

**IN THE SUPREME COURT OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA**

In the matter of an Application for Special Leave to Appeal to the Supreme Court under and in terms of Article 128(2) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

NIHAL SRI AMERESEKERE, of
No.167/4, Sri Vipulasena Mawatha,
Colombo 10.

PLAINTIFF-RESPONDENT-PETITIONER

S.C. Special Leave to Appeal
Application No. 18/92
Court of Appeal Leave to
Appeal Application Nos.206/91
D. C. Colombo Case No.3155/Spl.

- Vs -

1. MITSUI AND COMPANY LIMITED, a Company organized and existing under the Laws of Japan and having the Principal Place of business at 2-1, Ohtemachi 1-Chome, Chiyoda-Ku , Tokyo, Japan and having a Liaison office and/or a Place of business in Sri Lanka at No.315, Vauxhall Street, Colombo 02.
2. TAISEI CORPORATION, a Company organized and existing under the Laws of Japan and having the Principal place of business at 25-1, Nishi-Shinjuku 1-Chome, Shinjuku-ku, Tokyo, Japan and having a Liaison Office and/or Place of business in Sri Lanka formerly at No.65, High Level Road, Maharagama and presently at Hilton Hotel Colombo.

1ST & 2ND DEFENDANT-PETITIONER -
APPELLANT-RESPONDENTS

3. KANKO KIKAKU SEKKEISHA YOZO SHIBATA & ASSOCIATES, Architects & Designers, a corporation duly organized under the Laws of Japan and having the Principal Place of business at No.9, Mori Building 1-2-2, Atago, Minato-ku, Tokyo, Japan.
4. HOTEL DEVELOPERS (LANKA) LIMITED, formerly known as LANKA-JAPAN HOTELS LIMITED, of No.16, Alfred Place, Colombo 03.
5. CORNEL LIONEL PERERA, Chairman/Managing Director, Hotel Developers (Lanka) Limited, of 16, Alfred Place, Colombo 03.

6. FREDERICK GERMAIN NOEL MENDIS, Director, Hotel Developers (Lanka) Limited, and of No.51/3, Dharmapala Mawatha, Colombo 03.
7. KAIRSHASP NARIMAN CHOKSY, Director, Hotel Developers (Lanka) Limited, and of 23/2, Sir Ernest de Silva Mawatha, Colombo 07.
8. DON PETER SEVERINUS PERERA, Director, Hotel Developers (Lanka) Limited, and of No.696/2, Havelock Road, Colombo 06.
9. KAZUTAKA KOBOI, Director, Hotel Developers (Lanka) Limited, and of 6-38, Fujimicho, Chigasaki, Kasagawa, Japan.
10. KANAPATHIPILLAI SHANMUGALINGAM, Director, Hotel Developers (Lanka) Limited, and of No.4, Ramakrishna Avenue, Colombo 06 and presently of 73, Isipatana Mawatha, Colombo 5.
11. KOJI ITO, Director, Hotel Developers (Lanka) Limited, and presently of No.315, Vauxhall Street, Colombo 02.

3RD TO 11TH DEFENDANT-
RESPONDENT-RESPONDENTS

TO: HIS LORDSHIP THE CHIEF JUSTICE AND THEIR LORDSHIPS THE OTHER JUDGES OF THE SUPREME COURT OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA.

On this 20th day of February 1992.

THE PETITION of the Plaintiff-Respondent-Petitioner above named (hereinafter sometimes called and referred to as "THE PLAINTIFF") appearing by Mr. J.W.D. Perera, practising under the name and style of De Silva & Perera, and his Assistant Mr. Vernon Gooneratna, his Attorneys-at-Law, states as follows:

1. The Plaintiff as a Shareholder of Hotel Developers (Lanka) Ltd., the 4th Defendant-Respondent-Respondent above named (hereinafter sometimes called and referred to as the "4TH DEFENDANT COMPANY"), instituted a Derivative Action, on the 13th September 1990, against the Defendant-Petitioner-Appellant-Respondents and the other Defendant-Respondent-Respondents abovenamed and sought the following reliefs against Mitsui & Co. Ltd., Taisei Corporation and Kanko Kikaku Sekkeisha Yozo Shibata & Associates abovenamed (hereinafter sometimes called and referred to as the "1ST, 2ND AND 3RD DEFENDANTS respectively, jointly and/or severally) on one hand and against the 4th Defendant Company on the other, in terms of the prayers to the Plaint, namely:
 - a) for a declaration that the 1st and 2nd Defendants are not entitled to any payments, whatsoever under and in terms of and according to the tenor of the said Construction Agreement referred to herein.
 - b) for a declaration that the 1st Defendant is not entitled to any payment, whatsoever under and in terms of and according to the tenor of the said Supplies Contract referred to herein.

- c) for a declaration that the 3rd Defendant is not entitled to have received any payments, whatsoever under and in terms of and according to the tenor of the Design & Supervision Contract referred to herein.
 - d) for a declaration that the said 1st & 2nd Defendants abovenamed are not entitled to make any claim, whatsoever under the said Loan Agreement referred to herein and therefore precluded from claiming under or enforcing the said Guarantees referred to herein.
 - e) for a declaration that the 4th Defendant Company is not under any obligation to make any further payment, whatsoever to the 1st and/or 2nd and/or 3rd Defendants abovenamed under the said contracts and agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract and the said Loan Agreement.
 - f) for a declaration that the 4th Defendant Company is entitled to the reimbursement of all monies paid and received by the 1st and/or 2nd and/or the 3rd Defendants abovenamed, to date.
 - g) for an Interim Injunction restraining the said 1st, & 2nd Defendants and the 3rd Defendant respectively, by themselves their representatives, servants and agents or otherwise howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two Guarantees and referred to in the plaint, until the final determination of this action.
 - h) for an Interim Injunction restraining the 4th Defendant Company by itself, its Directors, Servants and Agents or otherwise, howsoever, from entertaining any demand and/or claim from the 1st and/or the 2nd and/or the 3rd Defendants abovenamed in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint until the final determination of this action.
 - i) for a Permanent Injunction restraining the said 1st & 2nd Defendants and the said 3rd Defendant respectively, by themselves, their representatives, servants and agents or otherwise, howsoever, from demanding, claiming, drawing, receiving and/or collecting any monies, whatsoever, in any manner howsoever, under the said Contracts and Agreements, namely; the Construction Agreement, Supplies Contract, Design & Supervision Contract, Loan Agreement and the said two guarantees referred to in the plaint.
 - j) for a Permanent Injunction restraining the 4th Defendant Company by itself, its Directors, servants and agents or otherwise howsoever, from entertaining any demand and/or claims, whatsoever, from the 1st and/or 2nd and/or 3rd Defendants abovenamed in relation to the said claims and payments allegedly due to the 1st and/or the 2nd and/or the 3rd Defendants and/or paying any monies, whatsoever in any manner, howsoever, under the said Construction Agreement, Supplies Contract, Design & Supervision Contract and Loan Agreement referred to in the plaint.
2. The learned District Judge, on 18th September 1990, issued Enjoining Orders, in terms of, prayer "g" aforesaid against the 1st, 2nd & 3rd Defendants on one hand, and prayer "h" aforesaid against the 4th Defendant Company on the other, and also directed the issue of Notices of the Interim Injunctions respectively, and Summons on the said Defendants.
 3. The 5th to 11th Defendant-Respondent-Respondents abovenamed (hereinafter sometimes called and referred to as the 5TH TO 11TH DEFENDANTS respectively, jointly and/or severally) were made parties to the said Action, as they were Directors of the 4th Defendant Company, at the date of the Action, only for the purpose of notice and no reliefs were claimed against them.

4. At all times material to this Action, the 5th Defendant has been and is the Chairman & Managing Director of the 4th Defendant Company. The 6th Defendant was nominated by Cornel & Co. Ltd., the 7th Defendant, was elected at each Annual General Meeting.

8th & 10th Defendants were Directors nominated by the Government.

The 9th & 11th Defendants were Directors representing the 1st & 2nd Defendants on the Board of the 4th Defendant Company and one such representative had at all times material to this Action, functioned as the full-time resident Executive Director of the 4th Defendant Company, managing its day to day affairs and administration.

The 1st & 2nd Defendants were also Promoters and Shareholders named in the Prospectus and Signatories thereto, and in terms of the Articles of Associations the 4th Defendant Company could not even constitute a Shareholders Meeting or a Board Meeting, without the presence of the 1st & 2nd Defendants, who also had a veto power, which prevented any Board Resolution being passed without their consent.

5. Proxies were filed in the District Court on behalf of the 1st, 2nd, 9th & 11th Defendants by Mr. Razmara Abdeen, Attorney-at-law, and for the 3rd Defendant by Mr. S.D. Yogendra, Attorney-at-law, and for the 4th & 10th Defendants by the Hon. Attorney-General, and for the 5th, 6th & 7th Defendants by M/s. Julius & Creasy, Attorneys-at-law. The 8th Defendant failed to file Proxy.
6.
 - a) Objections to the grant of the Interim Injunction, in terms of prayer "g" aforesaid were filed only by the 1st, 2nd & 3rd Defendants.
 - b) Significantly, the 4th Defendant Company did not file Objections to the granting of the Interim Injunction against it, in terms of prayer "h" aforesaid.
 - c) None of the Defendants sought to vacate the Enjoining Orders.
 - d) Except the 8th Defendant, who failed to file Proxy, the 4th Defendant Company and the 5th to the 11th Defendants, who were present through their Attorneys-at-law at the Inquiry into the Objections of the 1st, 2nd & 3rd Defendants, to the granting of the Interim Injunction against them in terms of prayer "g" aforesaid, did not make any objections thereto and/or submissions thereon.
7. The learned trial Judge having considered all the material placed and adduced before him, namely the Pleadings and Documentations of the parties and of their oral and Written Submissions and citations of authorities in support thereof, granted by his Order dated 09.09.91 and delivered by his successor on 28.10.91, the Interim Injunction prayed for against the 1st, 2nd, & 3rd Defendants in terms of the aforesaid prayer "g" of the Pleat and the Interim Injunction prayed for against the 4th Defendant Company, without Objections thereto, in terms of the aforesaid prayer "h" of the Pleat.

The trial is now fixed for 27th, 30th, 31st March and 01st April 1992.

8. The learned District Judge in his Order observed:
 - a) that, there is no acceptable basis, at present, for making payments to the 1st & 2nd Defendants,
 - b) that, the main issues are, the basis for the payment of monies and the question, as to whether, in relation to such issue, the volume of work had not been actually carried out, according to the contractual Agreements,
 - c) that, the other Defendants named in the case, i.e. the Directors, as persons having connections and showing interest concerning the Company, having intervened therein, in such matter, acting to obtain monies, had not readily acted to conduct a correct examination, on the basis of matters, that had arisen as referred to in a) and b) above,

- d) that, the said persons, having prevented such correct examination were attempting to, howsoever, effect the payment of monies,
 - e) that, whether, the said persons are exercising the influence, that they have gained in Society, to prevent the raising of the questions concerning, the matters of work in connection with the contracts, the Prospectus, the payments of the Company, and whether the contracts have been properly performed,
 - f) that, the collaboration of the said persons, was adverse to the interest of the Shareholders of the Company and that they were acting through such collaboration, in a manner amounting to defeat the interests of the Shareholders of the Company,
 - g) that, whether , the payment of monies, is a devious method of siphoning out, a large scale of foreign exchange from this Country,
 - h) that, the significance that is shown, is that, generally the Company which has to pay money, would be raising questions in respect of such situation and would not allow other parties to act arbitrarily,
 - i) that, if the position, that explains this is correct, then, this actually is an instance of acting in fraudulent collusion, concerning a large sum of money, and an attempt to obtain a larger sum of money, having performed a lesser volume of work,
 - j) that, in such circumstances, a party who is seeking justice through the legal process, to prevent the same, should be allowed to do so.
9. a) True copies of the Complaint, the Statement of Objections of the 1st & 2nd Defendants and of the 3rd Defendant are annexed hereto marked A1, A2 & A3 respectively.
- b) True copies of the Written Submissions of the Plaintiff, the 1st & 2nd Defendants and of the 3rd Defendant are annexed hereto marked A4, A5 & A6 respectively,
- c) True copy of the Order dated 09.09.91 and delivered on 28.10.91 by the learned District Judge of Colombo is annexed hereto marked as A7, together with its translation marked A7(a).
10. a) The 1st & 2nd Defendants sought Leave to Appeal from the aforesaid Order of the learned District Judge, issuing the Interim Injunction prayed for in terms of the aforesaid prayer "g" of the Complaint, in Application No.CA/LA/206/91.
- A true copy of the Petition is annexed hereto marked A8.
- b) The 3rd Defendant also sought Leave to Appeal from the aforesaid Order of the learned District Judge, issuing the Interim Injunction prayed for in terms of the aforesaid prayer "g" of the Complaint, in Application No.CA/LA/208/91.
- A true copy of the Petition is annexed hereto marked A9.
11. a) The said Applications were supported before Their Lordships W.N.D. Perera, J. and Weerasekera, J. of the Court of Appeal on 19.11.91 and upon the Counsel being heard, Their Lordships made the following Orders :
- In. 206/91 : "Counsel heard in support. Issue notice on the respondent returnable 10.12.91. Mention on 10.12.91"
- In. 208/91 : "Counsel heard in support. Issue notice on the respondent returnable 10.12.91. Mention on 10.12.91"

True copies of the Minutes dated 12.11.91 to 23.01.92 of the Court of Appeal in the said two Applications are annexed hereto marked A10(a) and A10(b) respectively.

- b) Notwithstanding the said Order dated 19.11.91 the Notice of the said Applications for Leave to Appeal had been issued on all the parties named in the District Court Case, including the 4th Defendant Company, which had not Objected in the District Court to the issue of the Interim Injunction against it in terms of the aforesaid prayer "h" of the Plaint. Such notice had been issued at the instance of the 1st, 2nd & 3rd Defendants, contrary to the aforesaid Orders dated 19.11.91.
12. a) On the said notice returnable date; i.e. on 10.12.91 the Plaintiff was represented by his Counsel, and the 5th, 6th & 7th Defendants, against whom the Plaintiff did not claim any relief in the said Action, were represented by their own Counsel and Their Lordships Wijeyaratne, J. and Edrisuriya, J. fixed the Leave to Appeal Inquiry for 17.01.92.
- b) Significantly, the 4th Defendant Company did not appear on the said 10.12.91, the Notice returnable date, before Their Lordships' of the Court of Appeal, either through, its representative or Counsel, as clearly evident by the Minutes of the said 10.12.91.

13. The Plaintiff filed his Statement of Objections to the said Petition for Leave to Appeal and, inter-alia, also Objected to the grant of Leave itself .

True copies of the Plaintiff's Statement of Objections in CA/LA/206/91 & CA/LA/208/91 are annexed hereto marked A11 & A12 respectively.

14. The Leave to Appeal Inquiry came up before Their Lordships' K. Palakidnar, J. (President, Court of Appeal) and Dr. A. de Z. Gunawardena, J. on 17.01.92 and continued on 20th, 21st and 22nd January 1992. The Plaintiff was present in Court throughout the said Inquiry on all the said dates.

15. a) On 17.01.92 apart from Counsel appearing for the 1st, 2nd & 3rd Defendants as Petitioners and the Plaintiff as Respondent, appearance was sought to be marked on behalf of the 4th Defendant Company and the 5th, 6th & 7th Defendants.
- b) Counsel for the 4th Defendant Company submitted, inter-alia, that there were matters on which, he can be of assistance to Court in determining the matter at issue and that he will be affected by any Order made by the Court of Appeal.
- c) Counsel for the 5th, 6th & 7th Defendants said that he was not making any submissions on behalf of his Clients, as his Clients will not be affected by any Order made by the Court of Appeal.
- d) Counsel for the Plaintiff raised a Preliminary Objection to the participation of the 4th Defendant Company, and the 5th, 6th & 7th Defendants inter-alia, on the basis:
- i) that, it was only that morning that he became aware, when appearances were marked for the 4th Defendant Company, that it had also been noticed by Their Lordships of the Court of Appeal,
 - ii) that, only persons who can properly participate in the proceedings before Their Lordships of the Court of Appeal were the 1st and 2nd Defendants, the 3rd Defendant and the Plaintiff,
 - iii) that, the other Defendants have no right to be heard in the said proceedings and if, the 1st & 2nd Defendants had made them parties, that was a procedural irregularity and if Their Lordships of the Court of Appeal had issued Notice on them, such issue was made per incuriam. It is now clear from the record, that Their Lordships in issuing Notice on 19.11.91, in both the said Applications, had directed the issue of notice only on the Respondent i.e. the Plaintiff,

- iv) that, the 4th Defendant Company, did not seek to vacate the Enjoining Order, and neither did it file Objections to the grant of the Interim Injunction against it in terms of prayer "h" of the Plaint, nor in any other manner, objected to any injunctive relief being granted against it,
 - v) that, having failed to challenge the grant of the Interim-Injunction in the District Court, the 4th Defendant Company cannot seek to challenge the said Order in the Court of Appeal, and accordingly could not participate in any manner whatsoever, in the proceedings before the Court of Appeal, and to permit the 4th Defendant Company to do so would be a grave procedural impropriety and illegal.
- e) It was further submitted that the 5th, 6th & 7th Defendants, persons against whom no relief was claimed in the said Action, who had also not participated in any proceedings in the District Court, other than file Proxy, were not necessary parties and had no legal right or status to appear in the said Leave to Appeal proceedings. The citation of *Sadhwani V Sadhwani* (1982) 2 SLR 647 was made on this point.
- f) However, the Court of Appeal overruled the aforesaid Preliminary Objection raised on Friday 17.01.92 and allowed the participation of the 4th Defendant Company and the 5th, 6th & 7th Defendants, on the basis that they are necessary parties, and further ordered the resumption of the argument day to day, from Monday 20.01. 92.

A certified copy of the said .Order made on the said 17.01.92 is annexed hereto marked A13.

16. It is respectfully submitted, that the said Order, is contrary to law and raises substantial questions of law, which are both fit for review by Your Lordships Court, in and of general and public importance, in the matter of due administration of justice. The questions of law arising for consideration are set out hereinafter.
17. Further argument commenced on 20th January 1992 (Monday) with Counsel for the 1st & 2nd Defendants in CA/LA/206/91 addressing Their Lordships. The submissions of the 1st & 2nd Defendants were along the lines of the Statement of Objections filed in the District Court and principally were that:
- a) the Plaintiff was not a party to the contracts P11, P13, P14, P15 & P17 and therefore had no right to file this Action or seek Injunctive relief under Sec: 54 of the Judicature Act.
 - b) that the Plaint did not disclose a cause of action.
 - c) that it did not disclose a prima-facie right in the Plaintiff.
 - d) that the rule in *Foss V Harbottle* precluded the Plaintiff from bringing this Action.
 - e) that if there was any right, it was with the Company, in respect of breach of contract, for which only the Company could sue and that too for damages only, and further, when the Company is quiet the shareholder has no right.
 - f) further submissions were made on questions of fact, by reference to the Statement of Objections, more particularly to certain amended Plans referred therein. In response to questions raised by Their Lordships, the said Counsel admitted that all copies of the original Architectural Plans were missing and that it was their only defect.
 - g) these submissions were made without having read or drawn the attention of Court to any of the averments in the Plaint.

18. The Plaintiff states that at this stage, Their Lordships' Court adjourned for a short recess and after the Inquiry resumed, His Lordship K. Palakidnar, J. informed parties, that it was not necessary to go into the facts and the non-availability of the Plans and that Their Lordships had decided to limit the Inquiry, only to the question as to, what status the Plaintiff had to proceed with the Action i.e. the Plaintiff's status and Locus Standi.
19. Submissions were then made by the Counsel for the 3rd Defendant, wherein he associated himself with the submissions made by the Counsel for 1st & 2nd Defendants, and inter-alia, submitted:
 - a) that, the 3rd Defendant has been fully paid,
 - b) that, the Plaintiff had no right to the Injunction, and
 - c) made further submissions on the facts, by reference to the Object ions and to the Written Submissions filed in the District Court.
20. Both Counse1 for the 1st and 2nd Defendants and the 3 rd Defendant submitted to Court, that the learned District Judge has not considered in his Order, the Objections raised by them at the District Court Inquiry.
21. At this stage, the Counsel for the 4th Defendant Company stated, that he wished to consider over the day, the making of submissions on questions of fact and that he would not contest the question of the Plaintiff's legal status to bring such an Action, whereupon, His Lordship K. Palakidnar, J. observed that "it would strengthen our hands".
22. Thereafter, the Counsel Mr. Nihal Fernando, who had on 17.01.92 marked appearance for the 5th, 6th & 7th Defendants, and who had at that stage said "that he is not making any submissions in this Application as his Clients will not be affected by the Order made in this Application", however, stated that the 7th Defendant had required him to make submissions and also to request Court to expunge certain comments made by the learned District Judge in his Order. Thereupon, Dr. A. de Z. Gunawardena, J. observed, that such Application was premature, since the only question to be argued was whether Leave shall be granted or not. Further proceedings were to be resumed on Tuesday 21.02.92.
23. On 21st January 1992, the learned Counsel for the 4th Defendant Company addressed Court both on the facts and the law, impeaching the Order of the learned District Judge and inter-alia:
 - a) submitted that a Derivative Action is available only as an exception to the Rule in Foss V Harbottle, in the case of fraud on the minority and/or wrong-doer control and that there was no fraud on the minority and/or wrong-doer control in this instance and therefore there could be no Derivative Action.
 - b) disregarding the Chartered Architect's certified Report filed of record in this Case by the Plaintiff, the said Counsel tendered to Court three unauthenticated and uncertified typed statements containing numerical data, on questions of certain figures and submitted that those unauthenticated and uncertified statements showed, that there was no fraud. The said statements were produced in Court notwithstanding Objections raised by the Plaintiff's Counsel thereto.
 - c) the same said Counsel, who was present throughout the District Court Inquiry, having not filed any Objections, did not make such submissions, nor produce such statements at the said Inquiry. The 4th Defendant Company in its Answer filed in the District court has admitted to the non-availability of the original Architectural Plans and to the non-availability of the Appendix to the Supplies Contract, that defined the scope of Supplies of Furnishings, Fixtures & Equipment to the said Colombo Hilton Hotel and further, to the non-availability of Specified Bills of Quantities and Final Measurements.
24. Mr. Nihal Fernando, Counsel for the 7th Defendant, stating that "the 7th Defendant wanted me to inform Court" submitted that:

- a) a Derivative Action is not part of the law of Sri Lanka, eventhough such right existed in England.
 - b) the Companies Act 17 of 1982 is comprehensive in respect of all rights of a shareholder and that such rights are today limited only to Sections 210 & 211 of the said Companies Act.
 - c) the Plaintiff did not have the requisite 5% shareholding to bring an Action, as required under Sections 210 & 211 of the said Companies Act.
 - d) therefore the Plaintiff had no right or status to have brought the Action in the first instance.
25. The Court then invited Counsel for the Plaintiff to address, firstly on the nature of a Derivative Action. Accordingly Counsel for the Plaintiff commenced his submissions and stated:
- a) that the ambit and scope of the provisions in Sections 210 & 211 of the Companies Act, were different and that they did not contemplate the principle of Derivative Action and that Derivative Action is a substantive right, distinct and different from what is laid down in Sections 210 & 211 of the Companies Act.
 - b) that a Derivative Action is distinct and different to a complaint by a Minority Shareholder, and is an action instituted by a Shareholder though in his personal name, actually on behalf of the Company and in the right of the Company, where the Company being under "wrong- doer" control could not take action to safeguard its interests; the reliefs claimed being only in the interest of and for the benefit of the Company.
26. a) Plaintiff's Counsel referring to the legal basis of the Plaintiff's action, made further submissions on the question of Derivative Action citing the case of Wa11ersteiner V Hoir, (1975) 1 AER Pages 849 and 857 (Lord Denning) and also Gower 4th Edition, in support of his contention and submitted that the Plaintiff had the right to bring such Derivative Action.
- b) Counsel further submitted, that a Derivative Action is brought, by a member of a Company, where "wrong-doers" are in control, who prevent the company itself from suing, and where such Action is brought, the entire benefit of the Action would go to the Company and not to the Shareholder, who brings such Action and that the action instituted by the Plaintiff is such an Action.
 - c) Counsel also informed Court, that within 3 months of the Plaintiff instituting such Derivative Action, he was removed from the Board of Directors, further to stifle such Action.
27. At this stage his Lordship Dr. A. de Z. Gunawardena, J. after consultation with his Lordship Pa1akidnar, J. informed Plaintiff's Counsel that they accept his contention with regard to the availability of a Derivative Action.
28. a) It was then submitted by Plaintiff's Counsel, that when the Petitioners allege that the Plaintiff does not disclose a cause of action, then as a matter of law, it is assumed that the averments in the Plaintiff are true and on that basis, determine whether a cause of action is disclosed and that, on that basis the allegations in the Plaintiff warranted a Derivative Action and that therefore there was a prima-facie case under Sect: 54 of the Judicature Act to injunctive relief. Attention of Court was drawn to paragraphs in the Written Submission of the Plaintiff on all of the above matters.
- b) It was also submitted, that the Petitioners were not entitled in law, to impeach the Order on this basis, when they have failed to address Court on the averments in the Plaintiff and to point out why, admitting them to be true, no cause of action was disclosed.

- c) Submissions were also made, by reference to paragraph 78 of the Statement of Objections of the Plaintiff in C.A. L/A 206/91, that the 1st & 2nd Defendants had deliberately and deceitfully suppressed material documents relevant to the Plaintiff's cause of action and which documents were annexed to the Plaintiff's Leave to Appeal Application and that therefore their Leave to Appeal Application should be dismissed in limine on that ground alone. In fact out of 105 Documents to the said Plaintiff, the said Plaintiff of the 1st & 2nd Defendants had annexed only 8 Documents.
 - d) In regard to 3rd Defendant's contention, that all monies due to it had been paid in 1987 and that therefore, no Injunction could be granted restraining it from receiving payments; it was brought to Their Lordships attention that the Audited Statement of Accounts in the Annual Report of March '89 published by the 4th Defendant Company, being the latest Accounts available to the Plaintiff at the time of instituting this Action, showed that as at 31.03.88 Rs.1,010,682.69 Mn. was owed and that as at 31.03.89 Rs.935,483.28 Mn. was owed to the 3rd Defendant.
 - e) Plaintiff's Counsel was then directed to address, on the question raised by the Counsel for the 7th Defendant, namely the reception of the English Law concept of a Derivative Action in the Law of Sri Lanka. Proceedings were directed to be resumed on Wednesday 22nd January 1992, for this purpose.
29. a) When proceedings resumed on Wednesday 22.01.92 Plaintiff's Counsel addressed Their Lordships on the availability of Derivative Action in the Law of Sri Lanka, inter-alia citing Sect: 3 of the Civil Law Ordinance and the case of De Costa V Bank of Ceylon 72 NLR 457.
- b) Plaintiff's Counsel was thereupon asked to justify the Order of the learned District Judge, though none of the other Counsel had either read or dealt with the judgement or referred to the contents thereof, though the Leave to Appeal was sought from the said Order.
- c) Submissions were then made as to why the Order should stand and no Leave be granted. It was submitted, that reading the Judgement as a whole, it was clear that the learned Trial Judge had considered all relevant matters, including the right of the Plaintiff and the balance of convenience of parties, on the basis of the assumption that the averments in the Plaintiff's Complaint are true and further that he had examined from that point of view, the existence of a cause of action and the right of the Plaintiff to bring the said Action.

The case of Balasunderam V Raman 79(1) NLR 361 was cited in support of the manner of evaluation and appreciation of the judgement of the District Judge.

30. At this stage his Lordship K. Palakidnar, J. told Counsel for the Plaintiff, that it was not necessary to go into other areas, and also told, that it was not necessary to address on questions of fact referred to by opposing Counsel, at this Leave to Appeal stage, and that normally, Their Lordships' Court grants Leave in most Cases.
31. But further submissions were thereafter permitted to be made by Counsel for the 1st, 2nd & 3rd Defendants on questions of fact and at the conclusion of the proceedings on 22.01.92 Their Lordships reserved Order and delivered same on 31.01.92.

A certified copy of the said Order dated 31.01.92 is annexed hereto marked A14.

32. In the aforesaid Order of 31.01.92 marked A14, Their Lordships proceed on the basis:
- a) that, the Plaintiff has brought this Action against the 4th Defendant Company, as the Company has acted in fraud of the shareholders, in accepting and making payments to the 1st, 2nd & 3rd Defendants in respect of the construction of the Colombo Hilton Hotel,
 - b) that, the Plaintiff sought an injunction restraining the 4th Defendant Company from making any further payments to the 1st, 2nd & 3rd Defendants,

- c) that, the District Court first made an Enjoining Order restraining the 4th Defendant Company from making further payments to the 1st, 2nd & 3rd Defendants,
- d) that, thereafter, the Interim Injunction was granted for the same purpose,
- e) that, this Leave to Appeal application is against the said Order,
- f) that, it is not clear from the Order of the learned District Judge, that, he has addressed his judicial mind to the question, whether the Plaintiff has adduced sufficient evidence to make out a prima-facie case,
- g) that, Counsel for the 1st & 2nd Defendants submitted, that the Plaintiff has no locus standi to bring the said Action, and that the facts urged did not disclose a cause of action, as also that, the Plaintiff does not have a right to bring a Derivative Action,
- h) that, Counsel for the 7th Defendant submitted, that a right to bring a Derivative Action does not exist in the Sri Lanka Law, and that the rights of a Shareholder are limited to Sections 210 & 211 of the Companies Act and a minimum of 5% Shareholding,
- i) that, in their view these are fit questions of Law to be decided in an Appeal and accordingly grant Leave to Appeal.

33. The Plaintiff being aggrieved with the said Orders of the Court of Appeal dated 17.01.92 & 31.01.92, begs special Leave to Appeal therefrom to Your Lordships Court, on the following substantial questions of Law, as matters that are fit for review by Your Lordships Court and of general and public importance in the administration of justice.

- a) The aforesaid Order on the Preliminary Objection is contrary to law and has occasioned a grave miscarriage of justice, in that:
 - i) The rule established by law and authority is that a party to a suit, who does not object to the grant of a relief against it, cannot thereafter seek to challenge or impeach the Order in any other judicial forum;
 - ii) The Court of Appeal has misdirected itself in law in holding, that the 4th Defendant Company and the 5th, 6th & 7th Defendants were necessary parties, inter-alia, as they would be affected by any Order of the Court of Appeal;
 - iii) To have permitted the 4th Defendant Company, not only to appear but also to make submissions, was a misdirection in law and vitiates the Order complained of;
 - iv) Nor did the 5th, 6th and 7th Defendants have any right or status to appear and/or be heard in these proceedings before the Court of Appeal;
 - v) It is submitted that the permission granted to the 4th Defendant Company, and the 5th, 6th and 7th Defendants to be heard through Counsel was in effect the grant of rights of Leave to Appeal, to parties, who had not participated at the hearing in the original Court and had never canvassed the correctness of the Order of the learned District Judge;
 - vi) The Court of Appeal also misdirected itself in law in holding that the 8th, 9th, 10th & 11th Defendants were also necessary parties and thereby occasioned a grave procedural irregularity and illegality vitiating the Order of the Court of Appeal.
- b) The aforesaid Order granting Leave to Appeal is contrary to law and the facts as presented to Court, in that:

- i) It is respectfully submitted, that the Court of Appeal has misdirected itself on the facts, in its analysis of the Plaintiff's case and of the Order from which Leave to Appeal had been sought only by the 1st, 2nd & 3rd Defendants.
- ii) As set out in paragraph 32(a) to (e) hereof, the Court of Appeal has understood, the proceedings before them, as involving an impeachment of the Injunction granted in terms of prayer "h" against the 4th Defendant Company, from paying monies to the 1st, 2nd & 3rd Defendants, when in fact, the 1st, 2nd & 3rd Defendants sought to impeach the Interim Injunction granted against them, only in terms of prayer "g", preventing them from claiming any monies from the 4th Defendant Company and/or the Government of Sri Lanka under the State Guarantees that had been issued.
- iii) It is respectfully submitted, that the Court of Appeal misdirected itself, by reason of a non direction, on which of the two Interim Injunctions was being challenged in the Petition before it, in so far as the Interim Injunction granted in terms of prayer "g" against the 1st, 2nd & 3rd Defendants, not only restrained them from claiming etc, from the 4th Defendant Company but also restrained the 1st & 2nd Defendants from claiming etc. under the Guarantees issued by the Government of Sri Lanka, guaranteeing the payments of the alleged loans, which today stands around U.S.\$ 190.0 Mn i.e. Rs.8,000.0 Mn, and claimed from the 4th Defendant Company by the 1st & 2nd Defendants. If payment is made under the said State Guarantees by the Government of Sri Lanka, it would also become a debt burden of the 4th Defendant Company itself, repayable to the Government of Sri Lanka.
- iv) It is respectfully submitted, that the 1st, 2nd & 3rd Defendants had only challenged the Interim Injunction granted against them in terms of prayer "g" to the Plaintiff and therefore for the Court of Appeal to have come to the view that the Leave to Appeal is against the Interim Injunction granted against the 4th Defendant Company in terms of prayer "h", is a misdirection, which goes to the root of the Order granting Leave, upon the supposition of a fact situation, which was non-existent before the Court of Appeal. The said misdirection vitiates the said Order.
- v) It is respectfully submitted, that the Court of Appeal has grievously misdirected itself in taking the view, that the Plaintiff's Action was on the basis that the Company has acted in fraud of its Shareholders, whereas the basis of the Plaintiff's Action was a Derivative Action.
- vi) It is respectfully submitted, that this misdirection vitiates the Order complained of, as it has denied the Plaintiff the substance of a fair and proper judicial hearing, specifically in the background of having been denied the opportunity of addressing the Court of Appeal, on the facts as pleaded in the Plaintiff constituting the cause of action of the Plaintiff, eventhough Leave was being sought on the grounds that the Plaintiff did not disclose a cause of Action and that the Trial Judge had not addressed his mind to this question of the Plaintiff's Case as set out in the Plaintiff. As pointed out hereinbefore, the Plaintiff was not even read by the Counsel for the Defendants, to apprise Court of the facts constituting the Plaintiff's cause of Action and nor the Order of the District Judge, from which Leave was sought.
- vii) It is therefore respectfully submitted, that when the Court of Appeal proceeded to determine, that there are fit questions of law to be decided upon in Appeal and accordingly granted Leave to Appeal, it was addressing its mind to a Case that was not before it.
- viii) It is manifestly clear, that the Court of Appeal has been under the erroneous belief that the Interim Injunction granted against the 4th Defendant Company, which never objected to the grant of the same, was before them and has granted leave on that basis; this is a misdirection in law which vitiates the said Order.
- ix) It is respectfully submitted that, the question whether the facts urged by the Plaintiff, discloses a cause of action, and whether the Plaintiff has a right to bring a Derivative Action, has been viewed by the Court of Appeal on a wrong supposition of facts and not from a point of view of

a Case presented by the Plaintiff and as emerging from its pleadings, which was before the Court of Appeal. It is therefore respectfully submitted, that it cannot form the basis of the judgement purporting to grant Leave to Appeal, on supposed questions of law, fit to be determined and not formulated by the Court of Appeal. This is a grave error which vitiates the order complained of.

- x) It is respectfully submitted, that when the Court of Appeal complains, that it does not appear from the Order of the learned District Judge, that he has addressed his judicial mind to the question before him, it is clear from the foregoing that it was examining the Order of the learned District Judge, from the point of view of its own erroneous appreciation of the Plaintiff's Case as referred to hereinbefore.
 - xi) It is respectfully submitted, that the Court of Appeal has not addressed its mind to the issues before it and therefore has misdirected itself on the facts in granting Leave to Appeal. The said order is therefore bad in law,
 - xii) It is respectfully submitted, that the Court of Appeal has grievously misdirected itself in law, in permitting and considering as a fit question of law, upon which Leave could be granted, the point raised by the 7th Defendant, when the said Defendant did not participate in the original Court proceedings, before the learned District Judge and when the 7th Defendant had no right nor status to be noticed, recognised or be heard in the Court of Appeal proceedings, in any manner whatsoever and as a matter of law; the 7th Defendant having also previously admitted in the Court of Appeal itself, that the said Order in this Application does not affect him,
 - xiii) The Court of Appeal has not differentiated between the grounds urged by the Counsel for the 1st, 2nd & 3rd Defendants for the grant of Leave, and those urged by the Counsel for the 4th Defendant Company and those urged by the Counsel for the 7th Defendant and accordingly the said Order Granting Leave is bad in Law.
 - xiv) It is respectfully submitted that the purported grant of leave on this ground alone vitiates the order of the Court of Appeal, and
 - xv) It is respectfully submitted, that the irregularities and/or illegalities complained of in the two Orders aforesaid negates and vitiates the validity of the entire Order complained of.
34. The Plaintiff respectfully submits that in the background of the averments herein contained, the following substantial questions of law arise which are not only fit for review by Your Lordships' Court, but are also of general and public importance, in the matter of due administration of justice. The substantial questions of law that arise are:
- a) whether a party Defendant (in this instance 4th Defendant Company) who had an Enjoining Order operating against it and a Notice of Interim Injunction having been served upon it, having appeared in the Action and having been granted the opportunity to challenge the continuance of the Enjoining Order and the grant of an Interim Injunction against it and having failed to do either and having stood by and permitted the Court to grant the Interim Injunction against it, without Objection of any kind whatsoever is –
 - i) entitled to be made a party to a Leave to Appeal Application proceedings by another Defendant, who had Objected to and contested the grant of an Interim Injunction against it,
 - ii) entitled to be noticed by an Appellate Court in such proceedings,
 - iii) entitled to appear and be heard to challenge and impeach the order granting the Interim Injunction against the other Defendants, and

- iv) entitled to tender fresh evidence for the very first time, before the Court of Appeal in a manner not provided for in law in the disposal of the Leave to Appeal Application by other Defendants.
- b) Whether to have noticed such a defendant and/or to have permitted anyone or more or all of the matters referred to in a) above, is a procedural irregularity/illegality, which vitiates the proceedings in which such participation was permitted and renders it null and void and the Order made there at.
- c) Whether a Defendant/Defendants made parties for purposes of notice only and against whom no relief, Interim or otherwise was sought or granted (in the instant Case 5th, 6th and more particularly the 7th Defendant, who had previously in the Court of Appeal itself, had admitted that the Order in this Application does not affect them) is or are entitled to:
 - i) be made a party to a Leave to Appeal Application proceedings by another Defendant, against whom an Interim/Final Order/Judgement has been made,
 - ii) be noticed by an Appellate Court in such proceedings,
 - iii) appear and be heard to challenge and impeach an Order/Judgement granted against another Defendant, and
 - iv) raise or be permitted to raise any question of fact or law for the determination of the Appellate Courts in such proceedings for the purposes of the grant of Leave to Appeal to another Defendant/Defendants or for any other purpose.
- d) Whether to notice such a Defendant and/or permit anyone or more or all of the matters referred to in c) above, is a procedural irregularity/illegality, which vitiates the proceedings at which such participation was permitted and renders null and void an Order made there at.
- e) Whether it is open to an Appellate Court, to grant Leave from an Order of an original Court, on the basis that it was not clear whether the Trial Judge has addressed his judicial mind, to the question whether the Plaintiff had sufficient evidence to make out a prima-facie case, for the grant of an injunctive relief, eventhough the Court of Appeal has misunderstood and misconstrued the nature and basis of the Plaintiff's Action itself, by a misdirection on the facts pleaded and relied upon by the Plaintiff for his Action.
- f) Whether such an approach to the grant of said Leave is ultra-vires its powers and is a misdirection which vitiates the Order.
- g) Whether it was open to the Court of Appeal, to have purported to grant leave on the question raised by the 7th Defendant, from the Order of the District Judge, as arising from the Order complained of, when the said point was not taken up before the original Court and could not have and did not engage the judicial mind of the Trial Judge.
- h) Whether it is permissible and/or correct for the Court of Appeal to purport to grant Leave to Appeal, on supposed fit questions of law without formulating such questions of law.
- i) Whether it is obligatory on the Court of Appeal to specifically deal with the Order, from which Leave is sought and the supposed errors in law, which necessitates the grant of leave and to formulate in precise terms the substantial questions of law.
- j) Whether Leave to Appeal (being an inter-locutory appeal) ought to be granted only on substantial questions of law, which go to the root of the case and not on any question of law, which cannot help dispose of the Action without proceeding to trial.

- k) Whether questions of law arising in inter-locutory proceedings, which do not go to the root of the case, should be gone into at the trial and not in Leave to Appeal proceedings.
- l) When an objection is taken to the locus standi of a Plaintiff, to bring an action on the basis, that the Plaintiff does not disclose a cause of action, whether the averments in the Plaintiff should be accepted as true, before it can be said, that the averments in the Plaintiff do not disclose a cause of action or whether it is open to a party Defendant to controvert the averments of fact in the Plaintiff and assert, that therefore the Plaintiff does not disclose a cause of action.
- m) Whether having permitted the Defendants to do so in the instant Case and having denied the Plaintiff the right to address Court on the factual averments in the Plaintiff, it is permissible for the Court of Appeal to grant Leave to Appeal, on the basis, that it is a fit question of law to be decided in Appeal whether the Plaintiff has a locus standi.
- n) Whether such a denial is a denial of the rules of natural justice and of a fair hearing for the Plaintiff.

35. The Plaintiff states that he has not previously invoked the jurisdiction of your Lordships' Court in this matter.

36. The Affidavit of the Plaintiff is annexed hereto in support of the averments herein contained.

Wherefore the Petitioner prays that Your Lordships' Court be pleased to:

- a) grant Special Leave to Appeal from the said Orders of the Court of Appeal dated 17.01.92 and 31.01.92.
- b) set aside the said Orders dated 17.01.92 and 31.01.92.
- c) affirm the Order of the learned District Judge of Colombo dated 09.09.91 and delivered on 28.10.1991 and direct the Action to proceed to Trial.
- d) grant costs and, such other and further reliefs as to Your lordships Court shall seem meet.

Attorneys-at-law for Plaintiff-Respondent-Petitioner

Documents filed with the Petition:

- Plaintiff's Affidavit
- Documents Marked A1 - A14

Attorneys-at-law for Plaintiff-Respondent-Petitioner

Settled by:

Mr. Harsha Cabral, Attorney-at-law,
Mr. Anil Tittawella, Attorney-at-law,
Mr. K. Kanag-Isvaran, P.C.,
Mr. H. L. De Silva, P. C.,