

IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST
REPUBLIC OF SRI LANKA

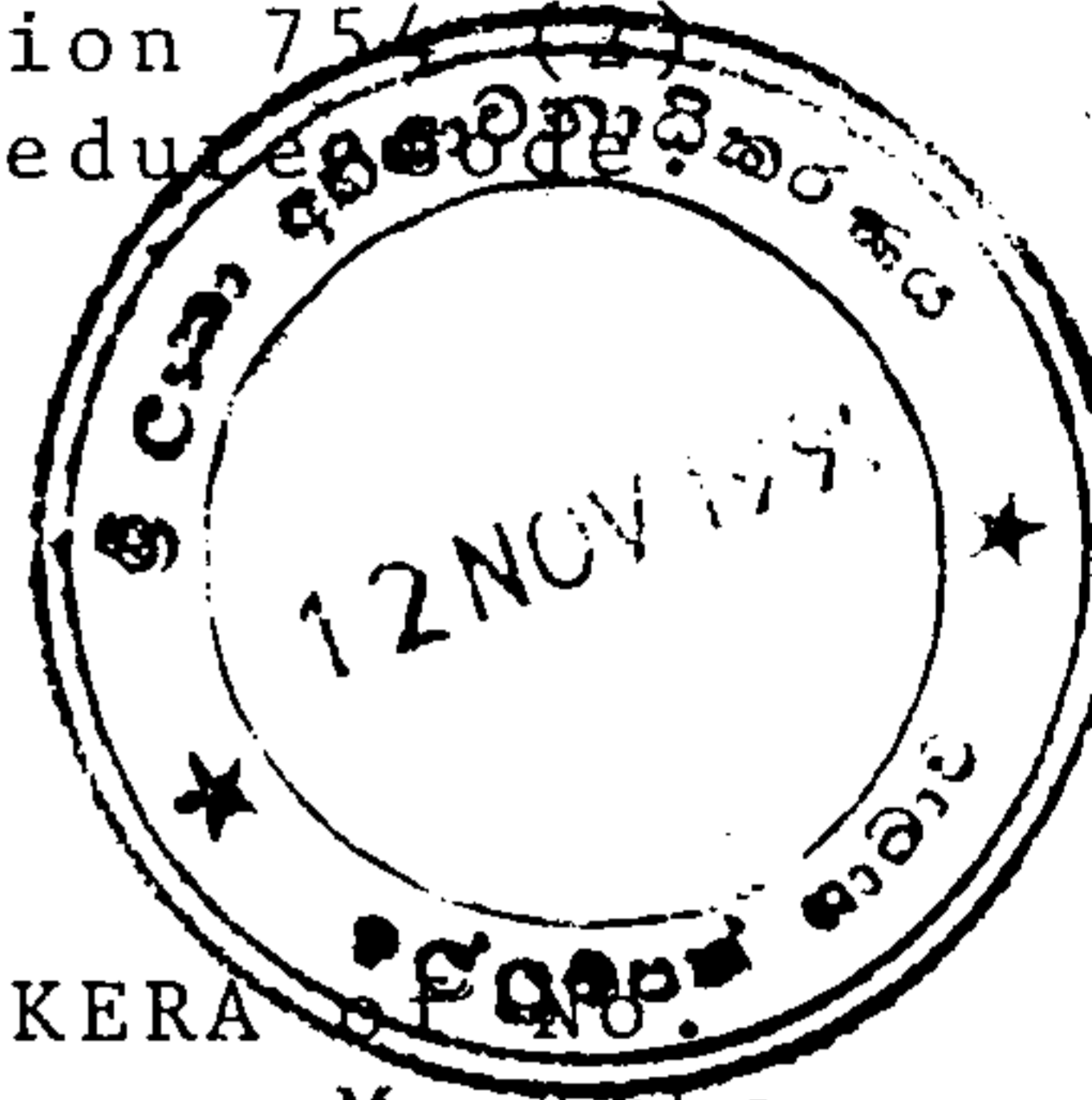
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In the matter of an
application for leave to
appeal under section 75
of the Civil Procedure

C.A. (Leave to Appeal)

Application No....206/91

D.C. Colombo Case No. 3155/SPL



NIHAL SRI AMARASEKERA
167/4, Sri Vipulasena Mawatha,
Colombo 10.

PLAINTIFF

- vs -

1. MITSUI & CO., LTD., 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 having a Liaison office and/or a place of business in Sri Lanka at No. 315, Vauxhall Street, Colombo 2.
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 at No. 65, High Level Road, Maharagama.
3. KANKO KIKAKU SEKKEISHA YOZO SHIBATA & ASSOCIATES, Architects & Designers, a corporation duly organized under the laws of Japan having the Principal place

AND

1. Mitsui & Co., Ltd.,
2-1, Ohtemachi 1-Chome,
Chiyoda-ku, Tokyo, Japan.

1st Defendant-Petitioner-Appellant

2. Taisei Corporation,
25-1, Nishi-Shinjuku, 1-Chome,
Shinjuku-ku, Tokyo, Japan.

2nd Defendant-Petitioner-Appellant

- VS -

1. Nihal Sri Ameresekere of No. 167/4,
Sri Vipulasena Mawatha, Colombo 10.

Plaintiff-Respondent

2. Kanko Kikaku Sekkeisha Yozo Shibata
& Associates Architects & Designers,
No. 9, Mori Building, 1-2-2, Atago,
Minato-ku, Tokyo, Japan

3rd Defendant-Respondent

3. Hotel Developers (Lanka) Limited,
Lanka Japan Hotels Limited,
No. 16, Alfred Place,
Colombo 3.

4th Defendant-Respondent

4. Cornel Lionel Perera,
16, Alfred Place, Colombo 3.

5th Defendant-Respondent

5. Frederick Germain Noel Mendis,
No. 51/3, Dharmapala Mawatha,
Colombo 3.

6th Defendant-Respondent

6. Kairshasp Nariman Choksy,
23/2, Sir Ernest de Silva Mawatha,
Colombo 7.

7th Defendant-Respondent

7. Don Peter Severinus Perera,
696/2, Havelock Road,
Colombo 2.

8th Defendant-Respondent

8. Kazutaka Kuboi,
6-38, Fujimicho, Chigasaki,
Kanagawa, Japan.

9th Defendant-Respondent

9. Kanapathipillai Shanmugalingam,
No. 4, Ramakrishna Avenue,
Colombo 6.

10th Defendant-Respondent

10. Koji Ito,
315, Vauxhall Street,
Colombo 2.

11th Defendant-Respondent

TO THEIR LORDSHIPS THE HONOURABLE THE PRESIDENT AND THE
OTHER HONOURABLE JUDGES OF THE COURT OF APPEAL OF THE
DEMOCRATIC SOCIALIST REPUBLIC OF SIR LANKA.

On this^{12th} day of November, 1991

The petition of the 1st and 2nd Defendants-Petitioners-
Appellants above-named appearing by their Attorney-at-law
Razmara Abdeen states as follows :-

1. The plaintiff above-named is a shareholder of the 4th
defendant company and was also a director thereof at the
date of institution of the above-styled action.

2. The plaintiff above-named instituted the above-styled
action on alleged causes of action said to have accrued to
the plaintiff, as a shareholder of the 4th defendant company
arising from, out of or in respect of certain contractual
agreements pleaded in the plaint, to wit:-

- (i) Construction Agreement dated 31-1-84 (P-11)
together with General Conditions as set out in
Pl2 annexed thereto made between 4th Defendant
company (hereinafter sometimes referred to as HDL)
and the 1st and 2nd defendants (Consortium) and
counter-signed by 3rd defendant as architect
appointed by 4th Defendant;

- (ii) Supplies Agreement (P13 with P14) dated 31-1-84 between 4th defendant and 1st defendant;
- (iii) Loan Agreement P15 dated 31-1-84 between 4th defendant and 1st and 2nd defendants;
- (iv) Letters of Guarantee (P17(a) & (b)) dated 17-2-84 by Government of Sri Lanka guaranteeing repayment of loans covered by P 15.

The plaintiff was no party to any of the aforementioned contracts.

3. (a) The 1st and 2nd defendants in pursuance of the Construction Agreement (P11) commenced construction of a hotel building in 1984 in accordance with architectural plans prepared by 3rd defendant dated 15-8-83 and submitted to UDA for approval on 19-10-83. The said building plans were approved by the UDA on 23/03/84 (P20(b)). Amended plans incorporating certain minor modifications were approved by the UDA on 29-4-86-vide sheets A12 and A31 of P54 filed with plaint.

(b) Construction of the hotel building in accordance with the approved plans (P54) was completed in April 1987 and Architect's (3rd defendant) Completion Certificate was issued on 30-4-87 to 1st and 2nd defendants. Certificate of Conformity that the hotel building had been constructed in accordance with approved plans (P54) was issued by the UDA-vide paragraph 45 (a) of plaint; and thereafter possession of the hotel building was taken over by the 4th defendant and the hotel was ceremonially opened on 11-09-87. From that date up to date the Hilton International Colombo has been carried on in the said hotel building by the Management Company in terms of the Management Agreement dated 31-1-84.

4. No complaint or allegation that there has been a breach of contract in the construction of the said hotel building by the 1st and 2nd defendants has been made by the 4th defendant at any time.

The first time the allegations which formed the basis of the plaint were made was after March 1990 by which date the payment of moneys payable in terms of the aforesaid Construction Agreement (P11) as well as the other contracts were long overdue.

5. On 12-09-90 the plaintiff instituted this action being a holder of 70,000 shares, which constitute 0.15% of the issued share capital praying for :-

- (a) A declaration that the 1st and 2nd defendants are not entitled to any payment whatsoever under the Construction Agreement P11;
- (b) A declaration that the 1st defendant is not entitled to any payment whatsoever under the Supplies Contract P13;
- (c) A declaration that the 3rd defendant is not entitled to have received any payments whatsoever under the Design and Supervision Contract-these defendants are not party to this Design and Supervision Contract;
- (d) A declaration that the 1st and 2nd defendants are not entitled to make any claim whatsoever under the Loan Agreement P15; and are therefore precluded from claiming under or enforcing the Guarantees P17(a) and P17(b) given by the Government of Sri Lanka;
- (e) A declaration that the 4th defendant is not under any obligation to make any further payments under the aforesaid contracts;
- (f) A declaration that the 4th defendant is entitled to the reimbursement of all moneys paid and received by the 1st and/or 2nd and/or 3rd defendants; and
- (g) For permanent injunctions restraining the 1st, 2nd and 3rd defendants respectively from demanding, claiming, drawing, receiving and/or collecting any moneys whatsoever in any manner howsoever under the aforesaid Agreements, Contracts and Guarantees.

The plaintiff simultaneously applied for interim injunctions in the same terms as the permanent injunctions. The Court on 18-09-90 directed notice of application for interim injunctions to issue on the 1,2,3 and 4th Defendants and also issued ex parte Enjoining Orders on the said defendants restraining them respectively in the same terms as those of the permanent injunctions prayed for by the plaintiff. A true copy of the said Enjoining Orders of Court is annexed hereto marked "A". A true copy of the plaint with the annexes thereto is filed herewith marked "B" and is pleaded as part and parcel hereof.

6. These defendants filed their Statement of Objections dated 12-11-1990 to the issue of the Interim Injunctions against them as well as against the 4th defendant, inasmuch as these defendants were prejudiced thereby. The inquiry into the matter of the interim injunctions against these defendants was taken up for hearing on 23.11.90. A true

copy of the said Statement of Objections with the annexes thereto is filed herewith marked "C" and is pleaded as part and parcel hereof. The Plaintiff's counter-affidavits are also annexed hereto marked C1 and C2.

7. At the inquiry into the plaintiff's application for the said interim injunctions on 23.11.90 oral submissions were made on behalf of the plaintiff and the 1st, 2nd and 3rd defendants.

Written submissions of the 1st and 2nd defendants setting out a summary of the case presented by them against the issue of the interim injunctions sought by the plaintiff were subsequently tendered. Written submissions were also tendered on behalf of the plaintiff and the 3rd defendant. True copies of the oral submissions made on 23-11-90 and the written submissions of the 1st and 2nd defendants and the plaintiff are annexed hereto respectively marked "D", "E" and "F", and are pleaded as part and parcel hereof.

8. By way of objections in limine the 1st and 2nd defendants in their said Statement of Objections marked "C" pleaded that :-

- (i) The plaint was unduly prolix and contained a mass of irrelevant circumstances and alleged facts; and that on the face of the material averments in the plaint the plaintiff did not expressly disclose a cause of action against these defendants in favour of the plaintiff;
- (ii) Admittedly in accordance with the terms of the Construction Agreement (P11) and the Supplies Contract (P13) between the 1st and 2nd defendants and the 4th defendant, the 1st and 2nd defendants were entitled to payment of a sum amounting approximately to JY 1,473,894,768 as at September 30, 1990 apart from the sums of moneys due owing and payable to the 1st and 2nd defendants respectively under and in terms of the Loan Agreement (P15); and notwithstanding these indisputable facts the plaintiff had deliberately undervalued the quantum of the above-styled action at Rs. 100,000 which is approximately only JY 333,000 and obtained interim relief ex parte in respect of an amount considerably in excess of JY 1,473,894,768;
- (iii) The plaintiff being a shareholder only and a Director at that time of the 4th defendant company, no right accrued to him personally from, out of or in respect of the contracts referred to in the plaint and in paragraph 2 hereof;
- (iv) By reason of the aforesaid facts no legal rights whatsoever of the plaintiff have been violated by

the 1st and 2nd defendants; nor was the violation of any such legal rights of the plaintiff threatened; accordingly the plaintiff was not entitled to interim injunctive relief under the provisions of section 54 of the Judicature Act.

9. The 1st and 2nd defendants further objected, inter alia, on the basis that the plaintiff's holding of 70,000 shares in the 4th defendant company constituted only 0.15% of the issued share capital as at March 31, 1990, and that on the face of the averments in paragraph 58 of the plaint the plaintiff had no locus standi to apply for any of the reliefs set out in paragraph 59 of the plaint, and that in the premises no cause of action whatsoever had accrued to the plaintiff on the alleged basis averred in the plaint.

10. The learned District Judge having reserved his Order postponed delivery of same several times and ultimately delivered it on 28.10.91 directing the issue of interim injunctions as prayed for in paragraphs (g) and (h) of the prayer to the plaint. True copies of the journal entries and the Order delivered on 28.10.1991 are annexed hereto respectively marked "G" and "H" and are pleaded as part and parcel hereof.

11. Being aggrieved by the said Order delivered on 28.10.1991 the 1st and 2nd defendants respectfully apply for leave to appeal therefrom to Your Lordships' Court on the following among other grounds which may be urged at the hearing of this application:-

- (i) The said order is contrary to law and in disregard of the admitted facts on the face of the plaint and certain specific documents annexed thereto relied on by the plaintiff as well as certain documents contents of which are not disputed by the plaintiff and which have been annexed to the 1st and 2nd defendants' said Statement of Objections marked 1D1 to 1D5;
- (ii) That the said order of the learned District Judge is based mainly on the following grounds:-
 - (a) That unless the 1st and 2nd defendants are restrained from claiming payment of the moneys due owing and payable to them and the 4th defendant is restrained from paying the same, the purpose of the interim injunction will be defeated;
 - (b) that the 4th defendant company and the 1st and 2nd defendants have acted fraudulently and collusively and in disregard of the rights of the shareholders of the 4th defendant company;

(c) that if the said payments are made to these defendants-petitioners-appellants (hereinafter sometimes referred to as appellants) they would take the said moneys out of the country causing grave and irreparable loss to the country and to the plaintiff-respondent who is a recognised investor in this country.

(iii) it is respectfully submitted that the learned District Judge has failed to consider the fundamental questions relevant to the issue of an interim injunction which constitute conditions precedent to the grant of an interim injunction, to wit:-

- (a) whether the plaintiff-respondent had a legal right which was violated or the violation of which was being threatened;
- (b) whether the plaintiff-respondent had a cause of action against these appellants;
- (c) whether any right whatsoever accrued to the plaintiff-respondent personally from out of or in respect of the aforementioned contracts referred to in paragraph 2 hereof;
- (d) whether any loss or damage would necessarily accrue to the plaintiff-respondent personally;
- (e) whether the plaintiff-respondent as a shareholder was entitled to institute and maintain the above-styled action on the face of the averments in the plaint and in particular paragraphs 58 and 59 of the plaint;
- (f) whether on the face of the averments in the plaint there was a misjoinder of parties and causes of action;
- (g) whether even assuming without conceding the truth of the allegations in the plaint that there had been a breach of contract by the appellants in the manner of construction of the hotel building, the plaintiff-respondent personally was entitled to institute and maintain the above-styled action;
- (h) whether in the absence of an action by the 4th defendant based on the alleged breach of contract, an injunction restraining these appellants from claiming payment of the moneys admittedly due owing and payable to

them should or could in law be granted;

- (i) whether in any event the plaint constitutes an action for breach of contract instituted by the plaintiff-respondent and if so whether the plaintiff-respondent is entitled to institute such an action on behalf of the 4th defendant company (HDL);
- (j) it is respectfully submitted that although these objections were specifically taken along with other objections in the said Statement of Objections filed by the appellants, the learned District Judge has completely failed to consider the same;
- (k) that in any event the learned District Judge has failed to consider whether any ultimate judgment to which the plaintiff-respondent was lawfully entitled in respect of the alleged breach of contract would be rendered ineffectual by the non-issue of the interim injunctions prayed for by the plaintiff-respondent.

12. These appllants further submit that the learned District Judge has taken into consideration extraneous circumstances not relevant to the question as to whether or not the interim injunctions should issue, and has on the other hand failed to consider the preliminary requirements before the grant of an interim injunction which could be issued only if its purpose being lawful were likely to be defeated and the ultimate judgment in the case would be rendered ineffectual. It is submitted that in this case the ultimate judgement prayed for by the plaintiff-respondent was also the issue of a permanent injunction in the same terms, and there was no substantive claim in the plaint for any monetary relief.

13. These appellants further submit that the learned District Judge in considering the balance of convenience has erred in taking the view that these appellants could lawfully claim accruing interest from the 4th defendant on the deferred payment of the moneys due owing and payable to the appellants inasmuch as he has overlooked the fact that an interim injunction restraining the 4th defendant company from paying these appellants the said moneys has been simultaneously issued by him. These appellants further submit that no security whatsoever has been required of the plaintiff-respondent as a condition for the issue of the said interim injunctions.

14. It is further submitted that despite the fact that the 4th defendant company is not disputing its liability to make payment of the moneys due and owing to these appellants, the

learned District Judge has at the instance of the plaintiff wrongfully restrained the 4th defendant from doing so and these appellants from claiming payment of the said moneys; that in the premises grave and irremediable loss and damage is being caused to these appellants by the plaintiff-respondent who has no right or title whatsoever to the said moneys or to any legal interest therein.

15. It is further submitted that, assuming without conceding, there was in fact a breach of the Construction Agreement (P11), the remedy of the aggrieved party, the 4th defendant, was to claim damages for breach of contract. In the absence of such a claim for substantive relief an interim injunction could not have been sought even by the 4th defendant, and that a fortiori such an interim injunction was not in law available to the plaintiff.

It is pointed out that in this instance the issue of the interim injunction is tantamount to sequestration before judgment of moneys payable to the 1st and 2nd defendants-petitioners-appellants without a prior claim for such judgment either by the 4th defendant or the plaintiff. It is, therefore, submitted that the Order for the issue of the interim injunctions was not only wrong but also not sanctioned in law and, therefore, illegal.

16. These appellants have already filed their Answer to the plaint and the case has been fixed for trial. These appellants, however, urge that in view of the special circumstances set out above, it is necessary that the question of the legality of the issue of the interim injunctions sought be decided by this Court as expeditiously as possible.

17. It is respectfully submitted that this interlocutory appeal should be heard and determined on the preliminary objections raised by these appellants even assuming without conceding the truth of the facts relied on by the plaintiff-respondent.

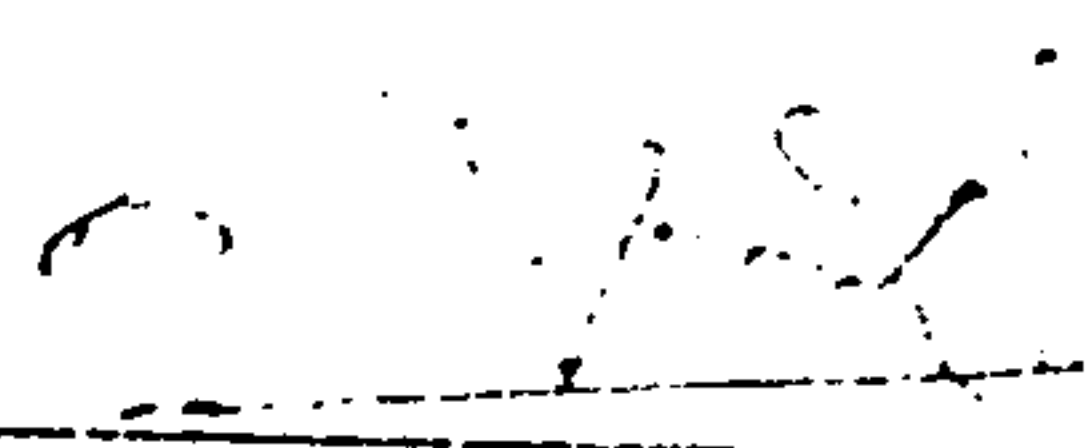
18. It is further submitted that the prayer for the issue of the interim as well as the permanent injunctions assumes that there has been in fact a breach of the Construction Agreement P11 with P12 by these appellants, and on that footing the plaintiff-respondent seeks injunctive relief to which he is not in law entitled; these appellants further state that the plaintiff-respondent's case is that the Plan P8 dated July, 1980 formed the contract drawings or architectural plans, which on the face of the plaint itself is demonstrably wrong inasmuch as the approved plans in pursuance of which the said hotel building was constructed are the Plans P54 and also inasmuch as Plan P8 has never been submitted to and approved by the UDA.

19. It is respectfully submitted that the said Order of the

learned District Judge is vitiated by non-direction, misdirection and grave error, and that in the premises it ought to be set aside.

Wherefore, the 1st and 2nd defendants-petitioners-appellants respectfully pray:-

- (a) that notice of this application be issued in the first instance on the respondents ;
- (b) that Your Lordships' Court be pleased to grant leave to appeal from the said Order delivered on 28.10.1991;
- (c) that Your Lordships' Court be pleased to set aside the said Order delivered on 28.10.1991 and refuse the plaintiff-respondent's application for injunctive relief;
- (d) for costs; and
- (e) for such other and further relief as to Your Lordships' Court shall seem meet.



Attorney-at-Law for 1st and 2nd
Defendants-Petitioners-Appellants