HENTLEY GARMENTS LTD. v. J. S. A. FERNANDO

COURT OF APPEAL
RANASINGHE, J. & RODRIGO, J.
C.A. (S.C.) APPLICATION 624/78 D.C. MT. LAVINIA 235/Z
JUNE 4 & 5, 1980

Contract – Agreement in restraint of trade – Considerations for issue of interim injunction.

The petitioner company carrying on the business of manufacturing and exporting of garments, instituted action in the District Court against the respondent who was at one time employed by the petitioner company as a shift supervisor, for breach of a written contract of employment resulting from his resignation. The petitioner company sought an interim injunction against the respondent restraining him from engaging himself in employment in any garment manufacturing or exporting business in terms of the contract. After inquiry the learned District Judge refused to issue an interim injunction and vacated the enjoining order initially issued. The petitioner company appealed from that order.

Held:

"All contracts in restraint of trade are *prima facie* void, and each case must be examined having regard to its special circumstances to consider whether or not the restraint is justified. The only ground of justification is that the restraint is reasonable having regard to interests of both contracting parties as well as to the interests of the public".

There was a serious question to be tried at the trial and this was not a case where material available to the District Judge at the time the order was made showed unmistakably that there was no case for an injunction at all; or that there was probably no right of the plaintiff which could have been violated. The facts and circumstances of the case seemed to show that this was a case where the learned District Judge should have dealt with the application for the interim injunction and the substantial dispute at one and the same time. The order was set aside and interim injunction as prayed for was directed to be issued.

Cases referred to:

(1) *Jinadasa* v. *Weerasinghe* (1929) 31 NLR 33.
(2) *Dissanayake* v. *Agricultural & Industrial Credit Corporation* (1962) 64 NLR 283.
(3) *Richard Perera* v. *Albert Perera* (1963) 67 NLR 445.
(4) *Mallika Ratwatte* v. *The Minister of Lands* (1969) 72 NLR 60.
(5) *American Cyanamid Co.* v. *Ethicon Ltd.* 1975 (1) AER 504.
(6) *Herbert Morris Ltd.* v. *Saxelby* 1916 - 1917 AER 305 at 314; (1916) 1 AC 88.
(7) *Mitchel* v. *Reynolds* (1711) 1 P Wms 181.
(8) *Maxim Nordenfelt Gun Company* v. *Nordenfelt* (1894) A.C. 535.
(9) *Mason Provident Clothing & Supply Co. Ltd.* 1913 A.C. 724.
(10) *Foster & Sons Ltd.* v. *V. Suggett* (1918) 35 TLR 87.

(11) *Commercial Plastics Ltd.* v. *Vincent* (1964) 3 AER 546.
(12) *Esso Petroleum Co. Ltd.* v. *Harper's Garage (Stourport) Ltd.* (1967) 1 AER 699.
(13) *Yakkaduwe Sri Pragnarama Thero* v. *Minister of Education* (1968) 71 NLR 506 at 511.
(14) *Marian White Ltd.* v. *Francis* (1973) 3 AER 857.

APPEAL from the Order of the District Court of Mt. Lavinia.

H. W. Jayewardene, Q.C. with *K. N. Choksy* for the plaintiff-petitioner.

C. Ranganathan Q.C. with *E. R. S. R. Coomaraswamy* for the defendant-respondent.

Cur adv vult.

26th June, 1980.
RANASINGHE, J.

The petitioner-Company (hereinafter referred to as "the Petitioner"), which carried on the business of manufacturing and exporting of garments, has instituted proceedings in the District Court of Mount Lavinia on 8.3.1978 in Case No. 235/Z against the Respondent on the footing that the Respondent, who was employed by the Petitioner as an Apprentice Shift Supervisor with effect from 1.3.77 and was subsequently confirmed in the said post as from 17.10.77, has, by tendering his resignation from the employment of the petitioner, by his letter dated 31.1.78, committed a breach of his contract of employment entered into with the Petitioner on 17.10.1977 (a copy of which said contract is the document marked "D" annexed to the petition), and has prayed, *inter alia,* for an interim injunction "restraining the respondent from engaging himself in employment in any garment manufacturing or exporting business".

The learned District Judge thereupon issued an ex parte Order enjoining the respondent accordingly pending the disposal of the application for the interim injunction. The respondent then filed objections to the issue of an interim injunction and also moved that the said enjoining order be vacated. After inquiry, the learned District Judge, by his order dated 22.6.78, refused the Petitioner's application for an interim injunction, and vacated the said Enjoining Order.

The learned District Judge has in his Order held that several of the terms and conditions set out in the said document marked "D" are unreasonable and illegal in that they constitute "a business or trade restraint", and that the respondent is not therefore bound by the terms and conditions of the said document "D".

A consideration of the principles, which should guide a Court in deciding whether or not to issue an interim injunction, would at this stage be most helpful.

In the case of *Jinadasa v. Weerasinghe*[1] Dalton, J. expressed the view that in an application for an interim injunction the Court "must be satisfied that there is a serious question to be tried at the hearing and that on the facts before it there is a probability that the plaintiff is entitled to relief". The application for an interim injunction was, however, refused in that case for the reason that, on the averments set out in the plaint itself, it was clear that there was "no case for an injunction at all".

The matters, which should be taken into consideration by a Court from which an interim injunction is prayed for, were considered by (H.N.G.) Fernando, J. (as His Lordship the Chief Justice then was) in the case of *Dissanayake v. Agricultural and Industrial Credit Corporation*[2]. In that case a land which had been mortgaged to the A.I.C.C. was sold by the said Corporation in pursuance of the statutory powers vested in it. Thereupon the mortgagor instituted an action for a declaration that the said sale was void on the grounds of material irregularity, and he also moved for an interim injunction to restrain the said Corporation from confirming the said sale. The learned District Judge held an inquiry which turned out to be a virtual trial of the principal dispute in the action, and, having taken the view that the plaintiff's objections were frivolous, he dismissed the plaintiff's application for an interim injunction. (H.N.J.) Fernando, J. set aside the order of the learned District Judge and in directing that an interim injunction do issue, expressed the view that the learned District Judge's opinion that the plaintiff could not succeed in his substantive action is not by itself a ground for refusing an interim injunction. His Lordship further stated, at page 285 as follows:

> "The proper question for decision upon an application for an interim injunction is 'whether there is a serious matter to be tried at the hearing' *(Jinadasa v. Weerasinghe).* If it appears from the pleadings already filed that such a matter does exist, the further question is whether the circumstances are such that a decree which may ultimately be entered in favour of the party seeking the injunction would be nugatory or ineffective if the injunction is not issued".

The question was once again considered by (H.N.G.) Fernando, J. in the case of *Richard Perera v. Albert Perera.*[3] In that case the

plaintiff sued for a declaration that he was the life Managing Director of the 5th Defendant-Company of which the 1st to 3rd defendants were Directors and the 4th Defendant-Company the Agents and Secretaries. The plaintiff also prayed for an interim injunction restraining the defendants from removing him from the office of Managing Director and from interfering with his duties and functions in that capacity. The defendants averred that the plaintiff had obtained loans from the Company and had thereby vacated his office of Managing Director by virtue of the provisions of Article 72(5) of the Table "A" of the Companies Ordinance. When the matter was taken up for inquiry before the learned District Judge the plaintiff admitted that he borrowed money from the Company. The learned District Judge, taking the view that the proviso to Article 72 operated to prevent vacation of office by the plaintiff, however, made order allowing the application for an interim injunction. Fernando, J. set aside the order of the learned District Judge, and, whilst re-affirming the view earlier expressed in Dissanayake's case *(supra)*, His Lordship expressed as follows at page 447:

> "While adhering to the view that the trial Judge should not decide the substantive question in considering an application for an injunction, I do not agree that some consideration of the substantive question at this early stage is necessarily irrelevant";

and at page 448:

> "Where the plaintiff through his Counsel and his evidence reveals information which justifies the *prima facie* view that he is not entitled to the substantive relief claimed in his plaint, it would, in my opinion, be wrong for a judge to ignore such information and issue the injunction. If the material actually placed before the Court reveals that there is probably no right of the plaintiff which can be violated, it would be unreasonable to issue the injunction".

It was contended on behalf of the plaintiff that what the learned District Judge had done was in effect decide the substantive question in dispute between the parties and that the learned District Judge should not have taken that course but should have restricted himself to considering whether there was a serious matter for decision and if so, whether prejudice would be caused to the plaintiff if the said injunction was not granted. It has to be noted that, even though His Lordship agreed with the view that the learned District Judge had in effect decided the substantial dispute between the parties, yet refused the plaintiff the interim injunction which the

plaintiff was seeking to obtain. The reason why His Lordship made such an order was due to the particular circumstances of that case. A document filed by the plaintiff himself with his pleadings and an admission made by the plaintiff's pleader at the inquiry, clearly supported the defence position that the plaintiff had, by his own actions, vacated his office as life Managing Director. The material which was thus placed before the learned District Judge at the inquiry into the application for the issue of the interim injunction revealed that "there is probably no right of the plaintiff which could be violated" and justified "the *prima facie* view that he (plaintiff) is not entitled to the substantive relief claimed in the plaint". It was in these circumstances that His Lordship expressed the view referred to above at page 447:

> "I do not agree that some consideration of the substantive question at this early stage is necessarily irrelevant".

It has to be noted that His Lordship did at page 449 state that it was also not a case where the grant of an injunction would ensure the maintenance of the status *quo* at the time of the institution of the plaint.

A consideration of the judgment of Fernando, J. in *Perera's case (supra)* shows that, whilst re-affirming the principle laid down earlier in the *Dissanayake case (supra)*, His Lordship nevertheless proceeded to modify it somewhat by stating that some consideration of the substantive question even at that early stage is not necessarily irrelevant.

In the case of *Mallika Ratwatte v. The Minister of Lands*,[4] it was laid down that; in order that an interim injunction may issue, it is not necessary that the Court should find a case which would entitle the plaintiff to relief at all events: that it is quite sufficient if the Court finds a case which shows that there is a substantial question to be investigated and that matters ought to be preserved in status *quo* until the question can be finally disposed of.

The principles that should be followed in deciding whether or not an interim injunction should be issued have been considered in England by the House of Lords in the case of *American Cyanamid Co. v. Ethicon Ltd.*[5] where it was laid down that: there is no rule of law that the court was precluded from considering whether, on a balance of convenience, an interlocutory injunction should be granted unless the plaintiff succeeded in establishing a *prima facie* case or a probability that he would be successful at the trial of the

action: all that was necessary was that the court should be satisfied that the claim was not frivolous or vexatious, i.e. that there was a serious question to be tried. At page 510 Lord Diplock stated:

> "It is no part of the Court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts in which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial . . . . . So unless the material available to the court at the hearing of the application for an interlocutory injunction fails to disclose that the plaintiff has any real prospect of succeeding in his claim for a permanent injunction at the trial, the court should go on to consider whether the balance of convenience lies in favour of granting or refusing the interlocutory relief that is sought".

These then are the principles which are relevant in determining whether or not an interim injunction should have issued in this case against the respondent. I shall now proceed to consider the material which is relied on by the plaintiff in support of his claim for an interim injunction. Before doing so I should refer to the argument advanced on behalf of the respondent: that the consideration of this question should be limited to the material set out in the plaint and the exhibits annexed thereto, and that any material arising from the evidence led at the inquiry should not be considered for this purpose.

Reliance was placed by learned Queen's Counsel for the respondent on the judgment of Lord Shaw in the case of *Herbert Morris Ltd. v. Saxelby.*[6] Be that as it may, in the present case, however, the position is that at the time the learned District Judge came to make his order he had before him not only the plaint and the exhibits annexed to the plaint, but also the evidence placed before him, without any objection, by both parties. In fact in the *Perera Case (supra)* the material elicited at the inquiry into the application for the interim injunction was not only considered but also weighed heavily in the ultimate decision not to issue the interim injunction prayed for. It appears to me to be too late for the respondent to move that the court do shut its eyes to the material elicited at the inquiry held before the learned District Judge on 10.4.78.

The plaint is based upon an alleged breach of clause (3) of the Contract of Employment, the document "D", which is as follows:

> "In consideration of the training you have just completed at Hentley Garments Limited, you will hereby agree and undertake that you will serve in the employment of Hentley Garments Limited for a minimum period of three years after confirmation of your services. In the event of your not serving as aforesaid or your employment being terminated for any reason whatever, you will further undertake that you will not take employment in any garment manufacturing or exporting business for a period of three years calculated from the date of your confirmation. In the event of any breach by you of this undertaking, Hentley Garments Limited will be entitled to restrain you by action at law and by injunction, and you will be liable to repay to Hentley Garments Limited by way of liquidated damages a sum equivalent to the aggregate amount paid to you during the period of your training and probation".

The position taken up by the respondent is that the restraint imposed by the Petitioner "is a restraint on the opportunity given to the Respondent to earn his livelihood", and "fails to satisfy the test of reasonableness between the parties and in the public interest as required by law", and that it cannot therefore be enforced.

Covenants embodied in contracts in restraint of trade fall into two familiar categories, viz. those by which an employee agrees that after leaving his present employment he will not compete against his employer either by setting up business on his own account or by entering the service of a rival trader, and those by the vendor of the goodwill of a business not to carry on a similar business in competition with the purchaser. In this case we are concerned only with the earlier category.

The development of the English law relating to restraint of trade has been greatly influenced by changing social concepts and conditions. Having begun with the view that all restraints of trade, whether general or partial, as being totally void as they tend to foster monopolies, in the year 1711 in the case of *Mitchel v. Reynolds,*[7] the view was taken that although a general restraint is necessarily void yet a partial restraint is *prima facie* valid and enforceable, if reasonable. Thereafter in 1894, in the case of *Maxim Nordenfelt Gun Co. v. Nordenfelt*[8] the House of Lords held that the old rule that general restraints were bad always and that partial restraints were bad if unreasonable has been modified and that the true test of the validity of a condition in restraint of trade is whether the restraint in the particular case, be it general or particular, is or is not reasonable. Subsequently, in the case of *Mason v. Provident Clothing and Supply Co. Ltd.*[9] the House of Lords laid down that all covenants in restraint

of trade, whether partial or general, are deemed to be *prima facie* void and unenforceable unless the test of reasonableness propounded by Lord Macnaghten in the *Nordenfelt case* was satisfied. Their Lordships did also stress a sharp distinction between contracts of service and contracts for the sale of business, stating that a restraint may be imposed more readily and more widely upon the vendor of a business in the interests of the purchaser than upon a servant in the interests of a master. The House of Lords thereafter, in the year 1916, gave effect to these principles in the case of *Herbert Morris Ltd. v. Saxelby (supra),* by holding that a covenant which restraints a servant from competition is always void as being unreasonable, unless there is some exceptional proprietary interest owned by the master, whether in the nature of a trade connection or in the nature of trade secrets, which requires protection. A restraint against competition by a servant has been held to be justifiable if its object is to prevent the exploitation of trade secrets learned by the servant in the course of his employment – vide *Forster and Sons Ltd. v. Suggett.*[10] In such a case the employer would have to prove definitely that the servant has acquired substantial knowledge of some secret process or mode of manufacture used in the course of his business. Even the general knowledge derived from secret information which has taught an employee how best to solve particular problems as they arises may be a proper subject-matter of protection – vide *Commercial Plastics Ltd. v. Vincent.*[11] The most recent decision in the development of this branch of the law in England appears to be the decision of the House of Lords in the case of *Esso Petroleum Co. Ltd. v. Harper's Garage (Stourport) Ltd.*[12] in which their Lordships affirmed the principles laid down in the *Nordenfelt case (supra).* In the course of their respective judgments their Lordships did, however observe: that the words of Lord Macnaghten in the *Nordenfelt case* were not intended to indicate that "any contract which in whatever way restricts a man's liberty to trade was (either historically under the common law or at the time of which they were speaking) *prima facie* unenforceable and must be shown to be reasonable" (per Lord Wilberforce, at page 730): that the changing face of commerce must always be borne in mind (*per* Lord Pearce, at p. 724): that restrictions which in an earlier age were classified as restraints of trade may, in the different circumstances of today have become "part of the accepted pattern or structure of trade" as encouraging rather than limiting trade (*per* Lord Wilberforce at p. 731); that certain restrictive agreements have now "passed into the accepted and normal currency of commercial or contractual or conveyancing relations", and are therefore no longer suspect (*per* Lord Wilberforce, at P. 729).

Weeramantry: Law of Contracts, sec 396, at page 384, summarises the position thus: "therefore all contracts in restraint of trade are *prima facie* void, and each case must be examined having regard to its special circumstances to consider whether or not the restraint is justified. The only ground of justification is that the restraint is reasonable having regard to the interests of both contracting parties as well as to the interests of the public".

The Petitioner has, in the plaint filed before the District Court, averred that:

"(11). (a) The defendant in breach of the contract dated 17.10.77 has taken up employment with a garment manufacturing business, Aitken Spence Garments Limited which is a competitor of the Plaintiff.

(b) The defendant after specialised training and skill in the day to day functioning, production, efficiency, supervision, co-ordination and control of the working of the manufacturing of garments left the services of the plaintiff in breach of his said contract with the plaintiff and joined another garment manufacturing business.

(c) .....

12. .....

13. .....

14. The Plaintiff further pleads that grave and irreparable loss and damage will be caused to the Plaintiff unless the defendant is restricted by an interim injunction from being in breach of the said contract dated 17.10.77 marked "D".

At the hearing before this Court learned Queen's Counsel on both sides referred this Court to the evidence placed before the learned District Judge on behalf of the parties.

The defendant in the course of his evidence stated, *inter alia,* in examination-in-chief:-

"පැමිණිලිකාර සමාගම වන සීමාසහිත හෙන්ට්ලි ගාමන්ට්ස් සමාගමේ මා කළ යුතු සේවය වූයේ ඇඳුම් කපන අංශයෙන් රෙදි කපා දුන්නාට පසුව ඒවා නිෂ්පාදන අංශයට දී එහි සේවක පිරිස හරිහැටි අවසාන කරනවාද කියා බලා ගැනීමය. ඇඳුම් කැපීම කළේ මම නොවේ. . . . . මගේ සේවය ස්ථිර කිරීමෙන් පසුවත් මම කළේ කලින් කරමින් සිටි වැඩ කොටසමය. විශේෂ ප්‍රහුණුවක් මට

කවුරුත් දුන්නේ නෑ. මට උපදෙස් පමණයි ලැබුණේ. පරීපාලන කටයුතු කිරීමට පමණක් සහ ඇඳුම් පැළඳුම් සෑදීම ගැන මට උපදෙස් ලබුණා. . . . . වී 2 දරණ සීමාසහිත එයිටිකන් ස්පෙන්ස් (ගාමන්ට්ස්) සමාගමේ ලිපිය අනුව මට ලැබුණේ කණිෂ්ඨ විධායක තනතුරකි. . . . . මේ නිසා දිනකට මට රු. 30 ක පාඩුවක් දැරීමට සිදු වී තිබෙනවා."

and, under cross-examination, as follows:–

" . . . . පැමිණිලිකාර සමාගමේ මම සේවය කළේ ඇඳුම් නිෂ්පාදනය කරන අංශයේ (ප්‍රොඩක්ෂන්ලයින්) කියාය. . . . . මේ වැඩ සියල්ලක්ම ඒකාබද්ධ කිරීම මට අයිතිව තිබෙන කාර්යයකි. සෑම වැඩ කරන දිනයක නිෂ්පාදනය කළ යුතු නියමිත අඩුම ඇඳුම් සංඛ්‍යාවක් තිබෙනවා. එම නිෂ්පාදනය කිරීමේ ගණන් ප්‍රමාණය සෑදීම මගේ වගකීමයි. . . . . 'ඇප්‍රන්ට්ස්' යන්නෙන් මා හේරුම් ගන්නේ එය පුහුණුවීමක් ලැබිය යුතු තනතුරක් බවය. නමුත් එවැනි පුහුණුවීමක් පැමිණිලිකාර සමාගමෙන් මට ලැබුණේ නැත. . . . . 1978.2.1 වන දිනය මම සීමාසහිත එයිටිකන් ස්පෙන්ස් (ගාමන්ට්ස්) සමාගමේ සේවයට බැඳුනේ. මම උසාවියට කියන්නේ මම මේ සමාගමේ නිෂ්පාදන සැලසුම් කරනවා කියාය. ඇඳුම් නිෂ්පාදනය කිරීම සැලසුම් කළා මම.

ප්‍ර: නිෂ්පාදන සැලසුම් කියන්නේ මොන අන්දමේ වැඩද?

උ: ඉදිරියට කරන්නට තිබෙන දේ ගැනය සැලසුම් කළේ.

ප්‍ර: එය පැහැදිලි කර කියන්න පුළුවන්ද?

උ: මට එම ප්‍රශ්නයට පිළිතුරු දෙන්න බැහැ. එය පුද්ගලික හා රහස් දෙයක් නිසා.

ප්‍ර: එය පුද්ගලික සහ රහස් වන්නේ තමා එම සමාගමේ කරන්නේත් හෙන්ට්ලි සමාගමේ කරගෙන ගිය වැඩ කොටස නිසාද?

උ: නැත.

ප්‍ර: නිෂ්පාදන සැලසුම් කියන්නේ මොනවාද?

උ: (උත්තරයක් නැත)

. . . . . .

. . . . . .

ප්‍ර: පැමිණිල්ලෙන් කියන්නේ තමා හෙන්ට්ලි (පැමිණිලිකාර සමාගමේ) සමාගමේ ලැබුණු පුහුණුව හේතුකොට ගෙන තමාගේ මතු දියුණුව ඇති කර ගන්න පුළුවන් වුනා කියාය.

උ: ඔව්.

and, under re-examination, as follows:

"පැමිණිලිකාර සමාගමේ දී මම යම්කිසි රහස් කිසිවක් එකතු කර ගත්තා නම්, ඒවා කිසිවක් දැනට වැඩ කරන එයිට්කන් ස්පෙන්ස් සමාගමේදී ක්‍රියාවේ යොදවන්න මට කිසිම අවස්ථාවක් ඇති වුනේ නෑ. පැමිණිලිකාර සමාගමේ මම කළේ පරිපාලන කටයුතුය. . . . . පැමිණිලිකාර සමාගමේ දී මම සැලසුම් නිෂ්පාදනය කළේ නෑ. දැනට මා රක්ෂාව කරන ස්ථානයේ කිසිම පරිපාලන කටයුත්තක් මම කළේ නැත. . . . ."

The only witness called on behalf of the Petitioner in the inquiry was the witness Donald Gray, the Petitioner's Production-Manager. This witness stated in his examination-in-chief:

"විත්තිකරුට පුහුණුවක් ලබා දුන්නා. ඔහු කියා සිටියා නම් ඔහුට උපදෙස් පමණයි ලැබුණේ කියා, එය වැරදිය. පුහුණු කිරීමේ අවස්ථාවල් තුනක් තිබෙනවා. 1 වන අවස්ථාව ඇඳුම් කැපීම සහ මැසීමය. 2 වන අවස්ථාව නම් එහි තත්ත්වයයි. 3 වන අවස්ථාව නම් නිෂ්පාදනය කිරීමේ කළමනාකාරිත්වයයි. . . . . විදේශවලින් අපෙන් බඩු ඉල්ලා එවනවා. එම විදේශ රටවලින් විශේෂඥයෝ අප කර්මාන්තශාලාවලට එනවා බලන්න අප වැඩ කරන තත්ත්වය කොහොමද ඔවුන්ට උවමනා කරන තත්ත්වයේ ඇඳුම් අපට මසා එවිය හැකිද කියා බලන්න. එම විශේෂඥයන්ගෙන් ලැබුණු උපදෙස් විත්තිකරුටත් ප්‍රයෝජනවත් කර ගැනීමට ඉඩ සැලසුනා. . . . . නිෂ්පාදන සැලසුම් කිරීම ඔහු පැමිණිලිකාර සමාගමේදී ලැබූ පුහුණුවේ කොටසකි. පරිපාලන කටයුතුද ඔහුගේ එක් රාජකාරී අංශයට අයිතිවන කොටසකි. . . . . මෙම ලිපියේ ('සී' දරණ ලිපියේ) කියා තිබෙනවා විත්තිකරුට ඔහු ඔහුගේ වැඩ කොටස හොඳාකාරව කරනවා නම් නිෂ්පාදන පරිපාලක විශයෙන් ඔහුගේ තනතුර ස්ථිර කර පඩි වැඩිවීමක් කරනවා කියා. . . . ."

and, under cross-examination:–

". . . . මේ රාජකාරිය අතුව ඔහු එක සැලසුම්කරුවෙක් හැටියට සලකන්න පුළුවන්. . . . . විදේශීය රටවලින් විශේෂඥයෝ පැමිණි විට ඔවුන්ගෙන් අප ඉගෙන ගත් දෙය විත්තිකරුවන් කියා දුන්නා. . . . ."

On a consideration of the principles set out in the cases dealing with contracts in restraint of trade referred to above, it would appear that, although a restrictive covenant in a contract of service would be considered to be *prima facie* void, yet, it is open to the employer to show that, having regard to the particular facts and circumstances in which the said agreement has been entered into, the said agreement is reasonable. The employer would therefore have to place before court all the evidence upon which he relies to establish the reasonableness of the covenants complained against. In such a case the reasonableness of such a restrictive covenant will have to be decided by court upon a consideration of not only the entirety of the evidence which the parties desire to and are entitled to place before

court but also the principles of law relevant to this matter. Such a final decision cannot and must not be taken at an inquiry into an application for an interim injunction, the nature and the scope of which is, as set out by the principles referred to earlier, very limited.

On a consideration of the averments set out in the plaint and the exhibits annexed to the plaint and those items of oral evidence led at the inquiry, and referred to earlier, it appears to me that there is a serious question to be tried at the trial and that this is not a case where the material available to the learned District Judge, at the time the order in question was made, showed unmistakably that there was "no case for an injunction at all" (31 N.L.R. p. 33) or even "that there is probably no right of the plaintiff which can be violated" (67 N.L.R. p. 448).

The views expressed by the learned District Judge in his order dated 22.6.78, referred to earlier, show that the learned District Judge has arrived at a finding on the main and the most crucial matter in which the parties are at variance, viz: whether clause (3) of the document "D" referred to earlier, constituted a restraint on the respondent's freedom of employment, and, if so, whether such restriction is reasonable. Such a decision, to say the least, is not only premature, but also unfair particularly by the employer who would not have placed at such an inquiry all the evidence which he would have placed at the trial itself.

I shall now proceed to consider whether the balance of convenience lies in favour of granting or refusing the interim injunction. This principle has been discussed by Lord Diplock at page 510 (f to i) in the judgment in the *American Cyanamid case (supra).* In the local case of *Yakkaduwe Sri Pragnarama Thero v. Minister of Education,*[13] (H.N.G.) Fernando, C.J. too considered this principle. The loss which the respondent would sustain in the event of his ultimately succeeding at the trial, if he were now restrained by an interim injunction, would, in my opinion, be adequately met by an order for damages against the Petitioner. The extent of any such loss sustained by the respondent is capable of determination with near precision. It would, on the other hand, be very difficult to assess the damages that would and could have been suffered by the Petitioner as a result of the respondent's continuance of what he is being sought to be prevented from doing, if the Petitioner was to succeed in establishing its rights at the trial.

According to clause (3) of the document "D" referred to earlier, the respondent has been confirmed in his post as from 1.10.77; and accordingly the period of three years during which he could, if at all, be restrained in terms of the said clause would expire on 1.10.1980.

As already stated the Petitioner instituted these proceedings on 8.3.1978. The order sought to be revised was made on 22.6.78; and the present application to this Court was made on 4.7.78. In the case of *Marian White Ltd. v. Francis,*[14] the Court of Appeal in England did, in a similar application, proceed to grant to the petitioner the relief sought for (which was a declaration) even though by that time the period, during which the restrictive clause was to be in operation, had long expired. In these circumstances, even though there now remains only a period of about three months, it appears to me that the Petitioner should not be denied on this ground alone the relief the Petitioner has moved for, as far back as March, 1978.

There is just one other matter I would like to refer to. The facts and circumstances of this case seem to me to show that this is a case where the learned District Judge should have followed the observations of (H.N.G.) Fernando, C.J. in the *Perera case (supra)* and dealt with the matter of the application for an injunction and the substantive dispute at one and the same time.

For the reasons set out above I make order setting aside the Order made by the learned District Judge on 22.6.80 dismissing the application for an interim injunction; and I direct that an interim injunction, as prayed for in paragraph (c) of the plaint, be issued to be in operation till 1.10.1977 upon the petitioner depositing, as security, a sum of Rs. 2,500/- in cash.

The parties are to bear their costs of this application. The costs of the inquiry held in the District Court are to abide the final decision of the action instituted by the Petitioner (the plaintiff) in the District Court.

RODRIGO, J. – I agree.

Appeal allowed.