

TRANSLATION

IN THE DISTRICT COURT OF COLOMBO

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

PLAINTIFF

No.: 3155/SPL.
Nature: Special
Value: Rs.100,000/-
Procedure: Regular

- 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.
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 of 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.
11. KOJI ITO, Director of Hotel Developers (Lanka) Limited; and presently of No.315, Vauxhall Street, Colombo 02.

DEFENDANTS

Before : P. Wijayarathne Esquire, District Judge
Recorded by: Gnana Jayakody

District Court, Colombo
Case No.3155/Special

09.09.1991

ORDER

By filing this Case, against the 1st to 10th Defendants, named therein, the Plaintiff in this Case, who is a Shareholder of the 4th Defendant Company, amongst the matters pleaded therein, has mainly disclosed, that the Company, in carrying out the construction work of the Hotel, called the Hilton Hotel in Sri Lanka, which was to be constructed in terms of the Agreements entered into with the 1st, 2nd and 3rd Defendant Japanese Companies, and that the said Companies acting in fraudulent collusion, have built the said Hotel in a manner very different to the Building defined for the purpose of this Hotel, as contained in the relevant Contractual Agreements and as set out in the Prospectus published by the Company, and accordingly that the said Defendants, acting in fraudulent collusion, concerning a large sum of money payable as per the Financial Plans and Supervisory Reports, having performed a lesser volume of work, have attempted to obtain a larger sum of money.

In the aforesaid context, the Plaintiff filed the Plaint in this Case, on the premise, that, having raised the question concerning the basis for the payment of monies and the question as to whether, in relation to such issue, the work had been performed in accordance with the said Contracts, and that the other Defendants named in this Case, as persons having connections concerning the said Hotel business, having intervened therein in such matter, acting to obtain the said monies, had not readily acted to conduct a correct examination, in relation to the matters that had arisen, on the basis of payment of monies, and whether the volume of work was actually not carried out in accordance with the contractual agreements, and that they having prevented such correct examination, were attempting to howsoever, effect the payment of monies, and accordingly the Plaintiff prayed for Interim Injunction against the 1st, 2nd and 3rd Defendant Companies, restraining them from claiming and interfering to receive any monies in any manner whatsoever, under the Construction Agreement, Supplies Agreement and Design & Supervision Agreement, Loan Agreement and the Guarantees and for an Interim Injunction against the 4th Defendant Company, from paying such monies to the 1st, 2nd and 3rd Defendant Companies or their employees, agents etc. until the determination of the matters referred to in the said Plaint.

The Court having considered the said Application, granted Enjoining Orders in the same manner and issued the Notice of Interim Injunctions.

The Objections that were filed thereto, by the Defendants, and the submissions made thereon by the learned Counsel, on behalf of the parties, became the subject of this Inquiry. When considering all the said objections, submissions and legal positions, the position that is clear, is that, the 4th Defendant Company which is the other party to the Agreements, in respect of which the 1st, 2nd and 3rd Defendants have a right to receive monies on such Contracts, did not contest such Application. However, the subject of the argument mainly adduced herein was, that the Plaintiff, who is a Shareholder of the Company, sees this, as an attempt by other Shareholders and the Parties, who are showing interest concerning the Company, and who are exercising the influence, that they have gained in Society, acting together with the Company, to prevent the raising of the questions concerning the matters of the work in connection with the Contracts, the Prospectus and payments of the Company and whether the Contracts have been properly performed, and that their collaboration was adverse to the interest of the Shareholders of the 4th Defendant Company, and that they were acting through such collaboration, in a manner amounting to defeat the interests of the Shareholders of the Company.

Accordingly, the present position is that the Defendants' statement, that they have performed their part of the Contracts and the willingness shown by the Company to accept the same, as set out by the Defendants, cannot be accepted as the basis for payment.

Accordingly, what should be actually considered is, whether, the position of the Company in relation to the said matters i.e. whether, the position taken concerning the Agreements entered into with the 1st to 3rd Defendants, is adverse to the interests of the Shareholders of the Company, or else, whether, it is not a reasonable act to protect such interests, and whether, such payments of monies by the Company is in fact a payment of money due to the 1st, 2nd & 3rd Defendants on the said Agreements or in fact, whether, as stated by the Plaintiff, this is a devious method of siphoning out, a large scale of foreign exchange from this Country.

Actually, the said matters, could be considered at a full trial to be held on the evidence in respect the relevant matters. It is clear that, if the said payments are made, before such time, as stated by the Plaintiff, the action of the Company in complying with the requirements of other Companies, without the Company protecting the interests of the Company, concerning its Shareholders, which action the Plaintiff is seeking to restrain, and that accordingly, the loss that could be caused to him, would be extensive and unlimited. The significance, that is shown herein, 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. The Plaintiff's complaint herein, is that Company having joined with the 1st to 3rd Defendants, is siphoning money out of the Company and the Country, against the interests of the Shareholders of the Company, which Actions of the Company, the Plaintiff is seeking to prevent. If the position, that explains this is correct, then this actually, is an instance of acting in fraudulent collusion. In such a circumstance, a party who, is seeking justice, through the legal process, to prevent the same, should be allowed to do so. Therefore, in taking into account these matters as a whole, I am of the view, that, a necessity lies to issue the Interim Injunctions, rather than to dissolve the Enjoining Orders already issued.

Having such a view foremost in my mind, in considering the loss and inconvenience that may be caused to the parties, due to the issuance of the said Interim Injunctions, I am of the view, that, if the said Interim Injunctions are not issued, that the means of remedying, the recovery of the said monies, after the payment of such monies by the Company and after the siphoning off of the said monies from the Country and the extensive loss that would be caused in common to this Country and also to the Plaintiff, who is an accepted investor of this Country, would be rare.

In considering the matter, concerning the 1st, 2nd and 3rd Defendants' right to receive money, which has to be compared against the above position, then, even if the Interim Injunctions are issued as applied for by the Plaintiff, there will be no bar to their right to receive the said monies, except for a delay to receive such money, even, if, they are entitled to receive, any money. Such a delay could be remedied by paying adequate interest.

Accordingly, in considering the inconvenience and loss, that may be caused to both parties, by such an Order, I am of the view, that more weight thereof, is in the favour of the issuance of the Interim Injunctions as applied for by the Plaintiff. I, therefore, rejecting the objections adduced, issue the Interim Injunctions, as prayed for under prayers (g) and (h) of the Plaint.

The taxed costs in relation to this Inquiry should be paid to the Plaintiff by the 1st to 4th Defendants.

Sgd. P. Wijayarathne,
District Judge, Colombo

- 09.09.91.

I do hereby certify that the foregoing is a true copy of the Order, issued on 28.10.91 in the District Court of Colombo, Case No.3155/Special.

Typed by : signed
Compared by: signed

Signed D. Liyanage
Registrar
District Court, Colombo.

TRUE TRANSLATION,
TRANSLATED BY ME,

W.V.R. ARIYARATNE

W. V. R. ARIYARATNE
Sworn Translator & Interpreter
District Court, Colombo

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