RANJIT SENANAYAKE AND OTHERS
v.
PAUL PEIRIS

COURT OF APPEAL
PALAKIDNAR, J. P/CA AND
A. DE Z. GUNAWARDANA, J.
REVISION APPLICATION NO. 120/91
LEAVE TO APPEAL APPLICATION NO. 14/91
D.C. COLOMBO CASE NO. 3011/SPL
11, 27 FEBRUARY AND
23 MARCH AND 12 MAY 1992

Revision – Requirement of exceptional circumstances – Proof of contempt of Court – stay order – ex parte interim order made under Section 213(1) of the Companies Act – Rule of practice in respect of ex parte orders – Preliminary objection to entertaining an application either by way of Revision or Leave to Appeal to set aside an ex parte order.

An interim order was issued by the District Court under Section 213(1) of the Companies Act restraining the Petitioners from removing the Respondent from the office of director. The Petitioners moved in Revision and obtained a stay of the said interim order, from the Court of Appeal. Thereafter acting under Article 83 (vii) of the Articles of the company, a request in writing by all co-directors was made to the Respondent to resign. According to the said Article when such a request is made, "the office of the director shall be vacated."

Held:

(1) that the Petitioners' apprehension that they would be liable for contempt of Court is not well founded and therefore there was no exceptional circumstance to act in Revision.

(2) that in view of the criminal nature of the contempt of Court proceedings,

(a) there must be clear evidence of violation of any Court Order or injunction.
(b) such an order should be strictly construed.
(c) in determining whether or not a breach has been committed, regard should be paid to circumstances and the object for which such injunction was granted or order was made.

(3) that it has become a rule of practice deeply ingrained in our legal system that a party moving to set aside an *ex parte* order must first go before the Court which made the *ex parte* order, to have it vacated, before moving the Court of Appeal. That the procedure laid down in Section 213(3) is an effective and expeditious remedy to set aside an interim order made under that Section.

Per Gunawardana, J. "It is important to note here that, when this Court grants interim relief by way of a stay order, it does not expect the parties to take steps which would substantially alter the rights of the parties before Court, as such Orders are issued, more to ensure that *status quo* is maintained between the parties, till the application is finally determined."

Cases referred to:

1. *Andradie v. Jayasekera Perera* (1985) 2 Sri LR 205, 209.
2. *Nadarajah Mahendran v. Sockalingam Sinnaduari*, C.A. minutes of 26 January, 1990.
3. *Mylvaganam v. Kanagasabai* 78 NLR 280.
4. *P. A. Thomas & Co. v. Mould* (1966) 1 All ER 963, 967.
5. *A. G. v. Leveller Magazine Ltd.* (1979) 2 WLR 247.
6. *Gargial v. Somasundram Chetty* 9 NLR 26.
7. *Habibu Lebbe v. Punchi Etana* 3 CLR 84.
8. *Caldera v. Santiagopillai* 22 NLR 155.
9. *Sayadoo Mohamado v. Maula Abubakkar* 28 NLR 58.
10. *Loku Menike v. Sellenduhamy* 48 NLR 353, 354.

APPLICATION for revision of order of District Court of Colombo.

Lakshman Kadirgamar, P.C., with *M. Y. M. Faiz, P.C.* and *H. Gunaratna* for respondent-petitioner.

H. L. de Silva, P.C., with *Nihal Fernando* and *N. M. Musaj* for petitioner-respondent.

Cur. adv. vult.

27th July, 1992.

A. DE Z. GUNAWARDANA, J.

There are two applications before this Court, against the same Order. The two applications are, 1) Revision Application No. C.A./120/91 and 2) Leave to Appeal Application No. C.A./L.A./14/91. By both Applications, the Respondents–Petitioners (hereinafter referred to as the Petitioners) are seeking to set aside the Order of the District Court of Colombo dated 21 January, 1991, made under Section 213(1) of the Companies Act No. 17 of 1982, directing that the Petitioner Respondent (hereinafter referred to as the Respondent) should function as a Director and as an Executive Director of the 8th Petitioner-Company, until the final determination of the Original Application made by the Respondent (under Section 210 and 211 of the said Act) dated 15 September, 1989. The said Order was obtained by the Respondent on an *ex parte* application to the District Court, in consequence of the requests made by all the co-directors of the 8th petitioner-Company, by writings dated 8th and 9th January 1991, purporting to act under Article 83(vii) of the Articles of Association, of the said company. The said writings requested the Respondent to resign from the office of Director with immediate effect. The said Article states that the office of Director "shall be vacated", if such a request is made by all co-directors.

When the said two Applications came up before this Court, the parties agreed to take up both Applications for argument together.

The learned Counsel for the Respondent raised a preliminary objection to the said two Applications being entertained by this Court, viz., that the Petitioners should have first moved the District Court under Section 213(3) of the Companies Act, "for an Order of revocation or variation of the *ex parte* order" dated 21 January, 1991, instead of coming direct to this Court. He further submitted that the Petitioners have bypassed the said procedure, by moving for Revision and asking for Leave to Appeal from the said Order.

The Learned Counsel for the Petitioners submitted that there are ample exceptional circumstances warranting the grant of relief by way of Revision. He added that, they have a right to maintain the Application for Leave to Appeal as they have complied with all the necessary requirements for maintaining the said Application.

The learned Counsel for the Respondent contended that the Petitioners have, by moving for Revision of the said Order, disregarded a well-established practice existing for over a hundred years, and cited the case of *Andradie v. Jayasekera Perera* [1] where Siva Selliah, J. at page 209 stated that,

> ". . . the practice has grown and almost hardened into a rule that where a decree has been entered *ex parte* in the District Court and is sought to be set aside on any ground, application must in the first instance be made to that very Court and that it is only where the finding of the District Court on such application is not consistent with reason or proper exercise of the Judge's discretion or where he has misdirected himself on the facts or law will this Court grant extraordinary relief by way of Revision or *Restitutio in Integrum* which are extraordinary remedies."

In opposition to the said contention the learned Counsel for the Petitioners cited the unreported case of *Nadarajah Mahendran v. Sockalingam Sinnadurai* [2], where Court of Appeal had acted in revision, in spite of the fact that, the petitioner in that case, had already moved the District Court to set aside the interim injunction under the provision of Section 666 of the Civil Procedure Code. It must however be pointed out that, the Court of Appeal acted in revision in that case on the basis that exceptional circumstances that existed in that case warranted the exercise of the revisionary jurisdiction. The Court held that the petitioner in that case was in peril of being charged for contempt of court, in respect of the interim injunction issued by the District Court, if the petitioner in that case, acted in pursuance of the Order made by the Primary Court. In that case, the petitioner had obtained an Order from the Primary Court enabling him to remain in possession of the premises in question on an application made by him, under Section 66 of the Primary Courts Act. However, the respondent in that case had, subsequent to the Order of the Primary Court, obtained an interim injunction from the District Court restraining the petitioner in that case, from occupying that part of the premises which was occupied by the said petitioner. Thus the application in revision was made in exceptional circumstances where either party may have been dealt with for

contempt by either the Primary Court or the District Court if both Orders were sought to be implemented. Furthermore, there was also the question whether the District Court had, in the circumstances, the jurisdiction to issue the interim injunction, in view of the prior Order made by the Primary Court, having regard to decision in *Mylvaganam v. Kanagasabai* [3], where it was held that,

> "The mere fact that a suit is pending in a civil Court does not deprive the Magistrate of jurisdiction to make an Order under Section 62 of the Administration of Justice Law, No. 44 of 1973."

These difficulties could not have been resolved except by a Court having appellate jurisdiction over both the lower Courts. It was in these exceptional circumstances that the Court of Appeal acted in revision in the said case.

The learned Counsel for the Petitioners submitted that in the instant case too, the Petitioners have a "justified apprehension that they are in peril of being sued for contempt of Court." He added that,

> "The finding of the District Court that the letter of 8/1/91 (RP31) has negated its Order of 16/11/90 (RP25) has, in reality, made it virtually impossible and/or futile for the Petitioners to apply for revocation of the said Order under Section 213 (3) of the Companies Act, since there is no additional material that the Petitioners can possibly place before the District Court to change its finding."

However upon a careful consideration of the Order of the learned District Judge dated 21 January, 1991, there does not appear to be a specific finding that Petitioners are guilty or liable for contempt of Court. What the said Order states is that,

> "As the Court has given special consideration to the basis, that in matters relating to appointment of directors of the company it should be seen that the interests of the company are not affected and the rights of the minority shareholders are not suppressed, the Court should hold that if the acts of the

Respondent effected by document "Y" and "Z" are allowed. It is clear that the Defendants are *trying* (my emphasis) to negate that position."

(The above quotation is from the translation provided by the Petitioners.)

Thus it is clear that after a careful consideration of all the facts and circumstances placed before him, at that stage, the learned District Judge has arrived at a tentative finding that the Petitioners are only "trying to negate" (not that they have) the interests of the Company and the minority shareholders. Also, there does not appear to be any specific finding that the Petitioners have violated the earlier Order of the District Court dated September 15, 1989. Furthermore, the Petitioners have urged before this Court, legal arguments to show that the requests to resign under Article 93(vii), of articles of Association of the Company, is not the same as removal from office and that it only amounts to vacation of post. The benefit of these legal arguments was not available to the District Court when it made the Impugned Order, *ex parte*.

These circumstances, in our view leaves room for the Court to be persuaded otherwise, if the Petitioners sought to go before the District Court as provided for under Section 213(3) of the Companies Act.

In addition, the learned Counsel for the Petitioners submitted that a charge for contempt of Court would not lie against the petitioners in this case mainly on two grounds, viz. 1) that the act committed by the Petitioners, "did not come strictly within the terms of the restraining Order." 2) that,

"even if the letter dated 8/1/91 (RP31) was a violation or negation of the terms of the District Court Orders of 15/9/89 and 16/11/90, because the said letter constituted the "event" of removing the respondent, the said letter was valid in law because even the removal of the Respondent was not prohibited and was permissible, on 8/1/91, by virtue of the said stay Order granted by your Lordship's Court."

To substantiate the argument that a charge for contempt of Court would not lie against the Petitioners, the learned Counsel for the Petitioners submitted firstly, that the act committed by the Petitioners viz. the issuing of the letter dated 8/1/91, "did not come strictly within the terms of the restraining Order." He added that it is settled law that in view of the rigour of the penalties which may be visited, upon being charged for contempt of Court, the language of a restraining or injunctive order is strictly interpreted and applied, so as not to place a dependant in jeopardy, and that a person will not be held guilty of violating an injunctive order, if the act complained of did not come strictly within the terms of the restraining order. In the case of *P. A. Thomas & Co. v. Mould* [4] was held that,

> ". . . where parties seek to invoke the power of the Court to commit people to prison and deprive them of their liberty, there has got to be quite clear certainty about it."

In that case the committal for contempt was set aside because the injunction was not sufficiently specific to cover the alleged contemptuous act.

The above dictum in *P. A. Thomas & Co. v. Mould* was applied by the House of Lords in the case of *A. G. v. Leveller Magazine Ltd.*[5], where Lord Edmund Davis said,

> "nor, my Lords, would it be acceptable were the Attorney-General to urge, in effect, that no injustice has here been done since the *wishes* of the Court were clear and the determination of the respondents to flout or disregard those wishes equally clear. Mr. Sedley rightly observed that, if no direction was in fact given, thinking cannot have made it so, and the appellants were correct in thinking that by publishing they were breaching no ruling of the Court. I have to say respectfully that I am uneasy at the view expressed by Lord Widgery, C.J. that "the deliberate flouting of the Courts *intention* is sufficient to constitute criminal contempt, for as O'Conner, J. said in *P. A. Thomas & Co. v. Mould* ..." (the aforementioned quotation is then quoted.)

We are in agreement with the views expressed in the above cases that, in view of the criminal nature of the contempt proceedings, that

not only must there be clear evidence of violation of any Court Order or injunction but also that such an order or injunction must be strictly construed to ascertain whether there was in fact a breach committed.

The learned Counsel for the Petitioners further submitted that, in this case there is no doubt that when the Respondent first came to the District Court the "event" contemplated by the Respondent was the motion to remove the Respondent at an Extraordinary General Meeting of the Company. The Respondent's object was to prevent that "event" taking place. The first interim order (16/9/89) was sought for that purpose. It was in these circumstances and for that object that the interim order (19/9/89) was granted by the District Court. He cited Halsbury's Laws of England, 3rd Edition, Volume 21, page 433, para 915 which states thus,

> "In determining whether or not a breach has been committed, regard is paid to the circumstances in which and the object for which, the injunction was granted."

In our view, this appears to be the correct approach to ascertain whether in fact the terms of an injunctive order have been violated.

The second ground on which the learned Counsel for the Petitioners relied on to show that a charge of contempt, could not be maintained against the Petitioners was that, even if the letter dated 8 January, 1991 was a violation or negation of the terms of the District Court Orders of 15 September, 1989 and 16 November, 1990, the said letter was valid in law because the removal of the Respondent was not prohibited and was permissible on 8 January, 1991, by virtue of the operation of the stay order issued by this Court on 14 December, 1990 and which was operative till 16 January,1991.

In dealing with obtaining of the stay order dated 14 December, 1990, from this Court the Counsel for the Respondent has stated, in his written submission that it,

> ". . . was in reality not to canvass the Order of the D.C. dated 16th Nov. 1990, but to render it ineffective for the time being to enable him to do precisely what he was restrained from doing

by the District Court viz. removing the Respondent from the Board."

In this regard it must be pointed out that, what the Petitioners did was to issue the two writings dated 8/1/1991 and 9/1/1991 and thereafter withdraw on 15 January, 1991 their two applications to this Court, one for Revision and the other for Leave to Appeal, from the Order of the learned District Judge, dated 16 November, 1990. It is important to note here that when this Court grants interim relief by way of a stay Order, it does not expect the parties to take steps which would substantially alter the rights of the parties before Court, as such Orders are issued, more to ensure that *status quo* is maintained between the parties, till the application is finally determined.

The above-mentioned arguments were adduced by the learned Counsel for the Petitioners to show that in the aforesaid circumstances the Petitioners would not be liable for contempt of Court. However, in inviting this Court to act in revision, one of the grounds relied on to show the existence of exceptional circumstances in this case, was the apprehension of the Petitioners for being charged for contempt of Court. Having considered the submissions and the circumstances enumerated above, such an apprehension does not appear to be well-founded.

We have given careful consideration. and are not convinced, that the other matters relied on by the Petitioners would amount to exceptional circumstances. Therefore, we are of the view that there are no exceptional circumstances in this case which warrants the exercise of the revisionary jurisdiction of this Court.

The other question that has to be considered in this case is whether the Petitioners can maintain the Application for Leave to Appeal. With reference to that question, it is pertinent to note that there is a long line of cases which have held, that an application should be made in the first instance to the Court which made the *ex parte* order, even in cases where there is a right of appeal. In the case of *Gargial v. Somasundram Chetty* [6], where the defendant's proctor moved for a postponement on the ground that his client was

ill, in India, and that the client had taken away the relevant documents, the application was refused and judgment was given in favour of the plaintiff. In the appeal, against that judgment Layard, C.J. stated as follows:–

> "Now, if this was an *ex parte* order, I cannot understand how an appeal can be entertained by this Court. 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."

Layard, C.J. in the course of his judgment referred with approval to the observations of Bonsor, C.J. to the same effect, in *Habibu Lebbe v. Punchi Etana* [7]. He further stated that,

> "There is no doubt in my mind that had been the practice of the court for the last thirty years at least, and I believe that it existed prior to that date."

Bertram, C.J. applied the same principle in *Caldera v. Santiagopillai* [8], where after several unsuccessful attempts to serve summons on the defendant, substituted service was effected by affixing the summons on the land. After the final decree was entered the defendant had come to know of the decree and made an application to the District Court to set aside the decree. The District Court granted the application, holding that there had been no effective service of summons. In appeal, the said Order of the District Court was upheld, and Bertram, C.J. observed that a person seeking to set aside an *ex parte* 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 the case of *Sayadoo Mohamado v. Maula Abubakkar* [9], where in a summary procedure action under Chapter LIII of the Civil Procedure Code the defendant had obtained leave to appear and defend on an *ex parte* application. It was held that an order made

ex parte granting leave to defend may be vacated by the Court making the Order.

Even in cases where the application was made strictly not under any provision of the Civil Procedure Code, this principle was followed. In *Loku Menike v. Sellenduhamy* [10] at page 354 Dias, J. observed that,

> "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."

The above cases illustrate how this principle had been applied uniformly to different situations arising in each case. In our view the same principle would apply in this case too and the Petitioners should have gone before the District Court which made the impugned *ex parte* order to get it set aside, without entertaining unreasonable apprehensions about the Court. Furthermore, there is specific procedure laid down in Section 213(3) of the Companies Act, to make an application to the District Court "for an order for revocation or variation of the *ex parte* order." This is an equally effective and a more expeditious procedure. We hold that, in the circumstances of this case, the Petitioners should have followed that procedure.

Accordingly the preliminary objection is upheld and both applications 1) Revision application No. 120/91 and 2) Leave to appeal application No. 14/91 are hereby dismissed, with costs fixed at Rs.1050/-.

As we have decided to send the case back to the District Court, we have not gone into the merits of the said two applications, particularly in regard to the legal effect of the writings of 8 January, 1991 and 9 January, 1991, which in our view, is not a complicated

question of law, but should properly be decided after a full inquiry in the District Court.

K. PALAKIDNAR, J. (P/C A) – I agree.

Case sent back for re-trial.