of the defendant that the only course open to the plaintiff was to have made application under s. 403 to set aside the abatement order within a reasonable time. L.B. de Silva, J. (with H. N. G. Fernando agreeing) held that although the order of abatement was entered by court ex mero motu, yet it was entered without any notice to the plaintiff who had no opportunity to show cause against it and that it was an ex parte order the validity of which the plaintiff could challenge in the same case at any time. In *Nagappan v. Lankabarana Estates Ltd.* (25) Samarawickrame, J. expressed his approval of the principle enunciated in *Bank of Ceylon v. Liverpool Marine & General Insurance Co., Ltd (supra)* (24) and in *Loku Menika v. Selenduhamy (supra)* (19). These authorities therefore clearly establish the principle that a court which makes an ex parte order without notice to the party who is adversely affected by it is entitled to set it aside on the application of such party in the same case. This power is derived not from any express provision in the Code but, as stated above, from a rule of practice which has become deeply ingrained in our legal system. I am therefore of the view that in the instant case it was legally competent for the learned District Judge to vacate the enjoining order which was made by him ex parte.

The next matter that arises for consideration is whether the Court of Appeal was justified in setting aside, by way of revision, the order of the learned District Judge vacating the enjoining order. This involves two questions. One is whether there were in this case exceptional circumstances warranting the exercise of the revisionary powers of the Court of Appeal. The other is whether, assuming the existence of such exceptional circumstances, the material on record by way of affidavits and exhibits justified the setting aside by it of the District Judge's order vacating the enjoining order. With regard to the first question it is now settled law that the exercise of the revisionary powers of the appellate court is confined to cases in which exceptional circumstances exist warranting its intervention. The view formed by the Court of Appeal in the instant case is that the interests of justice demanded its intervention by way of revision for the reason that the affidavits and exhibits placed before it by the plaintiff revealed a very

high handed act on the part of the defendants who by taking the law into their own hands had forcibly ejected the plaintiff who was in lawful possession of the hotel. The tenability of this view of the Court of Appeal has been the subject matter of much controversy before us. Upon a careful and close consideration of the salient facts and circumstances of this case, I do not think the view expressed by the Court of Appeal can be substantiated. The agreement P1, ex facie, is a hotel management agreement. By it the plaintiff was appointed by the 1st defendant the Managing Agents of the hotel for the purpose of the management, control and operation of the hotel in accordance with and subject to the terms and conditions therein. A perusal of the terms and conditions reveal that the plaintiff was, in the performance and discharge of its functions, duties and obligations, acting in no capacity other than that of managing agents of the 1st defendant. The staff and employees of the hotel were in the employ of the 1st defendant and not of the plaintiff. The running of the hotel by the plaintiff was at the expense of the 1st defendant who was obliged to remunerate the plaintiff for its services. The 1st defendant was also liable to indemnify the plaintiff for any loss, claim or liability incurred in acting as managing agents of the hotel in the normal course of business. These stipulations in P1 seem to indicate that the true relationship between the 1st defendant and the plaintiff was one of principal and agent or master and servant respectively. They do not lend support to the view taken by the Court of Appeal that the plaintiff was in possession of the hotel. P1 establishes that the plaintiff's entry and occupation of the hotel was with the leave and licence of the 1st defendant for the purpose of the management, control and operation of the hotel for and on behalf of the 1st defendant. The position taken up by the 1st defendant is that it resumed the management of its hotel as from 30.8.1984 as it lawfully might since the plaintiff by its conduct repudiated the agreement P1 in consequence of which it came to an end. The instant case is not one where possession of the hotel premises has been handed over by the 1st defendant to the plaintiff to enable the latter to run a hotel on its own behalf or on its own right. The position of the 1st defendant that it always was and continued to be, through its managing agents (the plaintiff), in possession of both the hotel premises as well as the business and that thus no question of the ejectment of the plaintiff from either the premises or the business arose seems to be in accord with the stipulations contained in P1. The view of the Court of Appeal appears to have been based purely upon 'the affidavits and exhibits *filed by the plaintiff*' and the 'material

placed by the plaintiff', to use the words of the judgment of the Court of Appeal, and not on the proper construction of the agreement P1. There is no indication in the order of the Court of Appeal, which was invited to act in revision, that it gave any consideration to the position urged on behalf of the 1st defendant. The approach of the Court of Appeal to the vital issue as to whether there were or were not exceptional circumstances to warrant the exercise of its revisionary powers is untenable. It has also failed to address its mind to the important question why the plaintiff, without pursuing the application for an interim injunction then pending in the District Court, invoked the revisionary jurisdiction to vacate the order of the learned District Judge setting aside the enjoining order. The failure of the Court of Appeal to make an impartial assessment and evaluation of the facts and material relied upon by the defendants has resulted in its reaching the erroneous conclusion that the plaintiff was in possession of the hotel until its forcible ejectment by the defendants. The ground upon which the Court of Appeal founded its decision to exercise its revisionary powers is thus unsustainable and has to be rejected.

The other question that remains for consideration on this aspect of the judgment of the Court of Appeal is whether, assuming there were exceptional circumstances, the court was justified in setting aside on the merits the order of the learned District Judge. The learned District Judge vacated the enjoining order for the sole reason that the plaintiff had, at the time it applied for an interim injunction and obtained the enjoining order, suppressed and/or failed to disclose a material fact. This non-disclosure related to the order made by the Primary Court Judge on 31.8.1984 upon the filing by the Police of an information under s.66 of the Primary Court Procedure Act, No. 44 of 1979, as set out above. The Court of Appeal took the view that in the circumstances of the instant case the failure on the part of the plaintiff to disclose this particular fact did not amount to a wilful suppression of a material fact warranting the vacation of the enjoining order by the learned District Judge. In view of the conflicting views taken by the District Court and the Court of Appeal on this point, it is necessary to refer in somewhat detail to what led to and actually transpired in the proceedings that were instituted in the Primary Court It is not in dispute that the day before proceedings were commenced in the Primary Court, the 2nd defendant and shortly thereafter Samarakoon made statements to the Police–vide R20 and P3 respectively. In the information furnished to court by the Police the names of five persons were mentioned of whom the 2nd and 3rd defendants were referred to as the first party and Samarakoon as the second party The

information mentioned, inter alia, that the first party had on 30.8.1984 without any intimation to the second party forcibly taken the management of the hotel which had been managed by the plaintiff from 7.7.1983 up to that date. The report requests the Primary Court to make an interim order in terms of s.66(1)(*b*) of the Act. The correct section is s.67(3). On the very day that the report was filed (31.8.1984) in court, the 2nd defendant and Samarakoon appeared personally and were represented by counsel. The 3rd defendant was absent but was represented by counsel. Learned President's Counsel for Samarakoon (Mr. Daya Perera) tendered to court an affidavit from Samarakoon together with a copy of the Agreement P1 and moved for an interim restraining order under s.67(3). According to this affidavit the interim order sought was to restrain the three defendants (including the 1st defendant) from interfering with and obstructing the exercise of the lawful rights of the plaintiff, Samarakoon and their employees and agents. The caption in Samarakoon's affidavit cited the plaintiff as the 1st respondent, himself as the 2nd respondent, the 1st defendant as the 3rd respondent, the 2nd defendant as the 4th respondent and the 3rd defendant as the 5th respondent. The application of Mr. Daya Perera, P.C. was resisted by counsel appearing for the 2nd and 3rd defendants. After hearing the submissions of counsel the learned Primary Court Judge in his order, after referring to the fact that learned President's Counsel asked for an interim restraining order, stated as follows:

> "Whilst at this stage refusing the application for an interim injuction under s.67(3) of the Primary Courts Procedure Act, I inform Mr. Daya Perera, Senior Attorney, that this court will consider the affidavit and the document 1R1 submittd to court by Mr. Daya Perera, Senior Attorney. Further affix a notice on the land and report through Fiscal. Call case on 13.9.1984 for affidavits from both parties."

This order was made by the Primary Court Judge on 31.8.1984 (Friday) and on 3.9.1984 (the following Monday) the plaint in the present action was filed in the District Court.

At the hearing before the learned District Judge into the defendant's application to vacate the enjoining order, a copy of the proceedings of the Primary Court held on 31.8.1984 were produced marked A20 on behalf of the defendants. Vehement objection was taken to its production by counsel for the plaintiff but was, in my view very rightly, overruled by the learned District Judge. This objection does not appear to have been pursued by the plaintiff in the Court of Appeal at the hearing into the revision application. Be that as it may, it was sought to be resuscitated before us by learned Queen's Counsel for

the plaintiff. Upon a perusal of the written objections filed by the defendants in the District Court on 12.9.1984 to the enjoining order, in which there is a reference to documents A1 to A19 and thereafter to R21 (which should read A21) but no reference to A20, the motion dated 1.10.1984 seeking to amend paragraph 16 of the petition of objections by inserting a reference to A20 (notice of which was sent to the plaintiff's attorney-at-law by registered post), the observations of the learned District Judge that he had read this document at an earlier stage of the proceedings and also the fact that it was a certified copy of the Primary Court proceedings held on 31.8.1984 to which the plaintiff's General Manager, Samarakoon, and the defendants were parties, I am of the view that it was rightly admitted by the learned District Judge and that the objection raised on behalf of the plaintiff on 8.10.1984 that it has not been produced according to law was belated and without merit. A20 establishes:

(*a*) that the Police requested court to make an interim order;

(*b*) that Samarakoon in his affidavit stated that on 30.8.1984 the 2nd and 3rd defendants with the object of gaining control of the hotel without notice caused a gang of about 30 thugs to enter the hotel forcibly obstructing the mangement of the hotel and ejected him and the security officers therefrom resulting in irreparable loss and damage to the plaintiff;

(*c*) that Samarakoon in his affidavit asked, by way of interim relief, for an order ejecting the said thugs from the hotel and restraining the 3 defendants from obstructing or interfering with the lawful rights of the plaintiff, himself and their employees and agents;

(*d*) that Mr. Daya Perera, P.C. stated to court that in view of the tourists already in the hotel and of more to arrive it became necessary to ask for an interim injunction;

(*e*) that the court in its order referred to the fact that Mr. Daya Perera, P.C. asked for an interim injunction in terms of s.67(3);

(*f*) and that the court refused at that stage the application for an interim injunction but informed Mr. Daya Perera that he will consider the affidavit (of Samarakoon) and the document 1R1 (the agreement) submitted by him to court.

It is also not in dispute that on 26.9.1984 the attorney-at-law for Samarakoon stated to the Primary Court Judge that he was not pursuing the application for an interim order in view of the fact that the

District Court had issued an enjoining order on 4.9.1984. As stated earlier the only reference to the Primary Court proceedings made by the plaintiff at the time of institution of the present action in the District Court is contained in paragraph 14 of the plaint and paragraph 15 of the accompanying affidavit of Samarakoon which stated:

> "I made complaint to the Police....The Police have referred the matter to the Fort Magistrate's Court and the matter is pending therein."

The learned District Judge in his order vacating the enjoining order held that the failure of the plaintiff to disclose to court the fact that the Primary Court Judge had refused to grant an interim injunction constituted a wilful suppression of a material fact. Without going into the merits of the defendants application to vacate the enjoining order, he made order vacating the same.

Learned Queen's Counsel for the plaintiff in the first appeal submitted to us that the learned District Judge had not fully appreciated the effect of the order made by the Primary Court Judge on Samarakoon's application for an interim order. He contended that the District Judge had failed to realise that the order of the Primary Court Judge was in the nature of a temporary refusal of the interim order and that the application was to be taken up later after affidavits were filed and that it was therefore still pending before him. The sum and substance of the order made by him on 31.8.1984, learned Queen's Counsel maintained, was that he put off the consideration of Samarakoon's application for an interim order. He did not dismiss the application and no finality was reached till it was withdrawn by counsel for Samarakoon on 26.9.1984. Learned Queen's Counsel thus contended that, if at all, there was in this respect nothing but a defect in the plaint and Samarakoon's accompanying affidavit which did not amount to a wilful suppression of a material fact. Learned President's Counsel for the plaintiff in the second appeal urged that the Primary Court Judge did not refuse the interim order asked for by Samarakoon on the merits but merely deferred the question of granting the same. He cited authority to show the tests that have been adopted by courts in determining the issue of materiality of a fact. To justify the dissolution of an injunction the suppression or misrepresentation

should be of "such a character as to present to court a case which was likely to procure the injunction but which was in fact different from the case which really existed"—vide Halsbury's Laws of England, 4th Ed., Vol. 24, p.612 and the decisions cited therein. Thus a misstatement of the true facts by the plaintiff which put an entirely different complexion on the case as presented by him when the injunction was applied for ex parte would amount to a misrepresentation or suppression of material facts warranting its dissolution without going into the merits—vide *Bambarakelle Estates Tea Co. v. Goonewardene* (26), *Alphonso Appuhamy v. Hettiarachchi* (27) and *Moosajees Ltd. v. Eksath Engineru Saha Samanya Kamkaru Samithiya* (28). Learned President's Counsel submitted that in the instant case the failure of the plaintiff to disclose in the plaint or in Samarakoon's accompanying affidavit the fact that the application for an interim order (which was still pending in the Primary Court) was refused for the time being by the Primary Court Judge was of no or, if at all, only of marginal relevance to the question as to whether an ex parte interim injunction or enjoining order ought to issue. The Primary Court Judge had made no pronouncement on the merits of Samarakoon's application for an interim order but had only expressed a disinclination to make such an order at that stage. There was therefore no rejection of Samarakoon's application as erroneously found by the learned Distict Judge but only a deferment of its consideration until all affidavits were filed. Learned President's Counsel submitted that this was in law the correct position since a Primary Court Judge had, according to him, no jurisdiction to make an interim order until the commencement of the inquiry. S.67(3) of the Primary Courts' Procedure Act, he contended, empowered the Judge to make such an order after the commencement and before the conclusion of the inquiry but not before its commencement. An inquiry commences only after the court fixes the case for inquiry under s.66(7) upon the failure of the parties to arrive at a settlement in terms of s.66(6). Upon the basis of this construction learned President's Counsel maintained that the Primary Court was right in refusing to make an interim order at that preliminary stage. This legal submission too does not appear to have been raised at the hearing in the Court of Appeal.

S.66(6) of the Primary Courts Procedure Act states that 'the court shall before fixing the case for inquiry' endeavour ' ' induce the parties to arrive at a settlement of the dispute. S.66(7) enacts that where the

parties do not arrive at a settlement, 'the court shall fix the case for inquiry' on a date as specified therein S. 6, 7, in so far as it is relevant for a consideration of the legal submission of learned President's Counsel, stipulates as follows.

"67. (1) Every inquiry under this Part shall be concluded within three months of the commencement of the inquiry.

(3) Pending the conclusion of the inquiry it shall be lawful for the judge of the Primary Court to make an interim order containing any provision which he is empowered to make under this Part at the conclusion of the inquiry."

It would therefore appear that the inquiry referred to in s 67 is the inquiry the date of which is fixed under s.66(7) after the filing of affidavits or counter affidavits. The contention of learned President's Counsel is that the opening words in subsection (3) of s.67, namely, 'pending the conclusion of the inquiry; must in their context be construed to mean after the commencement and before the conclusion of the inquiry. In other words the construction sought to be placed by him to these opening words is that during the pendency of the inquiry an interim order may lawfully be made but not before its commencement as was done by the learned Primary Court Judge in the case in question. Such a construction, it was urged, was consistent with the plain and ordinary meaning of the language used in s.67 and also ensured that the principles of natural justice were observed in that all parties were heard by court before an interim order was made, the nature of which, except for its duration, is substantially no different from that of a final order made upon the conclusion of the inquiry. There is force in this legal submission of learned President's Counsel but I am unable to uphold the same for the following reasons. Part VII of the Primary Courts' Procedure Act confers a special jurisdiction on the Primary Court to inquire into and make determinations and orders in respect of disputes affecting land where breaches of the peace are threatened. The purpose of the conferment of this special jurisdiction on a Primary Court is to ensure the speedy and expeditious disposal, either by way of settlement or inquiry, of such disputes with the sole object of preventing the occurrence of the breach of peace that is threatened in the interests of the proper maintenance of law and order. The provisions contained in this Part stipulating prescribed time-limits for the filing of affidavits and counter-affidavits and the holding and completion of inquiries are

designed to achieve this object. These disputes very often disclose situations where threat to the peace are imminent unless immediate preventive action is taken by court. If the object of this Part of the Act is to be achieved, such cases require the making of an interim order forthwith by court. To wait until such time as the parties have filed their affidavits (for which purpose a maximum period of 3 weeks could be given by court) or until they have filed their counter-affidavits (for which purpose a further maximum period of 2 weeks could be given by court) or until the commencement of the inquiry on a date not later than another 2 weeks may well result in the actual occurrence of the breach of the peace sought to be averted on the information being filed in court. To hold that in such situations, which are so very frequent, the court is powerless to make an interim order at the earliest stage when the information is filed in court would be conducive to the perpetration than the prevention of the imminent breach of the peace and would set at nought the entire object of this statutory provision. It would therefore be more in accord with the object and reasoning underlying this Part of the Act to construe the words 'pending the conclusion of the inquiry' to mean until the conclusion of the inquiry and not, as maintained by learned President's Counsel, during the pendency of the inquiry. Nor does the plain language of the section (s. 67) warrant the restricted meaning sought to be placed on it by him. The section does not purport to prescribe the period of time during which an interim order may be made by court but merely specifies the event until the occurrence of which it is open to the court to pass such an order. This view of the meaning of the section would not give cause for a party to the dispute to complain of a violation of the principles of natural justice prior to the making of an interim order. S.66 ensures the presence in court of the parties to the dispute on the date of the filing of the information by the Police or on the date immediately succeeding thereto on which sittings of court are held. The parties to this dispute thus get an opportunity of being heard before an interim order is made. The nature and purpose of an interim order are such that it is purely a temporary order passed by court for the purpose of preserving the status quo until such time a final order is made. Neither order affects or prejudices the civil rights of any of the parties to the land in dispue. All these matters go to show that no party can seriously complain of a breach of the audi alteram partem rule by virtue of the making of an interim order prior to the commencement of the inquiry. Our attention was also drawn to the fact that the Court of Appeal has over the years consistently taken the

view that an interim order could lawfully be made by a Primary Court Judge even on the date of the filing of the informaton in court–vide *Muthukumarasamy v. Nannithamb*, (19) A consideration of the above matters make me reject the legal submission of learned President's Counsel.

This brings me to the next question that arises for our consideration, namely, whether the Court of Appeal was justified in the view it took that the non-disclosure by the plaintiff of the fact that the Primary Court Judge had refused to make an interim order in favour of its General Manager, Samarakoon, did not, in the circumstances of this case amount to a wilful suppression of a material fact. What then are these circumstances but for which the non-disclosure would, according to the Court of Appeal, have disentitled the plaintiff to an enjoining order upon the basis of the wilful suppression of a material fact. I am unable to find any such circumstances. The plaintiff sought an ex parte interim injunction against the defendants upon the basis of certain facts as deposed to by Samarakoon in paragraphs 14, 17 and 18 of his affidavit which was filed with the plaint. These facts are substantially the same as those set out in paragraphs 7, 8 and 9 of his affidavit filed in the Primary Court. The substantive relief claimed by the plaintiff in the District Court upon the basis of these facts was, more or less, the same as the interim relief claimed by Samarakoon in the Primary Court, namely, for an order restraining the defendants from causing any interference or obstruction to the exercise and discharge of the lawful rights of the plaintiff, Samarakoon and the plaintiff's representatives and agents. The dispute that arose between the parties was one which was justiciable by the Primary Court as well as the District Court in the exercise of their different jurisdictions. The Primary Court Judge was invited by counsel for Samarakoon to issue an interim injunction, by way of interim order, restraining the defendants from committing the above acts. The learned judge refused to issue the same at the stage he was invited to do so. Samarakoon who was present in court was undoubtedly aware that his endeavour to obtain an interim injunction failed even though for the time being Three days later the plaintiff upon the strength of another affidavit from Samarakoon moved the District Court to obtain the same order upon the same facts in respect of the same dispute without disclosing one word that the Primary Court Judge had refused (even though temporarily) his application for a similar order. It is my view that these circumstance if at all, demanded that Samarakoon should have in his second affidavit made a full and true disclosure of

the refusal of the Primary Court Judge to make an order in his favour. This refusal, if disclosed to the District Judge may well have induced him, in the exercise of his discretion, to refrain from issuing an enjoining order. It is very probable that this refusal, if placed before court, may have influenced it not to grant the enjoining order. It thus became a very material fact which ought to have been disclosed by the plaintiff at the time he applied for an ex parte injunction. The endeavours made by both counsel for the plaintiff to play down the full force and effect of the order of refusal by the Primary Court Judge cannot succeed. The refusal was effective as long as it stood and it is this refusal which very probably drove the plaintiff to seek redress in the District Court with such speed and promptitude. I am therefore of the view that the Court of Appeal erred in holding that there was not, in the circumstances of this case, a wilful suppression of a material fact by the plaintiff. On a close and careful consideration of the facts and circumstances upon which the Court of Appeal purported to base its findings which were so forcefully canvassed before us by both counsel for the defendants, I am of the view that the Court of Appeal misdirected itself and that the conclusions arrived at by it are untenable. Hence both appeals are allowed and the judgment of the Court of Appeal is set aside.

After the preparation of my judgment I have had the opportunity and privilege of perusing the judgment of my Lord the Chief Justice. I am, very respectfully, in entire agreement with the additional grounds set out by him in his judgment for allowing both appeals. I also agree, with respect, to the orders made by his Lordship in the concluding paragraphs of his judgment, including the order for costs.

H. A. G. DE SILVA, J.

I have had the advantage of reading the judgments of my Lord the Chief Justice and of my brother Atukorale, J. I am in complete agreement with them and I am of the view that for the reasons stated therein the judgment of the Court of Appeal should be set aside and both appeals allowed with costs as stated by my Lord the Chief Justice. I also agree to the other orders and directions made by His Lordship in his judgment.

Appeals allowed.