FELIX DIAS BANDARANAYAKE

v.

THE STATE FILM CORPORATION AND ANOTHER

COURT OF APPEAL,
SOZA, J. AND RODRIGO, J.
CA NO.163/81
D. C. COLOMBO NO. 83984/M
FEBRUARY 25, 27, 1981, MARCH 5, 6, 9, 10, 11, 12 and 13, 1981.

Interim injunction – material on which Court should decide ? Is oral evidence permissible ? – Regular and summary procedure - burden of proof - defamation suit - section 54 of the Judicature Act No. 2 of 1978 - tests to be applied in granting an interim injunction – ss. 662, 664, 666 C.P.C.

In deciding whether or not to grant an interim injunction the following sequential tests should be applied

1. Has the plaintiff made out a strong *prima facie* case of infringement or imminent infringement of a legal right to which he has title, that is, that there is a serious question to be tried in relation to his legal rights and that the probabilities are that he will win.

2. In whose favour is the balance of convenience– the main factor being the uncompensatable disadvantage or irreparable damage to either party?

3. As the injunction is an equitable relief granted in the discretion of the Court do the conduct and dealings of the parties justify grant of the injunction. The material on which the Court should act as the affidavits supplied by plaintiff and defendant. Oral evidence can be led only of consent or upon acquiescence.

In a defamation suit the plaintiff must in addition establish

(i) That the matter complained of is defamatory,
(ii) No defence such as truth or public benefit can be set up,
(iii) Nothing has happened to deprive the applicant of his remedy such as the giving of consent.

The burden of proof is on the plaintiff. In a defamation suit where the plaintiff seeks an interim injunction he must prove also that no defences such as justification and fair comment can be set up though at the main trial the burden of proving these defences would be on the defendant.

Cases referred to:

(1) Subramaniam Chetty v. Soysa (1923) 25 NLR 344
(2) Jinadasa v. Weerasinghe (1929) 31 NLR 33, 34
(3) Dissanayake v. Agricultural and Industrial Credit Corporation (1962) 64 NLR 283, 285
(4) Preston v. Luck (1884) 27 Ch.D497, 506, 508(C.A.)

(5) *American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504*
(6) *Hubbard v. Vosper [1972] 1 All ER 1023, 1029*
(7) *Richard Perera v. Albert Perera (1963) 67 NLR 445.*
(8) *Gamage v. The Minister of Agriculture and Lands (1973) 76 NLR 25, 43, 44.*
(9) *Yakkaduwa Sri Pragnarama Thero v. Minister of Education (1969) 71 NLR 506, 511.*
(10) *Ceylon Hotels Corporation v. Jayatunga (1969) 74 NLR 443, 446.*
(11) *Duchess of Argyll v. Duke of Argyll [1967] 1 Ch. 302, 331, 332.*
(12) *Monson v. Tussauds Limited (1894) 1 QB 671 (C.A.)*
(13) *Fletcher v. Besley (1885) 28 Ch. D.688.*
(14) *Roberts v. The Critic Ltd. and others [1919] WLD 26.*
(15) *Norris v. Menty [1930] WLD 160*
(16) *Heilbron v. Blignant [1931] WLD 167.*
(17) *Coetzee v. Central News Agency SALR 1953 (1) 449.*
(18) *Bonnard v. Perryman (1891) 2 Ch.D.269.*
(19) *Fraser v. Evans [1969] 1QB 349 (C.A.)*
(20) *De Costa v. The Times of Ceylon (1963) 65 NLR 217, 224.*
(21) *Rhodesian Printing & Publishing Co. Ltd. v. Howman N.O. SALR 1967 (4) 1, 14.*
(22) *Fraser v. Evans [1969] 1 All ER 8.*
(23) *Crawford v. Albu [1917] AD 102, 105*
(24) *Woodward v. Hitchins [1977] 2 All ER 751*
(25) *Collins v. Jones [1965] 2 All ER 145, 146.*

Application in Revision from Order of District Judge, Colombo.

H. L. de Silva with *E. D. Wickremanayake,*
K. C. F. Wijeyawickrema and *P. Samaratne* for petitioner.

Mark Fernando for the 1st respondent.

K. N. Choksy with Lakshman de Alwis and *Ronald Perera* for the 2nd Respondent.

Cur adv vult

SOZA, J.

April 10, 1981

SOZA J.

This is an application for revision of the order of the District Judge of Colombo dated 27th January 1981 entered in Case No. D. C. Colombo 83984/M. An application for leave to appeal has also been filed from the same order and these proceedings are numbered as C.A. – LA 12/81. The reasons for the order I will be making in this application for revision will serve to dispose of the application for leave to appeal too.

The facts leading up to the application before us may be stated

as follows: The plaintiff is a former Minister of Justice. He held, apart from the portfolio of Justice, a number of other portfolios including Finance and Public Administration. He has been in active politics for several years and since the year 1960 was a Member of the House of Representatives and, after the Constitution of 1972 was promulgated, of the National State Assembly. Throughout his political career he has been a member of the Sri Lanka Freedom Party and a Cabinet Minister when Mrs. Sirimavo Dias Bandaranaike was the Prime Minister. At the General Elections of 1977 however he suffered his first setback in politics when he failed to secure election.

When he was Minister of Justice the Bribery Department and the Department of Public Prosecutions were under him. The Secretary to the Ministry of Justice during the relevant period was Mr. Nihal Jayawickrema. The Bribery Commissioner was Mr. Ian Wickremanayake but at one time Mr. Kenneth Seneviratne held the posts of Director of Public Prosecutions and Acting Bribery Commissioner.

The plaintiff complains in paragraph 5 of his plaint filed on 26.5.1980 that in or about March 1980 he became aware that the defendant State Film Corporation was intending to release for public exhibition a film entitled "Sagarayak Meda" which was defamatory of him in that –

(a) The Minister of Justice portrayed as a character in the film was intended to refer to and represent him and was likely to be identified with him by members of the public who saw the film.

(b) The person playing the role of the Minister in the film was portrayed as a dishonourable person given to abusing and misusing his official position and authority for personal ends and as an untrustworthy and contemptible character.

The particular incidents and episodes in the film and the film as a whole were calculated to bring him to contempt and hatred and to cause serious injury and damage to his reputation. In paragraph 8 the plaintiff avers that the Minister of Justice in the film was shown in various episodes as one who used his official position and authority for private ends by directing the Bribery Commissioner in an unlawful manner in respect of a pending prosecution for bribery and as one who was deceitful and untrustworthy and as one who interfered with the work of the Bribery Commissioner to such an extent that that official was

driven to resign in protest. In paragraph 10 the plaintiff pleads that the alleged incidents and episodes concerning him in the film are both false and defamatory and were calculated to expose him to odium and obloquy and cause irreparable damage to his reputation and political future. The plaintiff therefore prays in his plaint for a permanent injunction restraining the defendant, its servants and agents and all persons acting under its authority from –

(a) releasing the film "Sagarayak Meda" for exhibition or showing to the public at any cinema, theatre or other public place, or to any persons in private, and

(b) exhibiting, showing, screening or otherwise publishing the said film at any public or private performance otherwise than under any statutory power or authority.

He also prays for an interim injunction in the same terms.

The plaint and application for interim injunction were supported before the District Judge of Colombo on 27.5.1980. The District Judge entertained the plaintiff's action and entered and issued an enjoining order restraining the defendant in the terms set out in the prayer for the permanent injunction valid till 13.6.1980. The Court also issued notice of the application for an interim injunction returnable 13.6.1980. The defendant filed its appearance on 13.6.1980 and was granted time till 11.7.1980 to file its answer and objections. On 11.7.1980 the defendant along with an affidavit filed petition objecting to the application for an interim injunction and moving to have the enjoining order dissolved. The defendant also obtained leave to file its answer later. In the meantime on 13.6.1980 Chalana Films Limited who were the producers of the film moved to intervene in the case under Section 18 of the Civil Procedure Code.

Notice of this application had been issued returnable 11.7.1980 and on this day, the application to intervene not being opposed, Chalana Films Limited were added as the 2nd defendant. The added 2nd defendant was allowed time till 25.7.1980 to file objections to the application for an interim injunction. It may be mentioned that the 2nd defendant came into the case because the enjoining order issued against the 1st defendant in effect barred the film "Sagarayak Meda" produced by the 2nd defendant at great cost not only from being exhibited but also from being put into shape for exhibition. On 29.8.1980 the 2nd defendant filed its objections accompanied by an affidavit and the matter

was fixed for inquiry. On 7.10.1980 the 2nd defendant moved to file amended objections and affidavit. On 16.10.1980 this application was allowed and the plaintiff took time to consider what steps he should take in view of the amended objections that had been filed by the 2nd defendant. On 30.10.1980 the plaintiff filed amended plaint along with an affidavit. He filed no counter affidavit. In the amended plaint and affidavit however he met some of the objections that had been advanced especially by the 2nd defendant.

The matter of the application for an interim injunction came up for inquiry before the learned District Judge on 27.1.1981 until which date the operation of the enjoining order had, from time to time, been extended. After hearing the parties the learned District Judge refused the application for interim injunction and dissolved the enjoining order.

The course which the proceedings of 27.1.1981 which preceded the order of the learned District Judge which is being sought to be canvassed before us, took should here be set out. Mr. Navaratnarajah who appeared for the 1st defendant Corporation submitted that he relied on the plea of justification and fair comment. He referred to the proceedings before the Presidential Commission reported in the Hansard dated 16th October 1980 where the Commissioners of the Presidential Commission had expressed their findings regarding the allegations made against the plaintiff. The plaintiff had been held to be guilty of some of the charges of corruption, abuse and misuse of power levelled against him. On this basis Counsel said the application for an interim injunction should fail. For the purpose of the inquiry Mr. Navaratnarajah added that he accepted paragraph 5(2) of the amended plaint. Learned Counsel for the petitioner submitted from the Bar that Mr. Navaratnarajah admitted paragraph 5(1) also. Mr. Navaratnarajah also submitted that once a plea of justification and fair comment is raised the interim injunction cannot be issued. Mr. Choksy who appeared for the 2nd defendant supported the position taken up by Mr. Navaratnarajah. For the purposes of the inquiry Mr. Choksy was prepared to admit the averments contained in paragraphs 2,3,4,5(1), 5(2) and 6 of the plaint, and yet satisfy the Court that in law no injunction could be granted. Mr. H. L. de Silva in reply submitted that the submissions advanced were rooted in fallacy. The plaintiff was not complaining of a statement made or comment concerning him. His action was based on the fact that a film had been produced containing scenes and sequences, episodes and incidents concerning the plaintiff which were totally false and malicious. The pleas of

justification and fair comment were being advanced *mala fide*. The first matter the Court would have to be certain about is the nature and content of the scenes and episodes the plaintiff was complaining about. In order to do that he would have to call the plaintiff and supporting witnesses. Then the defendants could give their explanations. At that stage the Court questioned Mr. Choksy as to whether he was calling any evidence. Mr. Choksy then invited the Court to rule on the question whether oral evidence was legally admissible and moved to be heard on that point. Mr. de Silva then said he was moving for an order *nisi*. Mr. Navaratnarajah referring to the sections of the Judicature Act and Civil Procedure Code dealing with procedure and injunctions submitted that no oral evidence could be led. The Court should and make its order on the documents, pleadings and affidavits before it. Mr. de Silva then reiterated his application to call witnesses and moved to be allowed to call the plaintiff to give evidence. The Court ruled that the evidence of the plaintiff was not necessary as he had filed an affidavit. Mr. de Silva at that stage made his submissions as to why the interim injunction should issue. He moved the Court to peruse the script relating to the film or at least to view the film so that the Court would be able to have a visual impression of what the film contained. Mr. de Silva stated that he had summoned the 2nd defendant to produce the film. The Court then mentioned that it had already indicated to Mr. de Silva that no oral evidence could be called. Further submissions were made by learned counsel for the plaintiff on the averments in the affidavits and objections of the defendants.

It is important at this stage to settle the question of the procedure that a party who applies for an interim injunction should follow. The provisions of law concerning the issue of an interim injunction are found in section 54 of the Judicature Act No. 2 of 1978 and sections 662, 664 and 666 of the Civil Procedure Code.

Generally speaking section 54 of the Judicature Act No. 2 of 1978 is the jurisdictional section while sections 662, 664 and 666 of the Civil Procedure Code set out procedure. Section 54 of the Judicature Act is with minor differences identical with sections 86 and 87 of the Courts Ordinance and with section 42 of the Administration of Justice Law No. 44 of 1973 which repealed the Courts Ordinance.

The Courts Ordinance (Ordinance No. 1 of 1889) and the Civil Procedure Code (Ordinance No. 2 of 1889) were proclaimed on 2nd August 1890 and 1st August 1890 respectively. An examination of the comparative provisions relating to injunctions in

these two statutes shows a remarkable consistency and harmony. Sections 86 and 87 of the Courts Ordinance carried the jurisdictional provisions. Section 86 set out three circumstances when the Court can issue an interim injunction and the form which the order should take. It is lawful for the District Court or the Court of Requests to issue an injunction:

(a) where it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission or continuance of an act or nuisance which would produce injury to the plaintiff, or

(b) where it appears that the defendant during the pendency of the action is doing or continuing or procuring or suffering to be done or commited or threatens or is about to do or procure or suffer to be done or committed an act or nuisance in violation of the plaintiff's rights respecting the subject-matter of the action and tending to render the judgment ineffectual, or

(c) where it appears that the defendant during the pendency of the action threatens or is about to remove or dispose of his property with intent to defraud the plaintiff.

It will be seen therefore that the Court is empowered to issue an interim injunction at the time the plaint is filed, or during the pendency of the action. For the Court to issue an interim injunction at the time the plaint is filed it must appear from the plaint:

(i) that the plaintiff demands and is entitled to a judgment against the defendant restraining the commission of an act or nuisance, and

(ii) that such act or nuisance would produce injury to the plaintiff.

The form which the order will take is also set out. It will restrain the defendant from committing or continuing any such act or nuisance.

Where the injunction is sought during the pendency of an action sub-paragraphs (b) and (c) of section 86 of the Courts Ordinance apply. For the Court to issue an interim injunction during the pendency of the action:

(1) it should appear that the defendant is doing or committing or procuring or suffering to be done or committed or threatens or is about to do or procure or suffer to be done or committed an act or nuisance

(i) in violation of the plaintiff's rights respecting the subject-matter of the action and

(ii) tending to render the judgment ineffecual; or,

(2) it should appear that the defendant threatens or is about to remove or dispose of his property with intent to defraud the plaintiff.

If the circumstances are as set in paragraph (1) above then the Court will make order restraining the defendant from doing or committing or procuring or suffering to be done or committed any such act or nuisance and if the circumstances are as set out in paragraph (2) the Court will make order restraining the defendant from removing or disposing of such property. Section 87 says that the injunction may be granted to accompany the summons. Obviously this is an injunction under section 86(a) moved for at the time the plaint is filed and it will generally be without notice. After the action has commenced, that is, after the plaint is filed, and before final judgment, the injunction which the Court issues would be with or without notice in the discretion of the Court acting under section 86(b) or 86(c). But if the defendant has already answered then the injunction will be granted only upon notice or an order to show cause. Notice or an order to show cause is then imperative. Where the Court decides to issue notice or an order to show cause the Court may grant an injunction restraining the defendant until the hearing and decision of the application. This last power is obviously available at any stage when an injunction is being sought and is commonly referred to as an enjoining order.

Upon what material should the Court act in issuing such an injunction? The answer to that too is found in section 86. It must appear from the affidavit of the plaintiff or any other person that sufficient grounds to grant an injunction exist. It is significant that there is no reference here to *viva voce* examination. In all cases an application for an injunction should be supported by an affidavit of the applicant or some other person having knowledge of the facts containing a statement of the facts on which the application is based. A petition praying for the injunction should normally be filed but where the injunction is prayed

for in the plaint itself no petition is necessary. Section 664 of the Civil Procedure Code provides that in all cases except when it appears that the object of granting the injunction will be defeated by the delay, the Court must cause the petition for the injunction together with the accompanying affidavit to be served on the opposite party before granting the injunction. If the application is made after the defendant has answered the injunction shall in no case be granted before such service. Yet, the Court may in its discretion enjoin the defendant until the hearing and decision of the application. Section 666 of the Civil Procedure Code states that where an injunction has been issued, it may be discharged, varied or set aside by the Court on application made thereto on petition by way of summary procedure by any party dissatisfied with such order. For the purposes of deciding the matter before us section 666 does not come in for consideration.

It will be seen that there is complete harmony not to mention elegance in the provisions found in the Courts Ordinance and in the Civil Procedure Code on interim injunctions. It is of importance to remember that the Court will not grant an interim injunction where the defendant has answered except upon notice or an order to show cause. The stage contemplated is where the defendant has answered and not where he has merely appeared. These provisions stood until the passing of the Administration of Justice Law No. 44 of 1973. In section 42 of this Law, sections 86 and 87 of the Courts Ordinance reappear with some inconsequential changes of language. Of course in the new Judicature that was brought in by the Administration of Justice Law the Courts of Requests were abolished and instead the Magistrates' Courts were vested with limited civil jurisdiction similar to that which had been earlier exercised by the Courts of Requests. By the Civil Courts Procedure (Special Provisions) Law No. 19 of 1977 and the Civil Procedure (Amendment) Law No. 20 of 1977 the Civil Procedure Code was brought back with certain amendments. The Judicature Act. No. 2 of 1978 was passed on 2nd November 1978. This Act re-enacted substantially sections 86 and 87 of the Court Ordinance and Section 42 of the Administration of Justice Law No. 44 of 1973 which had replaced them. But on the question of issuing notice it stipulated that an injunction shall not be issued except upon notice or an order to show cause if the defendant had appeared. The use of the word 'appeared' in subsection 3 of section 54 introduces a discordant element in the provisions relating to the issue of injunctions in view of the fact that the Civil Procedure Code even after amendment continued to stipulate that notice is imperative only after the defendant has answered. However that may be, the substantial provisions remain the same. The material on which the Court should act still remains the same. The Court

grants interim injunctions on its appearing by the affidavit of the plaintiff or any other person that sufficient grounds exist therefor.

Is oral evidence then permissible ? On this point I would like to refer initially to the fact that the provisions relating to injunctions which appear in chapter 48 of the Civil Procedure Code are in Part V entitled "Provisional Remedies." This Part deals with other types of provisional remedies also – Arrest and Sequestration before Judgment (Chapter 47), Interim Orders (Chapter 49) and the Appointment of Receivers (Chapter 50). The injunction is treated in the Code as a provisional remedy. Indeed so it is. Arrest and sequestration before judgment are provisional remedies which the Court may grant on a petition of the plaintiff supported by his own affidavit and, should the judge consider it desirable, *viva voce* examination – see section 650 and section 653. Chapter 49 deals with interim orders which the Court can make for the sale of perishable property and for the detention, preservation, inspection or survey of property which is the subject-matter of the action. The procedure to be followed is stipulated to be summary procedure. Chapter 50 deals with the appointment of receivers. The procedure to obtain the appointment of a receiver is by application of the party who shall establish a *prima facie* right or interest in the property sought to be committed to the possession or custody or management of the receiver. Notice of the application for the appointment of a receiver must be served on the adverse party. Accordingly the appointment of a receiver is done by a form of regular procedure. It is significant that the Civil Procedure Code in dealing with certain types of provisional remedies specially provides for *viva voce* examination but not for others.

Under the Civil Procedure Code only two types of procedure are contemplated for actions in Court – regular procedure and summary procedure. The Code defines an action as a proceeding for the prevention or redress of a wrong. Every application made to the Court for relief or remedy obtainable through the exercise of the Court's power or authority or otherwise to invite its interference constitutes an action. There can even be an action within an action as Bertram C. J. held in the case of *Subramaniam Chetty v. Soysa.*[1] Hence the application for an injunction is an action.

The procedure of an action, as I said before, must be either regular or summary. In regular procedure the person against whom the application is made is called upon to formally state his answer to the case which is alleged against him in the application before

1. (1923) 25 NLR 344.

the Court entertains any question of fact or exercises its discretion thereon in any manner. In summary procedure the applicant simultaneously with preferring his application supports with proper evidence the statement of facts made therein. If the Court in its discretion considers that a *prima facie* case has been made out, it will make the order sought against the defendant without affording him an opportunity of opposing it but conditioned to take effect only in the event of his not showing good cause against it on the day appointed for the purpose, that is, the Court will enter and issue an order *nisi,* or it will appoint a day for entertaining the matter of the application on the evidence furnished and notice the defendant that he will be heard in opposition to it on that day, that is, enter and issue an interlocutory order. Except where the Code or any other law stipulates that proceedings shall be taken by way of summary procedure, regular procedure must be adopted but there could be such variations of the regular procedure as the Code may prescribe – see in this connection sections 5, 6, 7 and 8 of the Civil Procedure Code. Summary procedure can be followed only where the Code stipulates it.

While summary procedure when taken must follow the steps in procedure laid down in Chapter 24 of the Code, regular procedure when applicable must be followed in accordance with the steps prescribed for the particular application. Applications for an injunction under Chapter 48 of the Civil Procedure Code must be made by way of regular procedure in the manner prescribed by the Code, that is, plaint and affidavit or petition and affidavit and generally with notice to the other side barring the occasion when the Code dispenses with notice. When notice is given the procedure being regular the defendant must be "called upon to formally state his answer to the case which is alleged against him in the application before any question of fact is entertained by the Court, or its discretion thereon is in any degree exercised" – see the first illustration to section 7 of the Civil Procedure Code.

In an application for an injunction therefore when the defendant appears on notice he must be allowed to formally state his answer to the allegations against him before the Court decides on the facts or exercises its discretion against him. How is the defendant "to formally state his answer" ? By affidavits. This is what section 54 of the Judicature Act says in effect.

It was submitted that the language of section 54 correctly interpreted should be taken to mean that the Court is free to consider only the affidavit of the plaintiff and the affidavits of any other persons submitted and relied on by the plaintiff. It was

argued that sufficient grounds for the issue of an injunction cannot possibly appear except from the affidavits of the paintiff and those on whom he relies. But such an interpretation cannot be arrived at except by putting an unwarranted restriction on the language of the section. The affidavits of the defendant and those on whom he relies can help to correct the picture presented by the plaintiff and those who support him. To ascertain whether sufficient grounds exist for the issue of an injunction the Court must look for assistance to the affidavits submitted by the defendants no less than to the affidavits submitted by the plaintiff. The section is couched in language which is clear and needs no gloss. The words "any other person" are wide enough to include the defendant and those on whom he relies.

Further the interpretation contended for by the petitioner would seem in the first place to be wrong in principle and a violation of the *audi alteram partem* rule of natural justice. It offends the principles of natural justice to notice a defendant in a judicial proceeding, permit him to file his affidavit in opposition to the relief claimed against him and then ignore both him and his affidavit when it comes to making the decision – see **de Smith Judicial Review of Administration Action 4th Ed. (1980)** pp. 158 et seqq.

Further, to restrict the language of the section would bring about the absurd result that the defendant though he appears on notice should remain silent and be a passive spectator of his own downfall. The defendant who appears on notice surely must not be condemned unheard – see **Jackson on Natural Justice** 2nd Ed. p. 104. The statute and the dictates of natural justice no less make it imperative that the Court do consider the affidavits submitted by the defendant also.

Therefore the material on which the Court should act is the affidavit of the plaintiff as well as the affidavits of any person (including the defendant) conversant with the facts.

It is apposite to mention here that section 181 of the Civil Procedure Code provides that in the matter of interlocutory applications, affidavits can be filed embodying not only statements of fact which are within the declarant's own knowledge and observation but also statements of his belief provided that reasonable grounds for such belief are set forth in the affidavit. Such belief can no doubt be on the basis of information gathered from persons who owing to their official position or other circumstances, though willing to testify in Court are yet not willing or

able to swear affidavits. Hence in our Civil Procedure Code there are adequate provisions to enable a party to place before Court all the necessary material without calling witnesses.

No doubt in the matter of deciding applications for interim injunctions the Court often receives and hears the oral testimony of witnesses. Where only private rights are involved procedure, except where it goes to jurisdiction or affects public policy can always be varied, or waived by acquiescence or consent of the parties. In the cases where oral evidence was led, objection was not taken to such procedure. But where objection is taken, as was done in the instant case, then the Court is obliged to follow the procedure laid down in the statute. In the absence of consent or acquiescence the Court should act only on the affidavits placed before it. The learned District Judge quite rightly, in my view, turned down the application of learned Counsel for the petitioner to call oral evidence.

The Court however considered only the affidavit filed by the plaintiff. This, as I have pointed out, is not correct. The Court should have also considered the affidavits filed by the defendants. It must be added that when one speaks of affidavits filed by parties one must remember that this includes the documents marked and verified in the affidavits. It is on this material that the Court should have acted.

Learned Counsel for the petitioner. not without justification, described the learned District Judge's order as all recital and no reasons. One searches the order in vain for any critical assessment or evaluation. Learned Counsel complained he was at a loss to ascertain the reasoning process adopted by the Judge or the particular factors that weighed with him. When the Court makes a decision on a hotly debated controversial issue, the parties are entitled to know the reasons which impel the Court to decide the matter in a particular way. An appellate tribunal called upon to review an order made without reasons being adduced for it is handicapped.

I might advert here to the fact that learned Counsel for the petitioner at first made an application to lead the evidence of the plaintiff and of witnesses and stated to Court that the defendants can be heard thereafter. This procedure was not acquiesced in on behalf of the respondents and there was much argument. Eventually learned counsel for the plaintiff settled for an order *nisi.* In other words he moved the Court to treat the matter as on summary procedure and on an *ex parte* basis. From my discussion of the relevant provisions earlier on it is clear that summary

procedure should not be followed when an application for an interim injunction is made. The Code does not provide for it and, as far as I know, it is not the practice of the Court either. In fact if summary procedure is followed in the matter of issuing interim injunctions it will result in delay. If an order *nisi* is entered it will have to be conditioned to take effect on a future date. An interlocutory order will delay the matter even more. This would mean that the mischief sought to be averted will not be stopped until such future date. Such delay may defeat the entire object of granting an interim injunction. I might add that even before us learned Counsel for the petitioner took up the position that the procedure should be summary. But before the argument advanced far he abandoned that stance. As summary procedure has not been stipulated regular procedure such as the statute prescribes should be followed.

The learned District Judge did not follow summary procedure. Yet he apparently thought the matter should be dealt with *ex parte* and that is perhaps why he gave no reasons for his order. He considered the submissions and authorities cited, the plaint and affidavit (no doubt the amended plaint and affidavit filed on 30.10.1980) and perused the documents filed with the plaint – the document 'A' (the Third Interim Report of the Special Presidential Commission of Inquiry) as well as the document G (the Hansard of 16th October 1980). The Third Interim Report of the Special Presidential Commission of Inquiry, was filed with the amended objections and affidavit of the 2nd defendant admitted of record on 16.10.1980. The plaintiff filed with his amended plaint and affidavit the document marked "I" which is a copy of his application to the Supreme Court for a writ of *certiorari* to quash the findings of the Special Presidential Commission. The third Interim Report of the Special Presidential Commission is an annexe of this application 'I'. Hence the learned District Judge was entitled to treat this Report as a document brought in, though of course not relied on, by the plaintiff also. But, as I have already explained, he was in error in ignoring the affidavits filed by the defendants and the documents verified and lodged with them.

Learned Counsel for the petitioner was wrong when he contended in the District Court that the procedure should be summary and the learned District Judge was wrong in dealing with the matter as if on an *ex parte* application. Yet it is the duty of this Court to consider whether the order of the learned District Judge dismissing the application for an interim injunction is sustainable.

One of the principal difficulties in dealing with this case is that we do not know what the film when finally exhibited will contain. We do not know exactly what particular scenes and sequences, episodes and incidents will be portrayed nor how much of it will be fact and how much comment; nor indeed the nature of such fact and comment. Despite this ignorance, we have to deal with the plaintiff's application for an interim injunction as best we can. The application is, it is well to remember, for an injunction *quia timet.*

It is necessary first of all to have a clear picture of the legal principles that are applicable to the question before us. The jurisdictional provisions have already been noted. This is an action instituted in the District Court and the application for an interim injunction was made at the time the plaint was filed. So section 54(1)(a) and (i) of the Judicature Act No. 2 of 1978 and sections 662 and 664 of the Civil Procedure Code apply. If it appears from the plaint that the plaintiff demands and is entitled to a judgment against the defendants, restraining the commission of an act or nuisance, which would produce injury to him the Court may, on its appearing by the affidavit of the plaintiff or any other person (and that would include the defendants as I have already pointed out) that sufficient grounds exist therefor, grant an interim injunction restraining the defendants from committing any such act or nuisance. The plaintiff must therefore have a clear legal right which is being infringed or about to be infringed. The injunction could be granted to accompany the summons or at any time after the commencement of the action and before final judgment and with or without notice in the discretion of the Court. In the instant case the matter came up after notice was issued on the first defendant. The 2nd defendant had taken notice. The burden is on the plaintiff to show that there is a serious question to be tried in relation to his legal rights – see *Jinadasa v Weerasinghe*[2] and *Dissanayake v Agricultural and Industrial Credit Corporation*.[3] The requirement that there should be a serious question to be tried in relation to the legal rights which the plaintiff claims with the probability of his winning has always been understood to mean that the plaintiff must show the existence of a *prima facie* case – see for instance **Banerjee: Law of Specific Relief** (1978 – 6th Edition) p. 585, also **Nathan: The Law of Defamation in South Africa** (1933) pp. 183, 184, *Preston v. Luck*[4] and *Jinadasa v. Weerasinghe* (supra). This is the law of Sri Lanka and it is the law of India and South Africa. It was the law of England too for

2. (1929) 31 NLR 33, 34.
3. (1962) 64 NLR 283, 285.
4. (1884) 27 Ch. D. 497, 506, 508 (C.A.).

upwards of a century until Lord Diplock in 1975 threw it overboard in his speech in the House of Lords case of *American Cyanamid Co. v. Ethicon Ltd.*[5] Lord Diplock regarded the requirement of a serious question to be tried as meaning that the plaintiff's case must not be frivolous ot vexatious. The doctrine Lord Diplock propounded may be set out in three sequential questions:

1. Is the plaintiff's case frivolous or vexatious ? In other words, is there a serious question to be tried ? (p. 510).

2. In whose favour does the balance of convenience lie ? As to this to what extent will the disadvantages to each party be incapable of being compensated in damages in the event of his succeeding at the trial ? (pp. 510, 511).

3. If there is no wide disparity in the balance of convenience what is the relative strength of the cases of the two parties ? If the case of one party is much stronger than that of the other, then that will tip the balance in favour of the party with the stronger case (p. 511).

After enunciating his new doctrine Lord Diplock added the warning that the Court is not justified in embarking on anything resembling a trial on material that is necessarily incomplete, conflicting and untested by cross-examination – see pages 510, 511.

In Sri Lanka we start off with a *prima facie* case. That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning. It is not necessary that the plaintiff should be certain to win. It is sufficient if the probabilities are he will win. Where however the plaintiff has established a strong *prima facie* case that he has title to the legal right claimed by him but only an arguable case that the defendant has infringed it or is about to infringe it, the injunction should not be granted *(Hubbard v Vosper).*[6] If the probability is that no right of the plaintiff will be violated or that he will suffer no wrong such as the law recognises then the injunction will not issue – see for instance the cases of *Richard Perera v Albert Perera*[7] *and Gamage v The Minister of Agriculture and Lands.*[8]

5. [1975] 1 All ER 504.
6. [1972] 1 All ER 1023, 1029.
7. (1963) 67 NLR 445.
8. (1973) 76 NLR 25, 43, 44.

The case as a whole should be taken into account and the relative strength of the cases of the plaintiff and the defendant assessed *(Hubbard v Vosper (supra) at p. 1029).*

If a *prima facie* case has been made out, we go on and consider where the balance of convenience lies– *Yakkaduwe Sri Pragnarama Thero v The Minister of Education.*[9] This is tested out by weighing the injury which the defendant will suffer if the injunction is granted and he should ultimately turn out to be the victor against the injury which the plaintiff will sustain if the injunction were refused and he should ultimately turn out to be the victor. The main factor here is the extent of the uncompensatable disadvantage or irreparable damage to either party. As the object of issuing an interim injunction is to preserve the property in dispute in *statu quo* the injunction should not be refused if it will result in the plaintiff being cheated of his lawful rights or practically decide the case in the defendant's favour and thus make the plaintiff's eventual success in the suit if he achieves it a barren and worthless victory – see Bannerjee (ibid) pp. 578, 579.

Lastly as the injunction is an equitable relief granted in the discretion of the Court, the conduct and dealings of the parties *(Ceylon Hotels Corporation v Jayatunga)*[10] *and the circumstances* of the case are relevant. Has the applicant come into Court with clean hands ? – see *Duchess of Argyll v Duke of Argyll.*[11] Has his conduct been such as to constitute acquiescence in the violation of infringement of his rights as the Court of Appeal in England found in *Monson v Tussauds Limited*[12] or waiver of his rights to the injunction ? Is it proper or necessary to issue an injunction as, for example, when there is very little prospect of the film being exhibited in the near future ? (Bannerjee (ibid) p. 586), Row's Treatise on the Law of Injunctions 3rd Ed. Vol. 1 p. 166 and Halsbury's Law of England 4th Ed. Vol. 24 p. 552 paragraph 984. These are germane questions when the Court is called upon to exercise its discretion to grant an equitable remedy such as injunction. In *Fletcher v Bealey*[13] the guidelines that should be followed by a Court when dealing with an application for an injunction *quia timet* when infringement of the plaintiff's rights is only apprehended were succinctly laid down by Pearson, J. who said as follows at page 698:

9. (1969) 71 NLR 506, 511.
10. (1969) 74 NLR 443, 446.
11. [1967] 1 Ch. 302, 331, 332.
12. [1894] 1 QB 671 (C.A.).
13. [1885] 28 Ch. D. 688.

"I do not think, therefore, that I shall be very far wrong if I lay it down that there are at least two necessary ingredients for a *quia timet* action. There must, if no actual damage is proved, be proof of imminent danger, and there must also be proof that the apprehended damage will, if it comes, be very substantial. I should almost say it must be proved that it will be irreparable, because, if the danger is not proved to be so imminent that no one can doubt that, if the remedy is delayed, the damage will be suffered, I think it must be shown that, if the damage does occur at any time, it will come in such a way and under such circumstances that it will be impossible for the plaintiff to protect himself against it if relief is denied to him in a *quia timet* action."

These then are the general principles which the Court should follow when called upon to issue an interim injunction. When the injunction is sought in a defamation case the same principles remain applicable but with reference to the first requirement that the plaintiff must make out a *prima facie* case that a clear right of his is being infringed or about to be infringed the following formulation is regarded as authoritative: The plaintiff must establish –

1. that the matter complained of is defamatory,

2. that no defence such as that the statement is true and for the public benefit can be set up, and

3. that nothing has occurred ro deprive the applicant of his remedy, such as the giving of consent.

In the event of any doubt on these points the injunction should be refused and the case is one to be decided at the trial. The above formulation was made by Ward J. in the South African case of *Roberts v The Critic Ltd. and others*[14] and has been consistently followed ever since – see *Norris v Mentz,*[15] *Heilbron v Blignaut*[16] and *Coetzee v Central News Agency.*[17] Textwriters like *Nathan* (ibid) pp. 183, 184 and *C. F. Amerasinghe: Defamation and other* **Injuries** (1968) pp. 170, 171 have also accepted the law as stated by Ward, J. in **Roberts'** case (supra).

Defences like justification and fair comment afford a complete answer to an allegation of defamation. When a plaintiff seeks an

14. (1919) WLD 26.
15. (1930) WLD 160.
16. (1931) WLD 167.
17. SALR 1953 (1), 449

interim injunction to restrain the publication of admittedly defamatory matter pleas like justification and fair comment will effectively muzzle his capacity to make out a *prima facie* case of a legal right being infringed or about to be infringed. This is the rationale which informs the proposition that the plaintiff who seeks an interim injunction must show not only that the publication complained of is defamatory but also that no defence such as justification or fair comment can be set up. Section 54 of the Judicature Act casts the burden on the plaintiff who seeks to restrain a defendant by an interim injunction from publishing admittedly defamatory matter to show that no defence like justification or fair comment is available. For otherwise he cannot be said to have made out a *prima facie* case. On the other hand at the trial the burden of proving the defence will be on the defendant.

In England too before the turn of the century Lord Coleridge C. J. in the case of *Bonnard v Perryman*[18] laid down the principle that an interlocutory injunction (as an interim injunction is called in that country) will not be granted when the defendant swears he will be able to justify the libel and the Court is not satisfied that he may not be able to do so. The same principle applies with respect to fair comment and privilege. The decision in Bonnard v Perryman (supra), has been followed in England up to date – see *Monson v Tussauds Limited* (supra), *Fraser v Evans,*[19] *Halsbury* (ibid) p. 552 paragraph 984, Salmond on Torts 16th Ed. p. 608 and Gatley on Libel and Slander 7th Ed. (1974) pp. 606, 607 paragraphs 1482, 1484.

But will the plea of justification make the gratification of public curiosity in regard to a person's private life legitimate ? Can an adventurous producer with impunity display in print and picture every incident dramatized peradventure of a person's private life which actually happened ? It cannot be done unless it is in the assertion of a legal right, in fulfilment of a legal duty or for the public benefit. In our law the ingredients of truth and public benefit are essential to sustain a plea of justification – see *Amerasinghe* (ibid) pp. 83, 84 *Nathan* (ibid) p. 199 and *De Costa v The Times of Ceylon Ltd.*[20]

So far as fair comment goes the constituents of the defence are, as Fieldsend J. explained in the case of *Rhodesian Printing & Publishing Co. Ltd. v Howman, N.O.*[21] that the comment must be

18. [1891] 2 Ch. D. 269.
19. [1969] 1 QB 349 (C.A.).
20. (1963) 65 NLR 217, 224.
21. SALR 1967 (4) 1, 14.

recognisable as such and be based on facts which are true and of public interest. It must be a genuine expression of opinion, that is, fair and *bona fide*, and relevant to the facts commented on even though it may be extravagant, exaggerated or prejudiced – see also *Amerasinghe* (ibid) p. 146 *Nathan* (ibid) p. 275 and *De Costa v The Times of Ceylon Ltd.* (supra) at p. 225.

The pleas of justification and fair comment spring from the right of freedom of speech which can be always exercised within such limits as the law prescribes. In Sri Lanka the right of freedom of speech is a fundamental right entrenched in our Constitution of 1978 – see Articles 14(1)(a) and 15(2).

As Lord Coleridge said in *Bonnard v Perryman* (supra) at p. 284:

> "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel. Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

Lord Denning in the case of *Frazer v. Evans*[22] where an interlocutory injunction was sought against the Sunday Times to restrain them from publishing certain articles, expressed similar sentiments at page 12:

> "There are some things which are of such public concern that the newspapers, the Press and indeed, everyone is entitled to make known the truth and to make fair comment on it. This is an integral part of the right of free speech and expression. It must not be whittled away. The Sunday Times assert that, in this case, there is matter of public concern. They admit that they are going to injure the plaintiff's reputation, but they say that they can justify it; that they are only making fair comment on a matter of public interest; and, therefore, that they ought not to be restrained . . . . . The Sunday Times should be allowed to publish the article at their risk. If they are guilty

22. [1969] 1 All ER 8.

of libel or breach of confidence or breach of copyright, that can be determined by an action hereafter and damages awarded against them. But we should not grant an interim injunction in advance of an article when we do not know in the least what it will contain."

Earlier in his judgment Lord Denning set out the legal principle thus at p. 10.

"The court will not restrain the publication of an article, even though it is defamatory, when the defendant says that he intends to justify it or to make fair comment on a matter of public interest. . . . . The reason sometimes given is that the defences of justification and fair comment are for the jury, which is the constitutional tribunal, and not for a judge; but a better reason is the importance in the public interest that the truth should be out . . . . . There is no wrong done if it is true, of if it is fair comment on a matter of public interest."

Incidentally this passage answers the criticism commonly advanced that the English law has grown from the fact that in England the defences of justification and fair comment are for the jury.

The right to make "fair and *bona fide* comment on a matter of public interest" to put the defence of fair comment at full length also arises from the fundamental right of freedom of speech. It is the right of every person to comment upon and criticise public institutions, public legislation and persons occupying public positions provided such criticism and comment are *bona fide* and fair and based on true facts. Bristowe J. in *Crawford v Albu*[23] had the following observation to make on the question of criticism:

"Criticism is not required to conform to the Court's standard of fairness or impartiality. People who occupy a public position or for any other reason have been so unfortunate as to focus upon themselves the light of public opinion must expect to be criticised."

In the instant case learned Counsel for the petitioner contended that the plea of justification should be considered on the basis that the defendants admit the plaintiff's averments in paragraph 5(1) and (2) of the amended plaint. Whatever the position taken up in the objections, for the purpose of the inquiry Counsel for the defendants had during the argument admitted paragraphs 5(1)

23. [1917] AD 102, 105.

and 5(2). I am quite prepared to consider the case on the footing that the defendants admit they are going to injure the plaintiff's reputation in the manner stated in paragraphs 5(1) and 5(2) of the plaint. But they say that they can justify it and that they are only making fair comment on a matter of public interest.

This is an appropriate stage to deal with the contention of learned Counsel for the petitioner that the findings of the Special Presidential Commission are irrelevant and cannot be utilised to support the pleas of justification and fair comment in the instant case. Learned Counsel referred to Lord Denning's 1980 Richard Dimbleby Lecture on the Misuse of Power and Prof. H. W. R. Wade's Hamlyn Lecture on Constitutional Fundamentals where some illuminating comments have been made on the possibilities of misuse of power and abuse of power by Parliament and even by the Judiciary. Learned Counsel submitted that though the findings of the Special Presidential Commission have been used to deprive the petitioner of his civic rights they cannot and should not be used for any other purpose. The petitioner still challenges both the validity and correctness of the findings of the Commission. This Court has no jurisdiction to go into the question whether the findings of the Commission are supportable or not. I am not prepared to say that anyone who makes allegations against the petitioner identical with or similar to those of which the Commission found him guilty is not acting *bona fide* or has no grounds on which he could possibly prove the truth of the allegations. Therefore I cannot agree that the findings of the Special Presidential Commission of Inquiry are irrelevant. They are relevant to establish the *bona fides* of the defendants, to give credence to their stand, to give substance to their claims that they are in a position to prove the truth of whatever they have portrayed in the film of the plaintiff's actions and conduct and to counter the contention that the pleas of justification and fair comment have been advanced *mala fide* and as a mere legal ploy.

To come back to paragraph 5 of the plaint. The question is, Are the defendants in no position to prove that the Minister of Justice though identifiable with the plaintiff is truly characterised in the film as a dishonourable person, given to abusing and misusing his official position and authority for personal ends and an untrustworthy and contemptible character ?

The defendants say they can justify these allegations. The justification no doubt must be of the precise allegations set out in the plaint. For example the defendant is not entitled to set out his own version of the matter complained of and then plead that that is true. Paragraph 5 however is couched in general language and

could cover a broad spectrum of conduct. The findings of the Special Presidential Commission in my view can be resorted to in order not only to prove the *bona fides* of the defendants' plea of justification but also to support their claim that they can prove the truth of the allegations. At this preliminary stage the Court is bound to accept the *bona fides* of a defendant who says that the defamation complained of in paragraph 5 is true and he will prove it and backs his statement with the findings of the Commission that the plaintiff is guilty of certain specified allegations of abuse and misuse of power. These remarks apply equally to the defamation complained of in paragraphs 9 and 10 of the plaint though there is no express admission of them. The allegations here too are general.

I will now deal with paragraph 8 of the amended plaint. This paragraph reads as follows:

> "8. The plaintiff states that the Minister of Justice in the film is shown in various episodes as one who uses his official position and authority for private ends by directing the Bribery Commissioner in an unlawful manner in respect of a pending prosecution for bribery, and as one who is deceitful and untrustworthy, and as one who interfered with the work of the Bribery Commissioner to such an extent that this official is driven to resign in protest."

It is contended on behalf of the petitioner that this allegation is totally untrue. He was not found guilty of such an allegation by the Special Presidential Commission. The truth of the defamatory scenes and episodes in the film must be proved. The defendants are in no position to do so. On the other hand Counsel for the defendants argued that what need be proved is the sting of the allegations. They are entitled to exhibit in dramatized form the main charge or gist of the allegations of which the plaintiff was found guilty by the Special Presidential Commission. The defendants need not justify immaterial details or mere expressions of abuse which will not produce an effect on the mind of the viewer different from that produced by the substantial part justified. It is sufficient if the substance of the libellous scenes and episodes is justified. As much must be justified as meets the sting of the charge, and if anything be contained in a charge which does not add to the sting of it, that need not be justified (Gatley ibid pp. 431, 432 – paragraph 1043) and *Rhodesian Printing and Publishing Co. v. Howman N. O.).* If for example a person has been found guilty in a Court of law of stealing the donation box of a Roman Catholic Church in Colombo and a film is made depicting

him as a person who has stolen the donation box of a Buddhist temple in Kandy, surely the plea of justification will still succeed. The sting of the charge is the stealing of the donation box of a religious institution and that is what has to be justified. In the case before us the Special Presidential Commission found that the Minister of Justice identifiable with the petitioner has in fact used his official position and authority for private ends by unlawfully directing the Director of Public Prosecutions in respect of presenting an indictment for murder. Hence the defendants claim that they are justified in portraying the plaintiff in the manner described in paragraph 8 of the plaint. They submit that the gravamen of the charge and the substance of the allegation is that the Minister of Justice using his official position and authority interfered with the head of a department under him in an unlawful manner for his private ends in respect of a prosecution for a serious offence. This is the allegation they have to justify and pointing to the findings of the Special Presidential Commission they say they can do it. If the allegation is true the reference to deceitfulness and untrustworthiness can easily pass muster as fair comment. The additional episode of the Bribery Commissioner resigning in protest would be legitimate dramatist's comment and a permissible artistic flourish meant to point the moral of the story.

A person who is a public figure, and who has been a charismatic political leader wielding wide-ranging powers, and who still looks forward to a political future cannot complain if the truth about him is told and his actions and conduct are made the subject of fair dramatic comment. Take the case of *Woodward v Hutchins.*[24] Here a group of pop stars going by the professional names of Tom Jones, Engelbert Humperdinck, Gilbert O' Sullivan and Gordon Mills, all leading lights in the show business, had employed a press agent whose main assignment was to present the group to the public in a favourable light. Differences arose between the press agent and the group and the press agent wrote a series of articles to the Daily Mirror in which he revealed some unsavoury secrets and scandals about the private lives of some members of the group. Three articles appeared and then Tom Jones and others of the group sought an injunction to restrain further publication of the series. The Daily Mirror and the press agent intimated they were going to plead justification. Lord Denning who wrote the leading judgment in the case said as follows at p. 754:

"They are going to say that the words in the article are true in

24. [1977] 2 All E.R. 751.

substance and in fact. In these circumstances it is clear that no injunction would be granted to restrain the publication. These courts rarely, if ever, grant an injunction when a defendant says he is going to justify. The reason is because the interest of the public in knowing the truth outweighs the interests of a plaintiff in maintaining his reputation" (Emphasis mine).

If the image which a public figure has fostered is not the true image, it is in the public interest it should be corrected.

Learned Counsel for the petitioner, apart from contending that there was no factual basis for the pleas of justification and fair comment, submitted that it is not open to a defendant to advance the pleas of justification and fair comment when he has pleaded that he is unaware of the scenes and episodes complained of. He relied on the case of *Heilbron v Blignaut* (supra). This case concerned the apprehended publication of a defamatory article in a newspaper. The defendant had averred in his affidavit that the article in question was not defamatory but nevertheless he would be able to avail himself of both the defences of fair comment and truth and public benefit. Greenberg, J. who decided the case cited held that the defendant was not entitled in an affidavit to set up facts in the alternative, in one breath to say that there was no defamation and in the other to say that the defamatory matter is true. The learned Judge proceeded on the basis that you cannot have alternative facts in an affidavit. But why cannot a defendant say by way of defence that the words complained of are not defamatory but, even if they are, they are true? If A accuses B of making a defamatory statement about him, B can well say "I cannot recall having said this. But if I said it, it is true and I will prove it" or, "what I said is not defamatory but even if it is, it is true." I am of the view therefore that the decision in *Heilbron v Blignaut* (supra) so far as it relates to alternative averments in an affidavit is wrong. In fact C. F. Amerasinghe in his book **"Defamation and other Injuries"** has expressed his doubts as to the correctness of Greenberg, J.'s ruling on this point. I am of the opinion therefore that there is no legal bar to the pleas of justification and fair comment raised by the defendant. The plaintiff has failed to discharge the burden that lay upon him to show that the pleas of justification and fair comment cannot be set up.

At the trial it will be the task of the defendants to prove the truth of the defamatory scenes and episodes concerning the plaintiff depicted in the film. If they fail they expose themselves to be cast in aggravated damages. At the present stage once the pleas of justification and fair comment are taken and it does not

appear to the Court that the defendants are not in a position to prove it, an interim injunction cannot be issued.

I will turn to two further matters (though they were referred to earlier) because of their practical significance. Firstly, where all the other material is sufficient for the issue of an interim injunction, still it must be shown when an interim injunction *quia timet* is sought that danger is imminent. If the danger is not imminent the court may not give such assistance for the simple reason that such assistance is not required. In the instant case the document entitled "Crime, Punishment and Society" by Gamini Fonseka produced marked A1C shows that the film is not yet ready for exhibition. It is still with the Censors. There had been a show before the Censors on 28th January 1980 and again on 14th February and another screening had been fixed for 28th February. Gamini Fonseka explains that this is a colour film and what is submitted for censorship is the "cutting copy;" in other words a whole series of shots stuck together with cellotape. Each time the film runs through the projector there is damage to the film. If the damage is extensive then the producer is compelled to reprint, re-edit and sometimes even re-mix the sound-tract. This can happen. Already the print of the film is fairly badly damaged. A further viewing has been deemed necessary by the Censor Board. This was because the entire Board had not seen the picture. Further, the film had to be processed outside the country in Hong Kong. The entire process of cutting the negative, grading and printing had to be done outside Sri Lanka and for this technicians had to be sent from here to the laboratory abroad and maintained there at the expense of the producer until the work was completed. It will be seen therefore that the film will be subjected to many more processes before it is ready for exhibition. Secondly, in this case there is no affidavit from anyone who has seen the film. The first defendant has given the assurance that he will not release for exhibition anything that is defamatory which cannot also be justified. If we leave out the admissions that were made for the purpose of the argument, there is no firsthand account of what the film really contains. The plaintiff himself has not seen it. At one stage he sought the co-operation of the first defendant to arrange for a screening. The first defendant does not have the film in its possession and its officers do not know what exactly the film contains. There is authority for the proposition that the petitioner is not entitled to get the 1st defendant to arrange for a screening for his benefit so that he could identify exactly what scenes and episodes he was complaining of. On a somewhat similar point

which arose in the case of *Collins v Jones*[25] Lord Denning had the following trenchant observations to make:

> "A plaintiff is not entitled to bring a libel action on a letter which he has never seen and of whose contents he is unaware. He must in his pleading set out the words with reasonable certainty; and to do this he must have the letter before him, or at least have sufficient material from which to state the actual words in it. A suspicion that it is defamatory is not sufficient. He cannot overcome this objection by guessing at the words and putting them in his pleading. The court will require him to give particulars so as to ensure that he has a proper case to put before the court and is not merely fishing for one. If he cannot give the particulars he will not be allowed to go on with the charge."

In the instant case the plaintiff is complaining about scenes and episodes in a film he has not seen. Apparently he is going on what others have told him. He is anxious to see the film himself to pick out what is defamatory of him. There are no affidavits before the Court of what the film contains from persons who have seen it screened. In any event the exhibition of the film is a long way off. In these circumstances too an interim injunction cannot issue.

The order of the learned District Judge is therefore affirmed. The application for revision is dimissed with costs. Let the case record be sent back for the trial to proceed after an opportunity is given to the defendants to file their answer.

Rodrigo, J. I agree.

Application dismissed.

25. [1965] 2 All ER 145, 146.