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

In the matter of an application for Restitutio-in-Integrum under Article 138(1) of the Constitution of the Democratic Socialist Republic of Sri Lanka.

CA/RII/11/2023
WP/HCCA/COL/38/2023/LA
D. C. Colombo Case No. DRE/08/2021

Anusha Elfi Gunasekara nee Corea,
No.47, Ananda Coomaraswamy Mawatha, Colombo 07.

Plaintiff

Vs.

1. **Eddie Wijesuriya,**
2. **Razik Zarook,**
3. **Hiran Soysa,**

Trustees and Members on behalf of the Members of **Circolo Amichevole Per Residenti Italini** (Capri Club)
All of
No.62, Dharmapala Mawatha,
Colombo 07.

Defendants

And between

Anusha Elfi Gunasekara nee Corea,
No.47, Ananda Coomaraswamy Mawatha,
Colombo 07.

Plaintiff- Petitioner

Vs

1. **Eddie Wijesuriya,**
2. **Razik Zarook,**
3. **Hiran Soysa,**
   Trustees and Members on behalf of the Members of **Circolo Amichevole Per Residenti Italini** (Capri Club)
   All of
   No.62, Dharmapala Mawatha,
   Colombo 07.

Defendants- Respondents

And now between

1. **Mohan de Silva,**
   Member of Capri Club,
   No.62, Dharmapala Mawatha,
   Colombo 03.

2. **Manathunga Kithsiri Bandara,**
   Member of Capri Club,
   No.62, Dharmapala Mawatha,
   Colombo 03.

Petitioners

Vs

Anusha Elfi Gunasekara nee Corea,
No.47, Ananda Coomaraswamy Mawatha,
Colombo 07.
Plaintiff-Petitioner-Respondent

1. **Eddie Wijesuriya,**
2. **Razik Zarook,**
3. **Hiran Soyza,**

Trustees and Members on behalf of the Members of *Circolo Amichevole Per Residenti Italini* (Capri Club)
All of
No. 62, Dharmapala Mawatha,
Colombo 07.
Defendant-Respondent-Respondents

Before: Hon. D.N. Samarakoon, Judge of the Court of Appeal
Hon. Neil Iddawala, Judge of the Court of Appeal

Counsel: Upul Jayasooriya P.C. with Sandamal Rajapaksha, appears for the Petitioner

Faizer Musthapha P.C. with Senaka De Seram and Pulasthi Rupasinghe, Thiran Ediriweera instructed by Mrs. S. Fonseka for the Respondent.

Written Submissions on: 08/06/2023 by the Petitioner

08/06/2023 by the Plaintiff- Petitioner-Respondent

Date: 23.10.2023

ORDER

D. N. Samarakoon J.,

(01) Introduction:-

Friendly club for Italian residents is the English translation of "Circolo Amichevole per Residenti Italiani", which by the initial letter of each word is known as "The CAPRI Club". Incidentally, Capri is an island located in the Tyrrhenian Sea off the Sorrento Peninsula, on the south side of the Gulf of Naples in the Campania region of Italy. The main town of Capri that is located on the island shares the name. It has been a resort since the time of the Roman Republic. It is also said, that, "Capri is a feminine name and a place name associated with the island of Capri in Italy[1]. The island is situated in the Gulf of Naples in southern Italy[2]. In Italian culture, capri translates to 'impulsive change of mind'[3]."

Anusha Elfi Gunasekara nee Corea instituted a Rent and Ejectment action against (1) Eddie Wijesuriya, (2) Razik Zarook and (3) Hiran Soysa on 09th February 2021 claiming that they [*the last said three*] are trustees and members on behalf of the members of The Capri club.

[1] Capri Name Meaning, Origin, History, And Popularity (momjunction.com)
[2] Ibid
[3] Ibid

The plaint prayed for ejectment of the defendants, the members of The Capri club, their servants, agents, employees, representatives and all those holding under them and **for a permanent injunction** restraining the above from in any way or manner running a club and or conducting the business of a club and or running a restaurant in the premises. The plaint prayed for **an interim injunction too** on the same basis. Although the district court of Colombo had issued an enjoining order, by order dated 23.02.2023 the learned Additional District Judge dismissed the application for an interim injunction. The plaintiff sought leave to appeal against this order in the Civil Appellate High Court of Colombo and the learned High Court Judges after an interpartes hearing on 06.04.2023 granted leave to appeal issuing an interim order, which has the same effect of the above interim injunction to be valid until the determination of the appeal which was to be operative from 08.05.2023.

The present application by Mohan de Silva and Manathunga Kithsiri Bandara, both claiming to be members of The Capri club was supported for restitutio in integrum on 04.05.2023 and satisfied on a prima facie basis this court issued notice and interim orders as per paragraphs (e) (f) and (g) of the prayer to the petition. The paragraphs (e) and (f) dealt with an order staying the operation of the interim order of the learned High Court judges and the paragraph (g) dealt with an interim order staying further proceedings of the appeal in the High Court. These interim orders were initially operative until 17.05.2023 which was the notice returnable date.

Before the notice returnable date the plaintiff respondent on 10.05.2023 came before this court and moved to vacate the interim orders, whereby this court issued a notice on the petitioners returnable for 15.05.2023 to show cause as to why the interim orders should not be vacated.

As the learned President's Counsel for the petitioners was absent on 15.05.2023, the court heard both learned president's counsel on 17.05.2023 and the parties

have thereafter filed written submissions. Hence this order is in respect of the matter of extending the interim orders issued by this court on 04.05.2023.

The plaintiff respondent has taken several preliminary objections, which are,

(02) The petitioners were not parties to the district court action and therefore, cannot prefer the instant application to this court:

It is not necessary to examine cases which have said that it must be a party to the former action to invoke the jurisdiction of restitutio in integrum, because in the district court a section 16 [*of the Civil Procedure Code*] notice was published and it binds those who come under a certain category of persons although they are not individually named as parties in the action.

As the petitioners submit, it was said in *Jayawardena vs. The Baptist Missionary Society 1923, 25 NLR 97* by Schneider J., that,

> "**The effect of a representation order under section 16 of the Civil Procedure Code is to bind persons who are not parties, but who are represented as having a common interest, only in so far as the property which is the subject-matter of the action is concerned,** but is ineffectual to render them liable in costs or damages".

Furthermore, the petitioners state, that, in the contempt petition filed by the plaintiff respondent too the 15th accused is the 01st petitioner Mohan de Silva.

Therefore, petitioners are parties to the former action on above grounds.

(03) In the context of an identical or similar matter being adjudicated by the Supreme Court, this court is devoid of jurisdiction to hear the instant application:

Against the order of the Civil Appellate High Court, the petitioners have gone before the Supreme Court in leave to appeal application SC/HCCA/LA/202/2023 dated 02.05.2023.

In order to contend that the Supreme Court and this court cannot concurrently adjudicate on the same order, the plaintiff respondent cites, *Rajapakse Mudiyanselage Karunaratne vs. Iluktenna Arachchige Piyasena, C. A. case No. 02/2016 dated 23.05.2017*, in which it has been said,

"

> When the Supreme Court has acted in its jurisdiction touching upon an issue and if a petitioner seeks to revive and revisit that issue in this Court, this Court cannot usurp a jurisdiction which it does not have, in the guise of *restitutio in integrum*.

In that case the facts were different. In a rei vindicatio action, the district judge had rejected a plea of prescription by the defendant. Defendant's appeal to the Civil Appellate High Court was dismissed. The Supreme Court having heard both counsel did not grant leave to appeal. It was thereafter the defendant attempted to invoke jurisdiction under Article 138.

There is no such thing in this application and there is no "chaos" as envisaged by the plaintiff respondent.

(04) An application for restitutio in integrum cannot be instituted against an order of an appellate court:

The argument of the plaintiff respondent is that as the leave to appeal application is filed under section 757 of the Civil Procedure Code read with section 5A of the High Court of the Provinces (Special Provisions) (Amendment) Act No. 54 of 2006 the High Court of Civil Appeal has exercised appellate jurisdiction which is the same jurisdiction of this court and therefore this court cannot exercise its jurisdiction of restitutio in integrum jurisdiction.

In respect of the question [*a question "formulated" for the plaintiff respondent*] whether this court has jurisdiction to review judgments and orders made by the Civil Appellate High Court, the plaintiff respondent cites *Gammeddalage Nilanthi*

Munasinghe and others vs. Amitha Ariyawansa and others, C. A. RI 15/2018. The following extract is reproduced,

> "The learned counsel for the petitioner accepts that a party cannot **by way of a final appeal** come before this Court against the Judgment or Order of the High Court of Civil Appeal. But the argument of the learned counsel is that, nevertheless, a party can come before this Court against the Judgment or Order of the High Court of Civil Appeal **by way of revision and/or restitutio in integrum** in terms of Article 138 of the Constitution.
>
> If that argument is accepted, section 5C becomes meaningless, and the intention of the legislature will blatantly be defeated, as any party dissatisfied with any Judgment or Order of the High Court of Civil Appeal can come before this Court by way of revision and/or restitutio in integrum. Then the party dissatisfied with the Judgment or Order of the District Court will have three appeals—first to the High Court of Civil Appeal, second to the Court of Appeal, and third to the Supreme Court. That was obviously never the intention of the legislature. One of the main objectives of setting up High Courts of Civil Appeal is to curb laws delays in civil litigation and not to expand it.
>
> ……
>
> The question whether the Court of Appeal has jurisdiction to sit on Judgments and Orders made by the High Courts of Civil Appeal was particularly dealt with by Justice Salam (with Justice Rajapaksha agreeing) in the Court of Appeal case of Stephan Gunaratne v. Thushara Indika Sampath [CA (PHC) APN 54/2013 (REV)] decided on 23.09.2013.
>
> That is a case where the plaintiff-petitioner in a partition action came before this Court by way of revision against the Judgment of the High Court of Civil Appeal at Ratnapura. Dismissing the application in limine without issuing notice, Justice Salam stated:

> "The question that now arises for consideration is whether the Court of Appeal can exercise its revisionary powers under Article 138 of the Constitution in respect of a judgment of the High Court pronounced under the Provisions of Act No 54 of 2006 when the proper remedy is to appeal to the Supreme Court. Appreciably, Section 5A of Act No 54 of 2006 quite specifically states that all relevant written laws applicable to an appeal, in the Court of Appeal are applicable to the High Court as well. This undoubtedly demonstrates beyond any iota of doubt that the scheme provided by Act No 54 of 2006 to facilitate an appeal being heard by the Provincial High Court is nothing but a clear transfer of jurisdiction and in effect could be said that as far as appeals are concerned both the High Court and the Court of Appeal rank equally and are placed on par with each other. Arising from this statement of law, it must be understood that if the Court of Appeal cannot act in revision in respect of a judgment it pronounces in a civil appeal, then it cannot sit in revision over a judgment entered by the High Court in the exercise of its civil appellate jurisdiction as well, for both courts are to be equally ranked when they exercise civil appellate jurisdiction."

.....

Having quoted above, the plaintiff respondent further quotes another quotation reproduced in *Gammeddalage Nilanthi Munasinghe vs. Amitha Ariyawansa*, but not from Justice Salam but from Justice Priyasath Dep (later Chief Justice) and, since the continued reproduction of that extract without the part in middle would give the impression that it is also from the judgment of Salam J., the not quoted [*by the plaintiff respondent*] part is also quoted as follows.

> "A similar conclusion was reached by the Supreme Court in Balaganeshan v. OIC, Police Station, Seeduwa (SC SPL/LA No. 79/2015) decided on

01.04.2016 in interpreting similar provisions found in the High Court of the Provinces (Special Provisions) Act, No. 19 of 1990.

That is a criminal case where the accused unsuccessfully appealed to the Provincial High Court against the Judgment of the Magistrate's Court. Being dissatisfied with the Judgment of the Provincial High Court sitting in appeal, the accused appealed to the Court of Appeal in terms of section 138 of the Constitution. The Court of Appeal dismissed the appeal in limine on the basis of want of jurisdiction. Rejecting leave to appeal against that dismissal, Justice Dep (as His Lordship then was) with Justice Wanasundera and Justice Jayawardena agreeing held that:

Continues the quotation by the plaintiff respondent,

> ""When the Provincial High Court exercises appellate jurisdiction, it exercises appellate jurisdiction hitherto exclusively vested in the Court of Appeal. It exercises a parallel or concurrent jurisdiction with the Court of Appeal. The High Court when it exercises appellate jurisdiction it is not subordinate to the Court of Appeal. That is the basis for conferring jurisdiction on the Supreme Court under section 9 of the High Court of Provinces (Special Provisions) Act No. 19 of 1990 to hear appeals from the judgments of the High Court when it exercises appellate jurisdiction. I hold that the Accused Appellant–Petitioner should have filed a Special Leave to Appeal application against the judgment of the High Court exercising Appellate Jurisdiction to the Supreme Court in the first instance instead to the Court of Appeal. The Court of Appeal correctly upheld the preliminary objection and rejected the Appeal."

Hence I hold that the Court of Appeal has no appellate jurisdiction to set aside Judgments or Orders of the High Court of Civil Appeal by way of final appeal, revision or restitutio in intergrum. That is vested exclusively in the Supreme Court.'

The plaintiff respondent also cites *Wanasinghe Pedige Sumanawathie vs. Richard Peris Finance Ltd., C. A. RII 10/22* dated 30.05.2022 in this regard.

That case decided on 30.05.2022 says nothing new, except timorously following the case of Gammeddage Nilanthi Munasinghe and the case decided by Salam J.

The above are the main preliminary objections of the plaintiff respondent, except lashes, which will be considered later. But from the judgment of Salam J., there arises a question which is initially addressed.

(a) Has section 05A(1) of Act No. 54 of 2006 transferred the civil appellate jurisdiction of the Court of Appeal to the Provincial High Court?

Salam J., in the above quoted paragraph said,

> "This undoubtedly demonstrates beyond any iota of doubt that the scheme provided by Act No 54 of 2006 to facilitate an appeal being heard by the Provincial High Court **is nothing but a clear transfer of jurisdiction** and in effect could be said that as far as appeals are concerned both the High Court and the Court of Appeal rank equally and are placed on par with each other".

It is true that his lordship said, that, the two courts rank equally. But, at the same time it was said, "is nothing but a clear transfer of jurisdiction." The word "transfer" does not have an exact meaning. It can mean moving something from one place to another, in which case, it will no longer exist in the firstly said place. But it can also mean, change (the sense of a word or phrase) by extension or metaphor, for example, "between Latin and English, the sense was transferred from the inhabitants to the place." Denning L. J., said in *Seaford Court Estates Ld. Vs. Asher [1949] K. B. 481* at page 499 that "The English language is not an instrument of mathematical precision. Our literature would be much the poorer if it were."

But the other part of the statement that the Provincial High Court and the Court of Appeal rank equally [*as far as civil appellate jurisdiction is concerned*] is not ambiguous.

Section 5A says,

> "5A. (1) A High Court established by Article 154P of the Constitution for a Province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by any District Court or a Family Court within such Province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be".

This court considered an argument similar to that of the present plaintiff respondent in **Travel Data Tours and Travels (Pvt) Limited vs. Softlogic Finance PLC, CA No. RII/22/2017** dated 31.05.2022, one day after Sumanawathie's case.

In that case this court considered the case of "*Sharif And Others Vs. Wickramasuriya And Others (2010) 1 SLR 255*".

In Sharif's case, Eric Basnayake J., in the Court of Appeal considered the analogous situation in regard to the Provincial High Court created by Article 154P(3) of the Thirteenth Amendment to the Constitution.

It was said,

> "The Constitution
>
> Article 138 of the Constitution gives jurisdiction to the Court of Appeal with regard to its revisionary powers.
>
> Article 138 is as follows:
>
> 138 (1): The Court of Appeal shall have and exercise (subject to the provisions of the Constitution or of any law) an appellate jurisdiction for

the correction of all errors in fact or in law which shall be committed by any court of first instance, tribunal or other institution and sole and exclusive cognizance, by way of appeal, revision and restitutio in integrum, of all cases, suit, action, prosecutions matters and things of which such courts of First instance, tribunal or other institution may have taken cognizance (emphasis added).

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(2) Is not reproduced.

The sole jurisdiction given by Article 138 was expanded to High Courts by Article 154P (3) (b) under the 13th Amendment to the Constitution.

The Article is as follows:

154P (3) Every High Court shall (b) Notwithstanding anything in Article 138 . . . exercise, appellate and revisionary jurisdiction in respect of orders. . . by Magistrate Courts and Primary Courts within the province

In terms of Article 138 the Court of Appeal shall have and exercise. . . sole and exclusive cognizance by way of appeal; revision. . .

However Article 154(3) (b) has given the High Court appellate and revisionary jurisdiction in respect of orders by Magistrate Courts and Primary courts. Hence the Court of Appeal ceased to enjoy sole and exclusive jurisdiction. Article 154P did not take away the powers exercised by the Court of Appeal under Article 138.

However section 9 of the High Court of the Provinces (Special Provisions) Act appears to have caused a conflict with regard to the jurisdiction enjoyed by the Court of Appeal. According to this section an aggrieved person by a final order of a High Court in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P may appeal to

the Supreme Court on a substantial question of law with leave first obtained from High Court.

Section 9 of High Court of the Provinces (Special Provisions) Act No. 19 of 1990 is as follows:

> Subject to the provisions of this Act or any other law any person aggrieved by (a) a final order. . . of a High Court. . . in the exercise of the appellate jurisdiction vested in it by paragraph (3) (b) of Article 154P. . . which involves a substantial question of law, may appeal there from to the Supreme Court if the Court grants leave to appeal to the Supreme Court. . .

High Court is vested with original jurisdiction and is placed lower to the Court of Appeal in the order of Courts on superiority. However when a party chooses to go to High Court with a right of appeal to the Supreme Court, one may argue that the appellate powers of the Court of Appeal have been removed.

Has the powers of the Court of Appeal with regard to its appellate and revisionary jurisdiction been removed? This is not so. Articles 138 and 154P give jurisdiction to Court of Appeal and High Court respectively to hear appeals and revision from the Magistrate's Court Against the orders of these courts appeal lie to the Supreme Court with leave first obtained from the Court of Appeal or the High Court as the case may be, on a question of law. This does not mean that the powers enjoyed by the Court of Appeal had been taken away. The powers of the High Court are limited to the Province. The Court of Appeal exercises its powers for the whole island".

His Lordship Justice Eric Basnayake then considered the position with regard to the decentralization of civil appellate jurisdiction. His Lordship said,

> "Act No. 54 of 2006

This Act amended Act No. 19 of 1990 with the insertion of sections 5A, 5B, 5C and 5D. Section 5A(1) gives the appellate and the revisionary jurisdiction which is as follows:

> 5A (1) A High Court established by Article 154P of the Constitution for a province, shall have and exercise appellate and revisionary jurisdiction in respect of judgments, decrees and orders delivered and made by anv District Court or a Family Court within such a province and the appellate jurisdiction for the correction of all errors in fact or in law, which shall be committed by any such District Court or Family Court, as the case may be (emphasis added).
>
> (2) Not reproduced

I am of the view that the jurisdiction enjoyed by the Court of Appeal through Article 138 remains intact. Through Article 138 one has the liberty to invoke the jurisdiction of the Court of Appeal or to resort to a Provincial High Court in terms of Article 154P (3) (b). If one chooses to go to the High Court, an appeal would lie to the Supreme Court with leave first obtained from the High Court (Section 9 of the Act 19 of 1990). If one invokes the jurisdiction of the Court of Appeal under Article 138 an appeal would lie from any final order or judgement of the Court of Appeal to the Supreme Court with leave of Court of Appeal first obtained (Article 128(1) of the Constitution). It is thus clear that both courts enjoy concurrent jurisdiction on matters referred to in Article 154P (3) (b). The jurisdiction enjoyed by the Court of Appeal had not been disturbed by Articles of the Constitution or by the Acts of Parliament.

Sharvananda C. J., Colin-Thome, Atukorale and Tambiah J. in the case of *In Re the Thirteenth Amendment to The Constitution and The Provincial Councils Bill* (7) at 323 in their determination held as follows:

> "The Bill do not effect any change in the structure of the courts judicial power of the people. The Supreme Court and the Court of Appeal

> continued to exercise unimpaired several jurisdictions vested in them by the Constitution. There is only one Supreme Court and one Court of Appeal for the whole Island. The 13th Amendment Bill only seeks to give jurisdictions in respect of. . . Without prejudice to the executing jurisdictions of the Court of Appeal. Vesting of this additional jurisdiction in the High Court of each province only brings justice nearer home to the citizen and reduces delay and cost of litigation."

Thus, the decentralization, but not the transfer, of appellate powers of the Court of Appeal in criminal matters (in regard to Magistrate's Courts and in the especial, sui generis jurisdiction of the Primary Courts) and in civil matters (in regard to the District Courts and Family Courts) by the above legislation has not affected the hierarchy of courts. The Provincial High Court exercising some of the appellate powers of the Court of Appeal has not made it another Court of Appeal; neither had it reduced any such jurisdiction of the Court of Appeal.

But this was addressed in detail, to make this discussion complete and neither to say that once a High Court established under section 5A(1) of Act No. 54 of 2006 [*commonly, but colloquially called "Civil Appellate High Court" or "High Court of Civil Appeal*"] exercises its appellate jurisdiction, either in full, or in part, the Court of Appeal also can exercise the similar power it has on that matter; and nor to say, that, once such High Court exercises its appellate power the Court of Appeal can exercise a superior appellate power on that matter. This is the objection of the plaintiff respondent.

But, appellate power is not the only jurisdiction the Court of Appeal has or it exercises on a matter. It has the power of revision and the power of restitutio in integrum. It is the last said jurisdiction which has been invoked by the petitioners in this application.

(b) <u>The jurisdiction of restitutio in integrum:</u>

Mrs. Vivionne Gunawardena vs. Hector Perera, Officer in Charge, Police Station, Kollupitiya and others S.C. Application 20/1983 was an application

filed in respect of an alleged violation of a fundamental right, where Mrs. Vivionne Gunawardena alleged, among other things, that she was unlawfully arrested by the OIC of Kollupiya Police Station. The IGP, the 02nd respondent filed an affidavit from one Vinayagam Ganeshananthem, Sub Inspector, to the effect that he and not the 01st respondent who arrested Mrs. Vivionne Gunawardena because she had no "permit" to go in a procession. Although Mrs. Vivionne Gunawardane countered this position, the Supreme Court consisting of a three Judge bench did not believe her, but believed the affidavit of Vinayagam Ganeshananthem and decided that the petitioner's fundamental rights have been violated as Vinayagam Ganeshananthem is "guilty" of unlawfully arresting her.

Vinayagam Ganeshananthem then petitioned to the Supreme Court requesting to set aside the said decision of the Supreme Court itself, as he was only a witness (on affidavit) and he was not informed before finding him "guilty" and therefore the rule audi alteram partem is violated. This second case was decided by a Seven Judge bench of the Supreme Court, including the incumbent learned Chief Justice. The decision was divided 05 to 02 and the majority decided against Vinayagam Ganeshananthem.

The learned Chief Justice, who wrote the leading judgment of the majority said,

> "He submits that this caption read with prayer (a) to the petition invokes a jurisdiction in revision which this Court does not have. One has to look at the legislation which created this Court to find an answer to this dispute. That legislation is to be found in the second Republican Constitution of 1978. **The Supreme Court which existed up to the time of the first Republican Constitution of 1972 and which continued to exist under that Constitution ceased to exist when the 1978 Constitution became operative.** (Vide Article 105 (2) of the Constitution). **Its place was taken by the Court of Appeal** (Vide Article 169 (2) of the 1978 Constitution). A new Supreme Court has been constituted which is

the highest and final Superior Court of Record. (Article 118 of the Constitution)."

The relevant portion of Article 169(2) says,

> **"Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal."**

Ranasinghe J., despite being in the minority of the 07 Judge bench judgment referred to a case decided by Dias S.P.J. in 1950 which was on restitutio in integrum and said,

> "**The real basis upon which relief is given and the precise nature of the relief so given by the Supreme Court upon an application made to it for relief against an earlier Order made by the Supreme Court itself was very lucidly and very effectively expressed by Dias S.P.J. way back in the year 1951 in the case of Menchinahamy v. Muniweera, (40).** In that case, about six weeks after an appeal to the Supreme Court from an interlocutory decree in the District Court was dismissed by the Supreme Court, an application was made to the Supreme Court, on 23.3.1949, " for revision or in the alternative for restitutio-in-integrum" by the heirs of a party defendant, who had died before the interlocutory decree was entered but whose heirs had not been substituted in his place before the interlocutory decree was so entered. It was contended on behalf of the respondents: that there was no merit in the application: **that if the relief sought is granted then the Supreme Court would in effect be sitting in judgment on a two-Judge decision of the Supreme Court which had passed the Seal of the Court that the Supreme Court cannot interfere with the orders of the Supreme Court itself.** In rejecting these objections, Dias S.P.J., placed this matter in its proper setting quite convincingly in the following words:

> "In giving relief to the petitioner we are not sitting in judgment either on the interlocutory decree or on the decree in appeal passed by this Court. **We are merely declaring that, so far as the petitioner is concerned, there has been a violation of the principles of natural justice** which makes it incumbent on this Court, despite technical objections to the contrary, to do justice. "

Ranasinghe J., referring to the judgment of Menchinahamy vs. Muniweera (1950) 52 NLR 409, while being on the minority will not diminish its value. It shows how the then Supreme Court, exercised the power of restitutio in integrum, ***even*** against a judgment of its own. Today, such a power is vested, hence, not only under Article 138 of the Constitution, but also on the hierarchical arrangement of courts and in the mode of exercise of the powers of Courts, referred to by the learned Chief Justice, in relation to Article 169(2) in the present Court of Appeal.

Ranasinghe J., further said in the said judgment,

> "The Supreme Court, as constituted under the 1978 Constitution, is not vested with the revisionary powers as exercised by the Supreme Court which was created by the aforesaid Courts Ordinance (Chapter 6)".

Despite this view being expressed in a minority judgment in that case, the judgment of the learned Chief Justice in the majority, drew a similarity between the present Court of Appeal and the former Supreme Court, to say that the present Supreme Court does not have revisionary powers. The majority of the Supreme Court also decided that "there is no justification for exercising any of the inherent powers of the Court in this case".

Thus it appears, that, the Supreme Court newly established under the 1978 Constitution does not have revisionary powers. Under section 37 of the Courts and their Powers Ordinance of 1889 [*Courts Ordinance*] the then Supreme Court was vested with revisionary jurisdiction. The "side note" to that section said, "Powers in appeal or on revision". The former Supreme Court of Ceylon had not the jurisdiction of restitutio in integrum vested on it by a statute, but as Dias S.

P. J., exercised it in Menchinahamy va. Muniweera in 1951, it was exercised on the strength of the Roman Dutch Common law which applies without being enacted by way of a statute. It is this jurisdiction of restitutio in integrum, which is presently vested in the Court of Appeal established under the 1978 Constitution by its Article 138.

Dias S.P.J. thus set aside a decree entered pursuant to a judgment given by two judges of the former Supreme Court (Supreme Court of Ceylon). He did so accompanied on the Bench with Gunasekera J., who agreed with him. Thus, even the decree of the same court was set aside exercising the power of restitutio in integrum.

The jurisdiction of restitutio in integrum is not limited to an alleged breach of the rule "audi alteram partem".

The above discussion also makes it clear, that,

(a) The power of restitutio in integrum, as exercised by Dias S.P.J. in Menchinahamy vs. Muniweera (1950) in the then Supreme Court is now vested in the present Court of Appeal,
(b) The power of revision is also vested with the present Court of Appeal,
(c) The present Supreme Court has, with respect, exercised its inherent powers very rarely (vide., the 07 Judge bench judgment referred to)

Therefore, despite the Provincial High Court of Colombo under section 5A of Act No. 54 of 2006 exercised civil appellate jurisdiction, it is not a bar to the exercise by this court the jurisdiction of restitutio in integrum which the petitioners seek to invoke.

(05) Whether the petitioners are guilty of laches:

It is alleged, especially in paragraphs 39 to 43 of the written submissions of the plaintiff respondent, that, the petitioners are guilty of laches, because the action against the defendants was instituted in 2021.

But it must be noted, that, the interim injunction was refused by the learned district judge only on 23rd February 2023 and the Civil Appellate High Court granted an interim order, which had the same effect of the interim injunction on 06th April 2023, to come to effect from 08th May 2023. This application was supported on 04th May 2023, four days before that. Hence there is no laches on the part of the petitioners.

(06) The question with regard to the extension of the interim orders issued in this application:

This court must now consider, having answered the preliminary objections, to the factual basis of the application for interim injunction, in order to determine the question of the extension of the interim orders.

The plaintiff respondent by plaint dated 09th February 2021, among other things, prayed for an interim injunction restraining the defendants, the members of the Capri club, their servants, agents or anyone who act under them from carrying on, in whatsoever manner or style, a club, business of a club and or a restaurant.

In the written submissions tendered for the petitioners in regard to the matter of extension of the interim orders issued by this court, it is mentioned as the heading to the part that commences from paragraph 63, that,

"**There is no prima facie sustainable/winnable case in favour of the respondent.**"

It is seen, that, in the order of the learned additional district judge refusing to issue an interim injunction too, she has referred to the case of **Felix Dias Bandaranayake vs. The State Film Corporation (1981) 2 SLR 287**, where His Lordship Justice Joseph Francis Anton Soza laid down as a sequential test,

(i) A prima facie or prima facie winnable case,
(ii) Balance of convenience and
(iii) Equitable considerations

The petitioners submit, that, the respondents have failed to establish the ownership of the late Lakshman Kumaradas Corea to the property which is the subject matter.

But, as submitted for the plaintiff respondent, section 116 of the Evidence Ordinance intervenes. It says,

"

116. Estoppel of tenants and of licensee of person in possession. — No tenant of immovable property, or person claiming through such tenant, shall, during the continuance of the tenancy, be permitted to deny that the landlord of such tenant had, at the beginning of the tenancy, a title to such immovable property; and no person who came upon any immovable property by the licence of the person in possession there of shall be permitted to deny that such person had a title to such possession at the time when such licence was given.

This was further elaborated in the case of Pathirana vs. Jayasundara 58 NLR 169.

This makes everything considered by the learned Additional District Judge on evidence regarding ownership of the plaintiff inadmissible.

The petitioners state at paragraph 59 of the written submissions, that, as per the Constitution of the club, any action must be instituted against the trustees of the club.

The plaintiff respondent's written submissions state at paragraph 61, that, the 01st to 03rd defendants in the original action have taken up the position, that,

(a) The 01st defendant ceased to be a trustee on 02nd February 2020,
(b) The 02nd defendant ceased to be a trustee on 30th September 2020 and
(c) The 03rd defendant ceased to be a trustee on 30th September 2020

On that basis the defendants have taken up the position that the plaintiff respondent has no cause of action.

The plaintiff respondent, in turn, by referring to letter marked as "P.10" attempts to show that they were trustees at least until October 2020.

Should the district court consider such evidentiary material at the time of granting or refusing to grant an interim injunction?

(07) The principle on which an interim injunction application must be considered:-

In FELIX DIAS BANDARANAYAKEV. THE STATE FILM CORPORATION AND ANOTHER 1981 1981 02 SLR 287 at page 302 Justice Soza says,

> "In Sri Lanka we start off with a *prima facie* case. **That is, the applicant for an interim injunction must show that there is a serious matter in relation to his legal rights, to be tried at the hearing and that he has a good chance of winning**. It is not necessary that the plaintiff should be certain to win. **It is sufficient if the probabilities are he will win**. Where however the plaintiff has established a strong *prima facie* case that he has title to the legal right claimed by him but only an arguable case that the defendant has infringed it or is about to infringe it, the injunction should not be granted *(Hubbard v Vosper)*."

The aforesaid dictum is cited so often in this country which is generally understood that if a plaintiff who is seeking an interim injunction under section 54(1)(a) of the Judicature Act (that is by way of the plaint itself) if not he can establish a strong case showing that he has a fair chance of winning no interim injunction can be issued. The appraising of the "fair chance of winning", "a strong prima facie case", "the plaint having established a legal right" and "the possibilities of success" and the like has the tendency to make judges deciding on the substantive issues in a case on pleadings and affidavit evidence at the stage of granting interim relief. Is this what is expected to be done by the widely used phrase "a prima facie case"?

But in **American Cyanamid Co. vs. Ethicon Ltd., [1975] A.C. 396,** Lord Diplock said,

"The notion that it is incumbent upon the court to undertake what is in effect a preliminary trial of the action upon evidential material different from that upon which the actual trial will be conducted, is, I think, of comparatively recent origin, though it can be supported by references in earlier cases to the need to show "a probability that the plaintiffs are entitled to relief" *(Preston v. Luck*(1884) 27 Ch.D. 497, 506, *per* Cotton L.J.)".

His Lordship *Justice Joseph Francis Anthony Soza* was however of the view that the approach adopted by Lord Diplock (with the concurrence of the entire House of Lords) in American Cyanamid Co. Ltd. vs. Ethicon Ltd. 1975 will not be adopted in this country.

CEYLON COLD STORES LTD. V. WHITTALL BOUSTEAD LTD. 1980 1980 02 SLR 120 said at page 130, [per Soza J.]

"In 1970 in the case of *Cavendish House (Cheltenham) Ltd. v. Canvendish-Woodhouse Ltd*. Harman, L.J. (Salmon, L.J. notably concurring) put the matter succinctly thus:

> "Therefore you start off with a prima facie case. That, of course, is the essential prelude to the granting of interlocutory relief".

This long-standing approach was however thrown overboard by the decision of the House of Lords in the case of *American Cynamid Co. v. Ethicon Ltd*. where Lord Diplock (Lord Salmon was one of the Judges who concurred with him) said that there was no such rule that the plaintiff seeking an interlocutory injunction should make out a prima facie case."

His Lordship added at page 131,

"We have not adopted the doctrine propounded by Lord Diplock. It is not likely that we will. **Our law is that an interim injunction will issue only**

if there is a substantial question to be investigated and the plaintiff makes out a prima facie case. The Court must assess the relative strength of the cases of the parties on the material before it. In the words of Lord Denning, M.R. in *Hubbard. V. Vesper.*

> "in considering whether to grant an interlocutory injunction the right course for a Judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done."

But in enjoining, so to say, the adoption of the doctrine propounded by Lord Diplock, Justice Soza in the same passage incorporated a passage from Lord Denning's judgment in **Hubbard vs. Vosper 1972** *which incorporation has a great significance.*

The reason is because in **Hubbard vs. Vosper [1972] 2 Q.B. 84** Lord Denning expressly deprecated the practice of employing strict rules to fetter the discretion (and such strict rules included the need for the existence of a "prima facie case").

(a) The misunderstanding of the principle laid down in Hubbard vs. Vosper.

The elusiveness and the "clogging" effects of the propositions that was condemned in Hubbard vs. Vosper[4] is such that the very effect of the decision in Hubbard vs. Vosper is often misunderstood. It so happened in the High Court of Chancery and in the Court of Appeal in American Cyanamid case too. Lord Diplock said about that in American Cyanamid case at page 540 and 541.

[4] It is Vosper not Vesper

"The notion that it is incumbent upon the court to undertake what is in effect a preliminary trial of the action upon evidential material different from that upon which the actual trial will be conducted, is, I think, of comparatively recent origin, though it can be supported by references in earlier cases to the need to show "a probability that the plaintiff is entitled to relief"(**Preston v. Luck (1887) 27 Ch.D. 497, per Cotton, L.J. at p. 506**) or "a strong prima facie case that the right which he seeks to protect in fact exists" (Smith v. Grigg Limited [1924] 1 K.B. 655, per Atkin, L.J. at p. 659). These are to be contrasted with expressions in other cases indicating a much less onerous criterion, such as the need to show that there is "certainly a case to be tried" (Jones v. Pacaya Rubber and Produce Company, Limited [1911] 1 K.B., 445, per Buckley, L. J. at p. 457) which corresponds more closely with what judges generally treated as sufficient to justify their considering the balance of convenience upon applications for interlocutory injunctions, at any rate up to the time when I became a member of your Lordships' House.

An attempt had been made to reconcile these apparently differing approaches to the exercise of the discretion by holding that the need to show a probability or a strong prima facie case applied only to the establishment by the plaintiff of his right, and that the lesser burden of showing an arguable case to be tried applied to the alleged violation of that right by the defendant (Donmar Productions Ltd. v. Bart [1967] 1 W.L.R. 740, per Ungoed Thomas,J. at p. 742. Harman Pictures Ltd. v. Osborne [1967] 1W.L.R 723, per Goff, J. at p. 738). The suggested distinction between what the plaintiff must establish as respects his right and what he must show as respects its violation did not long survive. It was rejected by the Court of Appeal in Hubbard v. Vosper [1972] 2 Q.B. 84- a case in which the plaintiff's entitlement to copyright was undisputed but an injunction was refused despite the apparent weakness of the suggested defence. **The court, however, expressly deprecated any attempt to**

fetter the discretion of the court by laying down any rules which would have the effect of limiting the flexibility of the remedy as a means of achieving the objects that I have indicated above. Nevertheless this authority was treated by Graham, J. and the Court of Appeal in the instant appeal as leaving intact the supposed rule that the court is not entitled to take any account of the balance of convenience unless it has first been satisfied that if the case went to trial upon no other evidence than is before the court at the hearing of the application the plaintiff would be entitled to judgment for a permanent injunction in the same terms as the interlocutory injunction sought".

Lord Diplock continued,

"Your Lordships should in my view take this opportunity of declaring that there is no such rule. **The use of such expressions as "a probability", "a prima facie case" or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interim injunction leads to confusion as to the object sought to be achieved by this form of temporary relief.** The court no doubt must be satisfied that the claim is not frivolous or vexatious; **in other words, that there is a serious question to be tried.**"

"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 on 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. One of the reasons for the introduction of the practice of requiring an undertaking as to damages on the grant of an interlocutory injunction was that "it aided the court in doing that which was its great object, viz., abstaining from expressing any opinion upon the merits of the case until the hearing" (Wakefield vs.

Duke of Buccleuch (1865) 12 LT 628 at 629) **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**".

Although in **CEYLON COLD STORES LTD. V. WHITTALL BOUSTEAD LTD. 1980 1980 02 SLR 120** the court incorporated in the passage quoted above, which advocated the "prima facie case" approach a reference to what Lord Denning said in Habbard vs. Vosper [1972] too, they are contradictory to each other.

What Lord Denning said in Habbard vs. Vosper was,

"In considering whether to grant an interlocutory injunction, the right course for a judge is to look at the whole case. He must have regard not only to the strength of the claim but also to the strength of the defence, and then decide what is best to be done. Sometimes it is best to grant an injunction so as to maintain the status quo until the trial. At other times it is best not to impose a restraint upon the defendant but leave him free to go ahead. For instance, in Fraser v. Evans [1969] 1 Q.B. 349, although the plaintiff owned the copyright, we did not grant an injunction, because the defendant might have a defence of fair dealing. The remedy by interlocutory injunction is so useful that it should be kept flexible and discretionary. It must not be made the subject of strict rules."

(b) Supposed difficulties in applying American Cyanamid case:

In **Ceylon Cold Stores vs. Whittall Boustead Ltd**. at page 131 reference has been made to supposed difficulties created by American Cyanamid decision.

> "**The decision of Lord Diplock caused difficulties for the Court of Appeal when that court was called upon to decide the case of *Follows v. Fisher* . Pointed expression has been given to the uncertainties caused by Lord Diplock's new doctrine by Peter Prescott writing in the *Law Quarterly Review* and by Alastair Wilson in an article entitled "Granting an Interlocutory injunction" in the New Law Journal of 27th March 1975, p. 302**".

Fellowes and son vs. Fisher is a case about a covenant in restraint of trade. It was a judgment in that case by Lord Denning himself, that had attempted to distinguish the American Cyanamid case.

Fellows and son were solicitors. They carried on a practice at Walthamstow. Fisher, their conveyancing and probate clerk was 20 years old when employed and had no training or experience at law. But he gained both, a certificate in land law and conveyancing at the London Chamber of Commerce and experience at work under Fellows and his son. The latter, when renewing his employment contracts every year, included a condition, that, if he leaves them he cannot work in Walthamstow, which was six miles long and two miles wide. Fisher resigned from H. Fellows and son and joined Amhurst Brown which was 150 yards away from the former. It was on counsel's opinion and advise that the condition in restraint of trade was unenforceable. The restriction was for five years.

It is true that Lord Denning either criticized or, at the very least, was sceptic about the American Cyanamid case. But as he himself said in his judgment, American Cyanamid was new, then. **The reluctance to accept something new, especially "a new way of thinking" is the main reason, that, the world goes in rounds and rounds, not only on its geographical axis.**

Lord Denning himself said,

> "The American Cyanamid case was only reported a little while ago, but we have already had two cases in which its effect has been canvassed in this court. It has perplexed the profession. It has been criticized in legal journals. So much that counsel have appealed to us for guidance." (page 130)

In regard to the facts of the case, Lord Denning M. R. said,

> "It seems to me that the restriction for five years may well be too long: and an area 12 square miles (densely populated) may well be too large. This young man had only a term of one year certain for his employment with Fellows. Yet he is to be restrained for five years. He worked only in conveyancing department. Yet he cannot take work in any capacity in any solicitor's office for miles around. If he were offered a job five miles away in an entirely different area – with no possibility of coming into contact with clients of Fellows and son – still he could not take it. Furthermore the words which prevent him being "interested in the legal profession" may well be too wide. Mr. Fisher was only employed as a conveyancing or probate clerk. Yet this clause would prevent him being employed in the legal department of a local authority or of a big company or as an assistant to a justices' clerk or court clerk – all of them situations in which he could not possibly affect the practice of Fellows and son. This case is very different from Flitch vs. Dewes [1920] 2 Ch. 159; [1921] 2 A. C. 158. In that case the area was a radius of seven miles from the Town Hall at Tamworth. But there were only two towns there, Tamworth with a population of 7000 and Lichfield of 6000 and several scattered villages. The defendant was a solicitor of renown, an advocate too, well known to most of the inhabitants. A restriction for life was held to be reasonable. It is altogether different with this young conveyancing clerk, known to very few, in an area of 12 square miles with 150,000 persons. I should have

thought that all that was reasonably necessary for the protection of the plaintiffs was a canvassing covenant such as (b) together with a covenant such as (a) restricting him from being employed for a period of one year and an area of one mile." (page 129)

Those facts show that Fellows and son vs. Fisher was not a case in which the plaintiff who seeks the interlocutory injunction will even have "a colour of right," as per the test of Alexander L. C. B., in Powell and others, Assignees of Thomas Lloyd vs. Ann Lloyd, 1827, which will be discussed in due course. In the circumstances, the authorities considered by Lord Denning in Fellows and son vs. Fisher, such as Smith vs. Grigg Ltd., [1924] 1K. B. 655, 659, "a strong prima facie case", per Atkin L. J.; D. C. Thomson and Co. Ltd., vs. Deakin [1952] Ch. 646, "a prima facie case or, if you will, a strong prima facie case", per Upjohn J. and Sir Raymond Evershed M. R.; J. T. Stratford and Son Ltd., vs. Lindley [1965] A. C. 269, "a prima facie case of some breach of duty by the respondent to him", per Lord Upjohn; Cavendish House (Cheltenham) Ltd., vs. Cavendish Woodhouse Ltd., [1970] R. P. C. 234, 235, "Therefore you start with a prima facie case", Harman L. J.; are superfluous. (page 131,132)

The above discussion would show, that, as this court did in regard to Fellows and son vs. Fisher, a case, in order to ascertain the principle of law applicable to it, should be considered with facts**. It is because facts guide the way law should take.** The importance of facts was reiterated in no uncertain terms in the following authority.

In the speech, " STARE DECISIS By Honorable Edward D. Re Chief Judge, United States Customs Court[5]", it was said,

"Of course, the issues raised in a case stem from the facts presented. **The facts of the case, therefore, are of the utmost importance.** The Latin maxim, **ex facto oritur jus**, tells us that **the law arises out of the facts**.

[5] Presented at a Seminar for Federal Appellate Judges Sponsored by the Federal Judicial Center May 13-16, 1975.

Of particular relevance are the following observations by Professor Brumbaugh[6]:

> Decisions are not primarily made that they may serve the future in the form of precedents, but rather to settle issues between litigants. Their use in after cases is an incidental aftermath. A decision, therefore, draws its peculiar quality of justice, soundness and profoundness from the particular facts and conditions of the case which it has presumed to adjudicate. In order, therefore, that this quality may be rendered with **the highest measure of accuracy**, it sometimes becomes necessary to **expressly limit its application to the peculiar set of circumstances out of which it springs**.

Hence, the authority of the precedent depends upon, and is limited to, "the particular facts and conditions of the case" that the prior case "presumed to adjudicate." Precedents, therefore, are not to be applied blindly. The precedent must be analyzed carefully to determine whether there exists a similarity of facts and issues, and to ascertain the actual holding of the court in the prior case."

Lord Denning attempted to reconcile the contradictory positions taken up by the House of Lords in American Cyanamid case [1975] and ten years ago in J. T. Stratford and son Ltd., vs. Lindley [1965] the 1975 one saying that "the House should…take this opportunity of declaring that there is no such rule. The use of such expressions as "a probability," "a prima facie case," or "a strong prima facie case" in the context of the exercise of a discretionary power to grant an interlocutory injunction leads to confusion as to the object sought to be achieved by this form of temporary relief" and the 1965 case saying, "…the principle which ought to guide your Lordships seem to me clear. An appellant seeking an interlocutory injunction must establish a prima facie case of some breach of duty

[6] Brumbaugh, Legal Reasoning and Briefing 172 (1917).

by the respondent to him…This being so, an injunction may be granted if it is just and convenient so to do, the remedy being purely discretionary. The balance of convenience in these cases is always of great importance…" Stating that he finds it impossible to reconcile these statements, he nevertheless said that he neither wish to suggest that either of them was per incuriam. He said,

> "When I last made so bold as to make such a suggestion in Broome vs. Cassell and Co. Ltd., [1971] 2 Q. B. 354; [1972] A. C. 1027, it was regarded as a piece of lese majeste [the insulting of a monarch or other ruler; treason:]. The House of Lords never does anything per incuriam. So what are we to do with two statements of principle by the House which are not reconcilable the one with the other". (page 132)

Having said, that, the only statement of reconciliation is when the House said at page 409,

> "there may be many other special factors to be taken into consideration in the particular circumstances of individual cases",

Lord Denning, considering examples of "individual" cases, from "industrial disputes", D. C. Thomson and Co. Ltd., vs. Deakin [1952] Ch. 646, J. T. Stratford and son Ltd., vs. Lindley [1965] A. C. 269; Camden Exhibition and Display Ltd., vs. Lynott [1966] 1 Q. B. 555; Emerald Construction Co. Ltd., vs. Lowthian [1966] 1 WLR 691; Daily Mirror Newspapers Ltd., vs. Gardner [1968] 2 Q. B. 762; Torquay Hotel Co. Ltd., vs. Cousins [1969] 2 Ch. 106; Cory Lighterage Ltd., vs. Transport and General Workers' Union [1973] 1 WLR 792 and Chappell vs. Times Newspaper Ltd., [1975] 1 WLR 482, **said they were decided on applications for interlocutory injunction: and never went to trial; with regard to breach of confidence,** Fraser vs. Evans [1969] 1 Q. B. 349; Hubbard vs. Vosper [1972] 2 Q. B. 84 and Distillers Co. (Biochemicals) Ltd., vs. Times Newspaper Ltd., [1975] Q. B. 613 **were all decided on interlocutory applications; covenants in restraint of trade and the like,** Home Counties Dairies Ltd., vs. Skilton [1970] 1 WLR 526; T. Lucas and Co. Ltd., vs. Mitchell [1974] Ch. 128; Esso Petrolium Co. Ltd., vs. Kingswood Motors (Addlestone) Ltd., [1974] Q. B. 142; Clifford Davis Management Ltd., vs. W. E. A. Records Ltd.,

[1975] 1 WLR 61 and George Orridge Ltd., vs. Lee, January 20, 1975, Bar Library Transcript No. 13A, **as such cases; in passing off cases,** Cavendish House (Cheltenham) Ltd., vs. Cavendish Woodhouse Ltd., [1970] R. P. C. 234, **decided on motion,** (1975) 91 L. Q. R. 169, **in patent cases the article in the New Law Journal for March 27, 1975, page 302 and commercial cases,** Bailey (Malta) Ltd., vs. Bailey [1963] 1 Lloyd's Rep 595; Acrow (Automation) Ltd., vs. Rex Chainbelt Inc. [1971] 1 WLR 1676 and Total Oil Great Britain Ltd., vs. Thompson Garages (Biggin Hill) Ltd., [1972] 1 Q. B. 318 **as cases where the granting of an interlocutory injunction virtually decided the action.** (page 133,134)

There are 21 cases and a Magazine [*which may be giving several other cases*] of various kinds which ended at the granting of an interlocutory injunction. The learned Master of Rolls try to say that notwithstanding the "individuality" of the case, it was the "prima facie case" principle that determined the injunction and the action both.

With the greatest respect to the learned Master of Rolls, the distinction in respect of the applicability of the principle, whether "**a prima facie case**" or whether "**a colour of right**" in regard to patent and defamation cases on one side and most of the other cases, especially those governed by agreement or contract on the other, will be considered towards the end of this order. The reader will find that what Lindley L. J., said in Preston vs. Luck in 1884, as "***a primâ facie right to have matters kept in status quo to this extent*****, <u>that their rights under that agreement shall not be defeated before the hearing"</u>**, also agrees with "**a colour of right**" test.

The following is what Denning, L.J., said about <u>Fellowes and son vs. Fisher</u> in the subsequent case of <u>Hubbard vs. Pitt (1976) Q.B. 142</u>[7].

[7]This should not be confused with Hubbard vs Vosper.

'The plaintiffs placed much reliance on the recent decision of the House of Lords in American Cyanamid Co., vs. Ethicon Ltd., [1975] A.C. 396. It was suggested that it had revolutionarised our approach to interlocutory injunctions: and that henceforward we were not to consider the strength of each party's case, but only the balance of convenience, and that in general the balance of convenience was to maintain the status quo. That would mean, in this case, and most cases, granting an interlocutory injunction.'

'**There has since been another case in this court differently constituted in which again the same point was made. It is Fellowes vs. Fisher [1976] Q.B. 122, about a covenant in restraint of trade. I have tried there to reconcile authorities. I will not repeat it here.** All I would say is that I think this case does not come within the ruling of American Cyanamid case. (a) In the first place this is one of the 'individual' cases in which there are special factors to be taken into consideration. So much so that the court must assess the relative strength of each party's case before deciding whether to grant an injunction. (b) The plaintiffs should not be granted an interlocutory injunction unless they can make out a prima facie case. In the second place there are 'uncompensatable disadvantages' which are so evenly balanced that it is appropriate to have regard to the strength of each party's case.'

In (a) the reference to the "individuality" of the case is in harmony with the decision in Hubbard vs. Vosper 1972. But in (b) there is a reference to a "prima facie case." It must be remembered that although Lord Denning in Hubbard vs. Vosper 1972 decried the employment of strict rules, it was not him but Lord Diplock who took it upon himself to castigate the use of the term a "prima facie case". The intention in this order is not to say a particular decision or a particular judge is correct in every aspect but as it was stated in the case referred to in **Samed vs. Seigutamby 1924** too to investigate grounds of the law in pursuit of

truth. (Emphasis and numbering as (a) and (b) added for convenience of explaining)

Incidentally, Jayewardene A. J., referred to at page 495, 496 in **Samed vs. Seguthamby** to a quotation from Lord Denman C. J., in *O' Connel vs. Regina (1844) 11 Cl. & F. (H. L.) 155* at page 372, where it was said,

> "I am tempted to take this opportunity of observing that a large portion of that legal opinion which has passed current for law falls within the description of "law taken for granted." If a statistical table of legal propositions shown be drawn out and the first column headed "Law of Statute" and the second "Law of Decision"; a third column, under the heading of "law taken for granted", would comprise as much matter as both the others combined. But when, in pursuit of truth, we are obliged to investigate the grounds of the law, it is plain and has often been proved by recent experience that the mere statement and re statement of a doctrine – the mere repetition of the cantilena of lawyers – cannot make it law, unless it can be traced to some competent authority and if it be irreconcilable to some clear legal principle."

Although Denning, L.J., said as above, in Hubbard vs. Pitt, the aforesaid discussion would show that Lord Diplock himself approved the approach Denning, L.J., suggested in Hubbard vs. Vosper, to assess the relative strength of each party's case before deciding whether to grant an injunction. The same thing Denning, L.J., said in Hubbard vs. Vosper was endorsed in American Cyanamid case. Except that, Lord Denning preferred in Hubbard vs. Pitt to use the term 'a prima facie case,' which was declared as creating confusion in American Cyanamid case, it would be seen that there was nothing in American Cyanamid that prohibited him in Hubbard vs. Pitt, from following the course he wanted.

The reading of the judgment in Hubbard vs. Pitt would show that Denning L.J.'s judgment in that case was a dissenting one. He decided it on freedom of speech. He wanted to refuse the interlocutory injunction. He said restraining defendants from exhibiting placards and leaflets by an interlocutory injunction would be contrary to the principle laid down by the court 85 years ago in *Bonnard vs. Perryman [1891] 2 Ch. 269*. Bonnard vs. Perryman [1891] was decided to strike a balance between two equal and competing rights.

Lord Coleridge CJ said,

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

The facts of Hubbard vs. Pitt as stated in the opening paragraph of Lord Denning's dissenting judgment are as follows,

> 'Some years ago Islington was run down in the world. Its houses were in a dilapidated condition. They were tenanted by many poor families. In recent years Islington has become a desirable area. Property men have stepped in. They have bought up the houses and persuaded the tenants to leave. They have done them up and sold at a profit. Now they are occupied by single families who are well to do'.

A group of social workers who deplored this development conducted a campaign against it called the 'Islington Tenants' Campaign'. The injunction was sought by

a company of property sellers to restrain them from 'picketing' before their offices.

Denning L.J., suggested discharging the injunction granted by the trial court on an undertaking that defendants will not obstruct, molest or intimidate anyone. But Stamp, L.J., and Orr, L.J., followed American Cyanamid case, quoting extensively from Lord Diplock's judgment and they did not interfere with the injunction granted by the trial court. The injunction remained in force.

It is indeed the proposition, that, the "prima facie case" test, should be confined to cases such as on patents and defamation, where two equal or almost equal rights compete with each other, but not in other cases; and certainly not in those governed by agreement or contract, is what this court makes in this order.

It will appear that in cases such as to limit freedom of expression, or cases on patents, where the claim and the defence are very much interconnected [*this will be explained later*] it is difficult to obtain an interim injunction.

Coming back to the subject of this section, it is submitted, that, more than a supposed difficulty created by the decision in American Cyanamid case, Fellows and son vs. Fisher and Hubbard vs. Pitt and the like constitute a best example of the difficulties the phrase a "prima facie case" creates, which American Cyanamid expressly denounced.

(c) The statutory regime pertaining to interim injunctions:

The statutory regime in regard to interim injunctions is governed by section 54 of the Judicature Act.

Section 54(1)(a) of the Judicature Act says,

““54.

(1) Where in any action instituted in a High Court, District Court or a Small Claims Court, it **appears**-

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

the Court may, on its **appearing by the affidavit** of the plaintiff or any other person that **sufficient grounds exist** therefor, grant an injunction restraining any such defendant from-

(i) committing or continuing any such act or nuisance; …”

The entitlement should be appearing on the plaint. The word “judgment”, followed by the words, “against the defendant, **restraining** the commission or continuance of **an act or nuisance**” signifies that it should be an entitlement to restrain the act of nuisance by way of a permanent injunction. The affidavit should show the existence of sufficient grounds. These are the fundamental requirements.

(d) Tracing history back to Preston vs. Luck (1884) :

Having said that, it must be stated, that presently there is an accepted notion or consensus, as also said by Lord Diplock in page 540, that the need to show “a probability that the plaintiff is entitled to relief” is traced to *Preston vs. Luck (1887) Ch. D. 497*.

However Cotton L. J., himself in that case did not use the term " prima facie case". Neither did Dalton J. who imported *Preston vs. Luck* into the case law of this country through **Jinadasa vs. Weerasinghe, 1929 31 NLR 33**.

Justice Soza said in his lordship's article "The interim injunction in Sri Lanka" published in the inaugural volume of the Judges' Journal published in 1991,

> "" In the local case of Jinadasa vs. Weerasinghe (l929) 31 N.L.R. 33 Dalton J. too did not use the phrase "prima facie case" but he adopted the language of Cotton L.J. in Preston vs. Luck (supra) when he laid down the requirements for an interim injunction in the following words at p.34:
> "
>
> > " 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 plaintiff is entitled to relief."

The term " prima facie case" was used in the accompanying judgment of Lindley J. in Preston vs Luck.

What did 'a prima facie case' meant in Preston vs. Luck 1884?

The question in that case and the decisions of the trial court and in appeal are relevant to the understanding of the principle, if any, laid down in that case and hence, reproduced in summery.

> " A negotiation took place as to the sale by L. to P. of a British patent and certain foreign patents for the same inventions, and ultimately an offer was made for sale at £500 and accepted by letter, **but it was not quite clear whether the offer and acceptance related to all the patents, or to the British patent only**. P. brought his action for specific performance, treating the contract as including all the patents, and moved for an injunction to restrain L. from parting with them. At the hearing of the motion he asked for leave to amend his writ, and for an injunction as to the British patent only:

Held, by Kay, J., that as L. had understood that he was negotiating about the British patent only, and P. that he was negotiating as to all the patents, there never was the consensus ad idem which is necessary to make a contract; that there was, therefore, no contract which P. could enforce; and that an injunction must be refused.

Held, on appeal, that an injunction should be granted, for that where a written agreement has been signed, though it is in some cases a defence to an action for specific performance according to its terms that the defendant did not understand it according to what the Court holds to be its true construction, **the fact that the plaintiff has put an erroneous construction upon it, and insisted that it included what it did not include, does not prevent there being a contract**, nor preclude the plaintiff from waiving the question of construction and obtaining specific performance according to what the defendant admits to be its true construction". (Emphasis added in this order)

This is what Lindley J. said in the comparatively brief judgment he wrote.

"" **The question we have to consider is what is proper to be done between this time and the hearing of the action. We have not now to decide the rights of the parties any further than is necessary for determining that question.** In order to determine that question, it is absolutely essential to see whether the Plaintiffs have any locus standi. They put their case on the agreement, and if there is no agreement, they are out of Court. In my opinion there is an agreement, for I think that the correspondence running through February and March, and ending with the telegram of the 31st of March, amounts to an agreement to sell the English patent. **That gives the Plaintiffs *a primâ facie right to have matters kept in status quo to this extent*, that their rights under that**

agreement shall not be defeated before the hearing. Without expressing our opinion as to the rights or claims of Captain Turner, it appears to me that we ought not to allow him and Mr. Luck to deal with this patent so as to deprive the Plaintiffs of such rights as they seek to establish. The Plaintiffs must undertake to amend their writ[8], and they must give the usual undertaking to be answerable in damages, and there will be an injunction restraining Captain Turner and Mr. Luck from assigning or dealing with the patent until the hearing or further order". (Emphasis added in this order)

Hence, as per the facts, L. had understood that he was negotiating about the British patent only, and P. that he was negotiating as to all the patents. There was a question whether a contract was formed. But, Lindley L. J., did not want to finally answer this question, before deciding to issue the interim injunction.

So that was what " a prima facie case" meant at its supposed birth place and source. It had come as a **test of locus standi** and " *a primâ facie right to have matters kept in status quo*". The supposed creator of the term *prima facie case*[9] , so to speak, Lindley J., himself had set its limits when his lordship said, " The question we have to consider is what is proper to be done between this time and the hearing of the action. We have not now to decide the rights of the parties any further than is necessary for determining that question..."

It cannot therefore mean that the plaintiff should establish and demonstrate all the strength of his case at this early stage and it also does not mean that unless he does so the consideration of balance of convenience in maintaining status quo does not arise[10]. Had it been so, like

[8] i.e., the plaint or what is similar to that

[9] But the said phrase has been used prior to Preston vs. Luck as it will be seen.

[10] As it was emphasized in later cases that advocated the "prima facie case" approach.

Kay J., the uncertainty of consensus ad idem in respect of all patents would have made the court refusing to grant the injunction. But Lindley J., granted it satisfying on what amounts to an agreement to sell English patents that there exists " a primâ facie right to have matters kept in status quo". So this was what was meant. And that was, it appears to me with great respect, what was meant by Lord Diplock when his lordship said,

> "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".

But the use by his lordship the phrase "*any real prospect of succeeding in his claim for a permanent injunction at the trial…*" caused confusion due to its similarity to "a probability" "a prima facie case" or "a strong prima facie case" because the latter phrases were never understood in the light of the judgment of Lindley J., which judgment is not cited ever[11].

Let us think about a plaintiff who had donated his estate to a relative, but subsequently instituted action to declare the donation is void (for some reason averred in the plaint) praying for interim relief to restrain the defendant from cutting and removing trees on the land. The district judge thinking that the plaintiff has not established a prima facie case or a good chance of winning [*for the title to the land is in the defendant*] refuses the interim injunction. The picture presented to the district court by affidavits and documents however alters at the trial when parties lead evidence in full, the donation could be declared void, but

[11] Cotton L. J.'s judgment is cited [not Lindley, L. J.'s] always and apart from a passing remark that actually the term 'a prima facie case' was used by Lindley J., the facts in that case, which helps the understanding of the context in which the said phrase was used is not cited.

now it is too late to stop the cutting of trees. Even if a commissioner is appointed to assess the damage, he may say he is unable to do so as the trees have been cut and removed. The court might then realize that it could have been expedient to have the defendant restrained for (i) balance of convenience favoured the plaintiff and (ii) status quo could have been maintained that way.

I am of the view, that, this was what Lindley L. J., meant when he said, "**That gives the Plaintiffs *a primâ facie right to have matters kept in status quo to this extent*, that their rights under that agreement shall not be defeated before the hearing."**

This should be the applicable principle in all cases, except in patent cases and defamation cases, which forms a separate class, until and unless any other such cases are added to it in future.

(e) Notes of Cases, with especial reference to Powell and others vs. Ann Lloyd 1827, De Mattos vs. Gibson 1859 and Challender vs. Royle 1887:

Mr. Andrew Gore writing in 1975 at the time of the making of the decision in American Cyanamid wrote about the historical factors which led to the said litigation saying,

> "MOST natural absorbable sutures used in the United Kingdom are produced by a firm called Ethicon. In 1966 a firm called Cyanamid registered a patent for synthetic suture. Marketed in 1970 it proved popular; by 1973 it had captured 15 per cent of the market. Ethicon countered by producing their own synthetic sutures. **Cyanamid thereupon sought an injunction against Ethicon alleging breach of**

their patent[12]. Graham J., as patent judge, held that a prima facie case of infringement had been made out, and, considering the balance of convenience favoured maintenance of the status quo, granted an interlocutory injunction. The Court of Appeal (Russell and Stephenson L.JJ. and Foster J.)' held that the plaintiffs had failed to make out a prima facie case, refuted counsel for the plaintiff's argument that an interlocutory injunction could nevertheless be granted if the balance of convenience favoured it,' and therefore discharged the injunction. Leave to appeal was granted.:' The House of Lords, allowing the appeal, laid out a series of principles to be applied to applications for interlocutory injunctions. **First, said Lord Diplock, with whom Lords Cross, Salmon and Edmund Davies and Viscount Dilhorne concurred, there is no rule requiring the court to be satisfied the plaintiff is prima facie likely to obtain judgment at trial.** It is enough if the court is satisfied that there is a serious question to be tried, which is met if the material before the court discloses that the plaintiff has any real chance of succeeding. If the court is so satisfied, it should consider the balance of convenience".

The American Cyanamid case being one that on two competing patents, was a case in which it was difficult to issue an interlocutory injunction. In such a case, which comes within cases mentioned under (f) below, the approach of the Court of Appeal was not wrong, as far as the justice of the case was concerned. The real value of what the House laid down [*deprecating the prima facie test*] is best employed in cases other than those come under (f) below.

Mr. Gore having said that Lord Diplock was of the view that "*the court had to establish[13] whether the plaintiff had proved a prima facie case to entitle him to final relief a recent doctrine, though with earlier antecedents*" but contrary to that

[12] Another similarity in this case, to that of Challender vs. Royle, is that, the one who had the later patent trying to injoin the one who had the former patent.
[13] Should be the claimant had to establish instead

proposition "*It was undoubtedly the practice in the later nineteenth century to require a prima facie case*", under footnote 13 he referred to several cases which are,

> "There are early nineteenth century cases using such language as, showing "*a colour of light* " (Powell v. Lloyd) (1827) 1 Y. & J. 427, 430, per Alexander L.C.B., whether there are "*difficult and important questions to be decided* (De Mattos V. Gibson) (1859) 4 De. G. & J. 276, 284, per Turner L.J., but these phrases probably carried a connotation similar to our understanding of "prime facie" today. This may be illustrated from the judgments given by Lord Cottenham L.C. in interlocutory cases: he makes it clear that a prima facie case, in our understanding of the term, must be established by the plaintiff (see, e.g. Hilton v. Earl of Granville (1841) Cr. & Ph. 283, 292, Electric Telegraph Co. v. Nott (1847) 2 Coop. T. Cott. 41, **but at times uses language which today would carry a very different meaning** (see, e.g. Glascott v. Lung (1838) 3 My. & Cr. 451, 455-"*a case which makes the transaction a proper subject of investigation in a Court of Equity*," Great Western Rly. v. Birmingham & Oxford Rly. (1848) 2 Ph. 597, 603-"*a substantial question between the parties*." And Lord Cranworth, in Shrewsbury & Chester Rly. v. Shrewsbury & Birmingham Rly. (1851) 1 Sim. N.S. 410, 427, juxtaposes these statements, '***the Court has to be satisfied that he has a fair question to raise. . .but I do not understand that in every case where there is a prima facie or probable case suggested***.. ." However, by the end of the century the language is clear and unambiguous: Preston v. Luck (1884) 27 Ch.D. 497, C.A., per Cotton L.J. at p. 506, Lindley L.J. at p. 508, Brown v. Stock Exchange Committee (1892) 36 S.J. 752, 753, per Bruce J., Challender v. Royle (1887) 36 Ch.D. 425, 443, C.A., per Bowen L.J. in very strong terms".

In **Powell and others, Assignees of Thomas Lloyd vs. Ann Lloyd** the plaintiffs were the assignees of Thomas Lloyd who went bankrupt on 20th January 1825. The assignees were appointed on 16th April 1825. Thomas Lloyd was the son of Ann Lloyd. Ann Lloyd as the administrator of the estate of her deceased husband John Lloyd entered into possession of the estate in question. It was a property demised to John Lloyd by one Baldwin before the former's death in 1787. John Lloyd received it by an indenture dated 25th November 1775 for a term of 60 years. Nineteen years from 1775 is 1794-95. It was at that time, 20th November 1795, when the original lease was having 41 years more, that Ann Lloyd entered into an agreement with Thomas Lloyd to lease the estate to the latter for that period. It was subject to a condition, that, if Thomas Lloyd fail to pay rent Ann Lloyd could re enter. The condition also provided that if Thomas Lloyd or his executors or administrators alienate the estate or any part thereof without the consent of Ann Lloyd, her executors or administrators, "or such other person or persons, as for the time being should happen to be entitled to the reversion of the premises, thereto first had and obtained in writing;..." Thomas Lloyd continue in possession until his bankruptcy and had paid rent to one Roberts, with the consent of Ann Lloyd "and who accepted the said rent from the said Thomas Lloyd as the person then holding the premises, and in the occupation and receipt of the rents and profits thereof". When Thomas Lloyd was bankrupt and after the appointment of plaintiffs as assignees, the latter entered into the possession of the estate. Ann Lloyd then instituted an action of ejectment. The plaintiffs prayed for the specific performance of the agreement dated 16th April 1825 and an injunction to restrain Ann Lloyd from proceeding with the action of ejectment. An injunction was granted for want of answer and Ann Lloyd died and the defendants were her executors. The defendants admitted, among other things, the payment of rent by Thomas Lloyd to Roberts with the privity of Ann Lloyd.

It was argued for the plaintiffs, among other things, that, "as the plaintiffs are willing to take upon themselves the responsibility of the lease, the consent of the

original lessor may be obtained for that purpose, which will obviate every difficulty; and in order to prevent the possession of the premises from being changed, the injunction should be continued."

The defendants argued, among other things, that, "assignees of a bankrupt have no right to a specific performance, in opposition to the provision in the agreement, there being no lease; for a specific performance can only be claimed by the person with whom the agreement is made, unless by the consent of the lessor. The case of Doe v. Powell does not apply, [*a determination by the King's Bench in the same case*] for it now appears that the lessor entered before the docket was struck, and the term having thus once ceased, could not be revived. In order to continue the injunction a clear right to the possession must be shewn".

Alexander L. C. B., decided,

> "This is an application to continue, to the hearing, an injunction already obtained, so as to prevent, until that period arrives, the possession from being changed. **I cannot admit the proposition, that the plaintiffs, in order to continue the injunction, must shew a right to a specific performance, it is, in my opinion, enough to shew some colour of right**; and the more so, as the Court is under the necessity of taking the facts as they are stated by the defendants themselves in their answer ; and the plaintiffs, on that account, cannot have the same advantage as they might have on the hearing of the case. I admit there is in this case a considerable question, whether the plaintiffs, as assignees of a bankrupt, can have a specific performance: but enough appears to shew the possibility of such a right, for a licence for that purpose may be obtained from the original lessor".

Mr. Gore, in his 1975 article giving reference to the above case, clearly printed, "a colour of light" [*as quoted above*] That was how something that was said in

1827 was altered in 148 years. But writing after 196 years we have to understand that Alexander L. C. B., said "a colour of right". So this was what it was decided in the oldest authority Mr. Gore cited.

The summary of the judgment said,

> "POWELL AND OTHERS, Assignees of Thomas Lloyd, v. ANN LLOYD. SAME V. J. LLOYD AND C. LLOYD, Executors of Ann Lloyd. Equit. Excb. Friday, May 18th, 1827.-**It is not necessary for a party who seeks to continue an injunction to the hearing, to shew an indefeasible right to the decree prayed by the bill.** Where, therefore, assignees of a bankrupt sought a specific performance of an agreement for a lease, against a party who was herself a lessee, and restrained from assigning without the consent of the lessor in writing thereto obtained; the Court continued the injunction to restrain proceedings at law; there being a probability of obtaining the consent of the lessor to the assignment."

The full judgment of the case Mr. Andrew Gore referred to as "(De Mattos V. Gibson) (1859) 4 De. G. & J. 276, 284" is available. It is actually **De Mattos vs. Gibson 1859** decided in the Chancery. Mr. Andrew Gore among other things says that "*difficult and important questions to be decided*" a phrase used by Turner L. J. "*probably carried a connotation similar to our understanding of " prime facie"today*". The facts in that case briefly are,

> "The bill and the affidavits in support of the motion stated, that by a charter-party dated the 23d of October 1857, and made between Henry Trewitt Curry, one of the Defendants, described as the owner of the *Allerton*, then in the port of Seldhis, of the one part, and the Plaintiff of the other part, it was agreed that the *Allerton* should load a cargo of coal at one of the collieries in the river Tyne, and being so loaded should proceed to Suez and deliver the same. That when the charter-party was entered

into the Defendant Curry was acting as, owner, and was in possession of the vessel under a contract for the purchase of her. That a considerable delay took place in the completion of the purchase, and that in consequence thereof a corresponding delay was occasioned in the dispatch of the vessel from her port of lading. That on the 6th of January 1858, the Defendant Curry became the registered owner of the vessel, and that on the 12th of January 1858, he mortgaged her to the Defendant Gibson. That previously to and at the date of the mortgage the Defendant Gibson had full notice of the charter-party, and, in fact, advanced the sum intended to be secured by the mortgage in order to enable the Defendant Curry to perform the charter-party and earn the freight made payable thereby. That the vessel met with bad weather in the Channel, and being much damaged, was obliged to put into Penzance for repairs, at which port she was when the bill was filed, in the hands of Mr W.D. Matthews, a shipwright, who claimed a lien upon her for the value of the repairs. That Gibson threatened and intended to sell the vessel under his power of sale without reference to her engagement under the charter-party, and that with that view he sent instructions to Matthews to allow her to be removed out of dock and sent back to Newcastle-upon-Tyne as soon as the repairs were completed, which would be in a few days. The prayer of the bill was, that it might be declared that the charter-party of the 23d of October 1857, ought to be specifically performed, and that the Defendant Curry might be decreed to perform it accordingly, the Plaintiff submitting to perform the same on his part, and that an injunction might be granted to restrain Curry from permitting the vessel and cargo to remain at Penzance or any place other than Suez, and also for an injunction against the Defendant Gibson".

Turner L. J., said,

"I also think that this injunction must be granted. We are here upon the question of an interlocutory injunction until the bearing of the cause, and the point, therefore, which I consider of importance to be attended to is whether there are or not difficult and important questions to be tried at the hearing.

It seems to me that there are three questions to be tried at the hearing of this cause which are questions certainly not at present sufficiently settled; one question, whether the Plaintiff is entitled to a specific performance of the contract contained in the charter-party? Another question, whether, if he is not so entitled, he may not nevertheless be entitled to an injunction to restrain a breach of the contract contained in the charter-party? And the third, which appears to me to be open in this case, whether, inasmuch as I assume that it would not have been competent to Mr Gibson, as between him and Mr Curry, to have committed a breach of the contract so as to have brought down upon Mr Curry an action for damages upon the charter-party, the charterer of the vessel may not be entitled to the benefit of that equity which Curry would have had as against Mr Gibson the mortgagee? I think that is a question also deserving of very great consideration, which can only be decided at the hearing of the cause; and without giving, therefore, any opinion on any of these questions, all of which must be discussed at the hearing, I think that there should be an injunction in the meantime".

The said judgment has six propositions of which those who are in favour of the view that "*a prima facie case*" as the term is understood currently was in vouge even from early or middle 19th Century must note. They are,

1. The question to be considered initially is "*whether there are or not difficult and important questions to be tried at the hearing*".
   The court found that there are three such questions.

2. whether the Plaintiff is entitled to specific performance of the contract contained in the charter-party?

3. whether, if he is not so entitled, he may not nevertheless be entitled to an injunction to restrain a breach of the contract contained in the charter-party?

4. whether, inasmuch as I assume that it would not have been competent to Mr Gibson, as between him and Mr Curry, to have committed a breach of the contract so as to have brought down upon Mr Curry an action for damages upon the charter-party, the charterer of the vessel may not be entitled to the benefit of that equity which Curry would have had as against Mr Gibson the mortgagee?

5. The court did not give any opinion on any of those questions until the hearing

6. An interim injunction was issued in the meantime

(f) Two kinds of cases, Defamation or Patent one category and the rest the other:

The case Herbage vs. Times Newspaper Ltd. having been decided by Lord Denning and Sir Denys Buckley in the Court of Appeal on 30th April 1981 has a significance. It was on defamation. It followed the then 95 years old case of Bonnard vs. Perryman. It distinguished American Cyanamid. The case **FELIX**

DIAS BANDARANAYAKE V. THE STATE FILM CORPORATION AND ANOTHER 1981 1981 02 SLR 287 was also argued before the Court of Appeal of this country in February and then on several dates in March 1981. It was decided on 10th April 1981 before Herbage vs. Times Newspaper Ltd. It was also on defamation. The plaintiff a cabinet minister in a former regime asked for the interim injunction to prohibit the exhibition of a film "Sagarayak Meda" [*surrounded by ocean a term in vernacular that signifies this island*] which he claimed was defamatory of him. Justice Soza too followed the case of Bonnard vs. Perryman and said at page 305

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

His lordship further quoted from that case and said at page 306 that,

> "As Lord Coleridge said in *Bonnard v Perryman* (supra) at p. 284:
>
> "The right of free speech is one which it is for the public interest that individuals should possess, and, indeed, that they should exercise without impediment, so long as no wrongful act is done; and, **unless an alleged libel is untrue, there is no wrong committed; but, on the contrary, often a very wholesome act is performed in the publication and repetition of an alleged libel.** Until it is clear that an alleged libel is

> untrue, it is not clear that any right at all has been infringed; and the importance of leaving free speech unfettered is a strong reason in cases of libel for dealing most cautiously and warily with the granting of interim injunctions."

The "Sagarayak Meda" case was on defamation. Applying the standard laid down in that case to cases of that type [mainly defamation or patent] is correct. But applying that standard to every case is not right.

The phrase in *Bonnard vs. Perryman*, that, "Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed;..." is significant. It was the same thing that was said as "In England too before the turn of the century Lord Coleridge C. J. in the case of *Bonnard v Perryman* laid down the principle that an interlocutory injunction (as an interim injunction is called in that country) will not be granted when the defendant swears he will be able to justify the libel and the Court is not satisfied that he may not be able to do so".

So if the defendant against whom an interim injunction is asked for on alleged defamation says "I shall prove at the trial this is not defamation" the court will very rarely issue an injunction was the rule.

It was the same thing that was said in Herbage vs. Times Newspaper Ltd. by Sir Denys Buckley that,

> "'the question what meaning the words complained of bore was primarily one for the jury. Suppose the words bore the second meaning alleged and an injunction were granted restraining further publication, if application were made to commit the defendants for contempt of court for breach of that injunction, the judge hearing the application would have to form a view as to whether there had been a breach of the injunction and decide whether the words used implied that Mr Herbage had been made bankrupt and discharged without paying his debts in full. It could not be right in a

defamation action to grant an action of that kind. There were special circumstances in defamation actions.'

Justice Soza in a way foretold the decision in Herbage vs. Times Newspaper Ltd. As per the 90 year old principle in English Law on defamation an interim injunction could not have been issued unless very rarely. The interim injunction was not issued.

Hence **FELIX DIAS BANDARANAYAKE V. THE STATE FILM CORPORATION AND ANOTHER 1981** was a case in which in any event an interim injunction could have been hardly issued.

A case similar is **CHALLENDER v. ROYLE decided in 1887** [1887] 36 Ch. D. 425, in the Court of Appeal. It was on two competing patents.

In 1879, a patent (No. 2350 of 1879) was granted to John J. Royle for various improvements, one of which was a tap union or nozzle for connecting nose pipes. In 1886, a patent (No. 4090 of 1886) was granted to Joseph Challender for a similar tap union. Royle on the 24th of that month, issued the circular set out in the judgment in which he threatened to take proceedings against all infringers. Challender wrote to Royle, challenging him to take legal proceedings to restrain the alleged infringement of his patent. Royle [**who had the earlier patent**] purchased from the Manchester Plumbing Decorating and Gas Fitting Limited a tap union manufactured by Challender. Royle's solicitors wrote to the Company [Manchester Plumbing Company who sold Challender's product] and threatened to bring an action for infringement against them if they continued to sell the alleged infringement. **Challender [the subsequent patent] commenced an action against Royle in the Chancery to restrain the Defendant from threatening any person or persons with legal proceedings or liability for using the invention protected by the Plaintiff's Patent.** The writ was not

served and in the meantime Royle commenced his threatened action against the Manchester Plumbing Company.

At the hearing in the Chancery for the interim injunction it was issued and the defendant appealed.

But in the Court of Appeal, like in "Sagarayak Meda" case, Cotton L. J. did not issue an injunction.

There was a difference between the two tap unions too, as Cotton L. J., explained in his judgment,

"In the year 1886 the plaintiff [Challender] took out a patent for a similar tap union, there being this difference, that the inner surface of the India rubber ring was in the plaintiff's tap union slightly sloping".

Section 32 and its proviso of Patents, Designs and Trade Marks Act of 1883 said,

> "Where any person claiming to be the patentee of an invention, by circulars, advertisements or otherwise threatens any other person with any legal proceedings or liability in respect of any alleged manufacture, use, sale or purchase of the invention, any person or persons aggrieved thereby may bring an action against him and may obtain an injunction against the continuance of such threats and may recover such damage (if any) as may have been sustained thereby, if the alleged manufacture, use, sale or purchase to which the threats related was not in fact an infringement of any legal rights of the person making such threats: Provided that this section shall not apply if the person making such threats with due diligence commences and prosecutes an action for infringement of his patent".

Hence, if threats [as by Royle] are pursued by institution of action, the injunction will not issue. In this case, Royle, before he was served with the writ [the process

of the court] by Challender had instituted action against Manchester Plumbing Company. The rights of Challender and Royle were, clashing on the same plane, so to say. In such a case an injunction will not issue.

Cotton L. J., said,

> "I am not satisfied that the legislature did not intend to lay down the following up the threats by an action as a sort of test whether the threats were bona fide, as Vice Chancellor Malins did in Axmann vs. Lund, Law Rep. 18 Eq. 330. In that case an action was brought to restrain threats and the Vice Chancellor asked the defendant who was issuing those threats whether he would undertake to bring an action for infringement. He declined to do so and the Vice Chancellor granted an injunction, it being recited in the order that the defendant declined to bring an action following up the treats. I think that is very likely what the legislature intended: …"

Both Judges in their respective judgments referred to "prima facie case", although they did not base the decisions on that, but on section 32. Had this case been decided without section 32 [such as in American Cyanamid, which too was a case on two competing patents] no injunction could have been issued unless on the basis of a test founded on "prima facie case" approach. Section 32 gave especial right for a patentee to obtain an injunction, but even then its proviso precluded it. This is why it was said that a case on two competing patents is not a case where an interim injunction could easily be granted.

(g) Conclusion:

It is to be noted that Lord Coleridge C. J. in 1891 said in Bonnard vs. Perryman "*Until it is clear that an alleged libel is untrue, it is not clear that any right at all has been infringed*".

His Lordship also said "*unless an alleged libel is untrue, there is no wrong committed.*"

So it is very rarely that an interim injunction will be granted to stop the publication of the libel.

The same principle can be applied to Challender vs. Royle 1887 too as "*Until it is clear that an alleged patent of the defendant is invalid it is not clear that any right at all of the plaintiff has been infringed*".

It can also be said "*unless an alleged patent of the defendant [such as Royle] is invalid there is no wrong committed.*"

The reader might now see the similarity in principle in a defamation action and an action of two competing patents.

Hence we can also say "So it is very rarely that an interim injunction will be granted to stop the defendant issuing the threats about the sale of plaintiff's product".

Therefore whenever there are two equally competing rights, one patent against an almost similar patent, or the right to dignity of one person against the right of freedom of speech of another, clashing with each other very rarely an interim injunction could be issued. The "prima facie case" test, as it is traditionally and popularly understood could be employed, without doing injustice to any party.

Now what happened in De Mattos vs. Gibson 1858? There was a contract between the plaintiff and the defendant Mr. Curry to transport goods by sea. The questions are whether the plaintiff can get its specific performance? Whether the plaintiff can get an interim injunction even otherwise? And can Gibson on his rights over the ship under the mortgage force Mr. Curry to make a breach of the contract thus becoming liable to the plaintiff for damages?

The questions are not directly connected like in the defamation case or in the case on patents. **Furthermore, there was a contract between parties unlike in the defamation case or patent case.**

In the defamation case and the case on patents there is a clash of two competing rights of almost equal strength in such a way that to find the defendant in breach of an interim injunction the whole case needs to be determined. This was explained very clearly by Sir Denyse Burkley in Herbage vs. Times Newspaper Ltd., 1981.

In cases of the kind of De Mattos vs. Gibson *if the question or questions are difficult ones the judge can leave that for later consideration* and go on to consider the balance of convenience.

In the defamation case and the case on patents *the judge cannot leave any question for later consideration* because to find the answer to the question whether the plaintiff has established an infringement or an imminent infringement of his alleged right, the entire case must be determined.

In the words of Lord Hoffmann in the Privy Council decision in **NATIONAL COMMERCIAL BANK JAMAICA LTD V OLINT CORP LTD (JAMAICA): PC 2009**

> "'The purpose of such an injunction is to improve the chances of the court being able to do justice after a determination of the merits at the trial. At the interlocutory stage, the court must therefore assess whether granting or withholding an injunction is more likely to produce a just result. As the House of Lords pointed out in American Cyanamid Co v Ethicon Ltd [1975] AC 396, that means that if damages will be an adequate remedy for the plaintiff, there are no grounds for interference with the defendant's freedom of action by the grant of an injunction. Likewise, if there is a serious issue to be tried and the plaintiff could be prejudiced by the acts

> or omissions of the defendant pending trial and the cross-undertaking in damages would provide the defendant with an adequate remedy if it turns out that his freedom of action should not have been restrained, then an injunction should ordinarily be granted.
>
> In practice, however, it is often hard to tell whether either damages or the cross-undertaking will be an adequate remedy and the court has to engage in trying to predict whether granting or withholding an injunction is more or less likely to cause irremediable prejudice (and to what extent) if it turns out that the injunction should not have been granted or withheld, as the case may be. The basic principle is that the court should take whichever course seems likely to cause the least irremediable prejudice to one party or the other. This is an assessment in which, as Lord Diplock said in the American Cyanamid case [1975] AC 396 , 408: 'It would be unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies, let alone to suggest the relative weight to be attached to them.'

It is indeed "unwise to attempt even to list all the various matters which may need to be taken into consideration in deciding where the balance lies" but in taking "whichever course seems likely to cause the least irremediable prejudice to one party or the other" I think and it is submitted with respect that the court must initially determine the type of the case whether it is Bonnard vs. Perryman 1891 Hubbard vs. Pitt, 1976 Herbage vs. Times Newspaper Ltd. 1981 Challender vs. Royle 1887 type or whether it is Powell and others vs. Ann Lloyd 1827, De Mattos vs. Gibson 1858 or Preston vs. Luck 1884 type.

This is not to say that they are the only two types of cases. But it is submitted that those two broad categories of cases would include most of the cases that come for decision in courts until some twist of facts concoct a new type of a case.

Lakshman Kumaradas Corea has leased the property which is the subject matter to the Capri club, by Lease agreement No. 71 dated 17.08.2000 for a period of Twenty years, which ends as per the said Lease agreement on 31st of July 2020.

The Lease is subject to a condition, in Clause (t), that, "at the expiration of the term of the lease as hereby agreed upon or sooner determination of the term hereby granted peaceably and quietly yield up deliver surrender and hand over unto the Lessor vacant possession of the demised premises…..".

As per the above discussion on the principles of issuing interim injunctions, if there is a serious matter to be looked into, the next consideration is the balance of convenience, or the degree of inconvenience faced by each party. As per Lindley L. J., in Preston vs Luck, 1884,

"**That gives the Plaintiffs *a primâ facie right to have matters kept in status quo to this extent*, that their rights under that agreement shall not be defeated before the hearing".**

What Lindley L. J., said 139 years ago is exactly what section 54(1)(a) above referred to says, as,

> "The entitlement should be appearing on the plaint. The word "judgment", followed by the words, "against the defendant, **restraining** the commission or continuance of **an act or nuisance**" signifies that it should be an entitlement to restrain the act of nuisance by way of a permanent injunction".

If the covenant is prima facie invalid, it will be different and the defendant could be allowed to do what he was doing which the injunction sought to restrain him from. This was the case in *Fellows and Son vs. Fisher [1976] 1 K. B. 122.*

When, on the face of it, the above clause in the Lease agreement, that, the property should be vacated on a certain date is not honoured, the balance of convenience will be for the plaintiff respondent to obtain the injunction.

In **KEET GERALD FRANCIS NOEL JOHN v. MOHD NOOR @ HARUN BIN ABDULLAH & 2 ORS.** COURT OF APPEAL, KUALA LUMPUR TUAN GOPAL SRI RAM JCA DATO' SITI NORMA YAAKOB JCA DATO' V.C. GEORGE JCA [CIVIL APPEAL NO. T-02-106 OF 1994] 13 DECEMBER 1994, [1995] 1 CLJ 293, it was said,

> "It is apparent from these passages that the learned Judge proceeded upon the erroneous assumption that the adequacy of damages in lieu of an injunction is a matter to be treated separately from the balance of convenience. **All matters that guide a Court of Equity in determining where the justice of the case lies are compendiously called "the balance of convenience"** and we have, earlier in this judgment, made reference to some of those matters".

On the basis of that dicta, which is in conformity with everything this order said about the principle of granting interim injunctions, which is, worthy of repetition and hence reproduced,

> "**All matters that guide a Court of Equity in determining where the justice of the case lies are compendiously called "the balance of convenience""**

and on that relationship ingeniously established between "balance of convenience" and "justice", can it be said that something done and continuously done, in violation of a clause in a notarially executed agreement is "convenience"?

Unless and until it is shown, to be so, this court is unable to extend the interim orders it granted.

If what was said in this order is summarized, it will be as follows,

(01) Under Article 169(2) of the Constitution,

““Unless otherwise provided in the Constitution, every reference in any existing written law to the Supreme Court shall be deemed to be a reference to the Court of Appeal.” [at page 18]

(02) In Menchinahamy vs. Muniweera (1951) Dias S. P. J., exercised the power of restitutio in integrum to set aside a judgment of the Supreme Court itself. Hence, under Article 138 of the Constitution, the Court of Appeal can exercise such jurisdiction in respect of an order made exercising the civil appellate jurisdiction of the provincial high court, [at page 18 et. Seq.]

(03) In **CEYLON COLD STORES LTD. V. WHITTALL BOUSTEAD LTD. 1980,** Justice Soza denouncing American Cyanamid and advocating a prima facie case approach incorporates a passage from Hubbard vs. Vosper [1972] by Lord Denning where Lord Denning expressly deprecated deciding the question of an interim injunction on strict rules, [at page 24 et. Seq.]

(04) Hubbard vs. Vosper [1972] is identified by Lord Diplock in American Cyanamid [1975] as a case in which the plaintiff’s entitlement to copywrite was undisputed, but an interim injunction was refused despite the apparent weakness of the suggested defence. So Hubbard vs. Vosper was not only a case in which the plaintiff had a strong prima facie case but the defendant’s case was weak. As per the prima facia case approach an interim injunction should have been issued. It was not issued. But in recommending the prima facie case test for every case, Justice Soza, in the Court of Appeal decision of **Felix Dias Bandaranayake vs. The State Film Corporation, 1981,** [Soza J. and Rodrigo J.] incorporated in his lordship’s passage which recommended that test, the contradictory approach in Hubbard vs. Vosper too, [Justice’s Soza’s statement is at page 23 and the discussion continues to page 28]

(05) The supposed difficulties created by the decision in American Cyanamid, especially stated in **CEYLON COLD STORES LTD. V. WHITTALL BOUSTEAD LTD. 1980** are more the effects of elusiveness in the concept of a prima facie case itself, but not such difficulties. In Fellows and son vs.

Fisher in which such difficulties were mentioned by Lord Denning, the interim injunction was not issued, because, the plaintiff's covenant in restraint of defendant's trade was unenforceable. In Hubbard vs. Pitt, in which Lord Denning referred to such difficulties in his dissenting judgment, he disallowed the interim injunction based on defendant's freedom of speech. There was no impediment caused by American Cyanamid dictum to decide either case. [at page 28 and from there to page 36]

(06) Precedent must be analysed carefully and not applied blindly. [authorities to this at page 31 and 32]

(07) The statistics of cases considered in Fellows and son vs. Fisher [1976] does not prove that prima facie case approach is always correct [The statistics are at page 33 et. Seq.]

(08) Hubbard vs. Pitt 1976, in which Lord Denning referred to prima facie case approach where the interim injunction was not allowed by his lordship (*in the dissenting judgment*) was a case where defendant's freedom of speech came in question. It was a clash of two equal or almost equal rights of the property developers of Islington to give the town a new look and Islington's old tenants to preserve their habitual [*perhaps romantic*] environment. Facts of this case are given at page 37. It is the humble opinion of this court that what Lord Denning, that eminent and prescient judge tried to do in his lordship's dissenting judgment in Hubbard vs. Pitt [1976] is right. It was a case where [*among few categories of cases*] the prima face case test could have been employed. An interim injunction should not have been issued against the freedom of speech of Islington's Old tenants. But, that does not mean, that, the principle contained in what this court reproduced from the speech of Lord Diplock in American Cyanamid case [1975] especially at pages 26 to 28 are incorrect.

(09) **It is indeed the proposition, that, the "prima facie case" test, should be confined to cases such as on patents and defamation, where two**

equal or almost equal rights compete with each other, but not in other cases; and certainly not in those governed by agreement or contract, what this court makes in this order. [at page 38]

It may be noted, that, Justice Soza himself said, in Felix Dias Bandaranayake vs. The State film Corporation, at page 304, that,

"When the injunction is sought in a defamation case the same principles remain applicable but with reference to the first requirement that plaintiff must make out a prima facie case that a clear right of its being infringed or about to be infringed the following formulation is regarded as authoritative: The plaintiff must establish

(1) That the matter complained of is defamatory,
(2) That no defence such as that the statement is true and for the public benefit can be set up and
(3) That nothing has occurred to deprive the applicant of his remedy, such as the giving of consent.

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

The examination of the above referred to South African cases shows that all three cases are on defamation.

In *Roberts vs. The Critic Ltd. and others (1919) The South African Law Reports, Transvaal Provincial Division page 26*, shows Ward J., saying,

> "Before granting an interdict on motion to restrain the publication of a libel, the court requires to be satisfied (i) that the publication threatened would necessarily be defamatory; (ii) **that no defence such as, e. g., truth and public benefit, could be established in an action on the publication;** and (iii) that nothing has occurred such as, e. g., consent to the publication, to deprive the applicant of his remedy.
>
> Quaere, whether and in what circumstances an interdict can be granted to restrain the publication of matter not before the court."

In *Norris vs. Mentz (1930) The South African Law Reports, Transvaal Provincial Division page 160*, Greenberg J., saying,

> "**The court will not issue a bare declaratory order, nor can the assistance of the court be invoked until there has been a concreate invasion of the rights of the applicant.** A subpoena issued by a commissioner alleged to have been illegally appointed is not such an invasion of rights as would entitle the person subpoenaed to an interdict.
>
> Hill vs. Bairstow (1915) WLD 135 applied.
>
> Intention to publish a libel is an invasion of rights which the court will interfere to prevent and the apprehended publication can be interdicted by the Court. **But before the court will restrain the publication of matter alleged to be defamatory, the applicant must satisfy the court that the matter complained of is defamatory and that there would be no defence open to the respondent in an action brought by the applicant on the defamatory matter.**
>
> Roberts vs. The Critic Ltd. and Others (1919) WLD 26 followed".

Heilbron vs. Blignaut (1931) The South African Law Reports, Transvaal Provincial Division page 167 is a case in which in a defamation case the court granted an interim injunction. But the strict approach that was taken shows that the prima facie case test would be justified in such a case.

Greenberg J., said,

"Where in an application to interdict the apprehended publication of a defamatory article in a newspaper, the respondent sets up that he can prove truth and public benefit, the court is not entitled to disregard his statement on oath to that effect.

In reply to such an application, respondent contended that the article was not susceptible of the innuendo alleged by the applicant and that it was not defamatory; he further alleged that, on his own interpretation of the article, he would be able to avail himself of both the defences of fair comment and truth and public benefit. The court having found that the article was susceptible of the innuendo alleged and that it was prima facie defamatory.

Held, the respondent could not therefore rely on his alleged defences based on his own interpretation of the article and that the interdict should be granted.

Roberts vs. The Critic Ltd. and Others (1919) WLD 26 applied.

In such an application the court must decide whether or not the article is defamatory of the applicant and if it is clear on affidavit that it is defamatory, is entitled to give effect to that decision.

A deponent may not in an affidavit set up facts in the alternative, as a pleader is entitled to do in a pleading".

Hence in defamation cases [*and also when two patents compete with each other*] the plaintiff seeking for an interim injunction has a greater burden to discharge, as per Justice Soza's own words and the decisions of those South African judgments his lordship followed. This is not so in other cases and especially when there is an agreement or contract, which might also give rise to specific performance.

The above would show, the inappropriateness of following a test which is justified in defamation cases in all other categories of cases, without discrimination.

Furthermore, this court is of the humble view, that, those South African reports, which this court found after the writing of the substantive part of this order [*and hence had to be included in the summary only*] confirms the proposition made in this order, that, a standard applied in defamation cases cannot be the standard to be applied in general.

(10) The case of Preston vs. Luck [1884] which sometimes is taken as an early example of the introduction of prima facie case test, was not, in fact, decided on that test as it is understood today. Cotton L. J., did not refer to that phrase. Lindley L. J., who referred to it, granted the interim injunction leaving the question of consensus ad idem for later considerations. Lindley L. J., said, "**That gives the Plaintiffs *a primâ facie right to have matters kept in status quo to this extent*, that their rights under that agreement shall not be defeated before the hearing".** It is the same thing section 54(1)(a) of the Judicature Act does say. The reference in that section [*analyzed at page 39*] is not to the final judgment. <u>The word "judgment", [in that section] followed by the words, "against the defendant, **restraining** the commission or continuance of **an act or nuisance**" signifies that it is an entitlement to restrain the act of nuisance by way of a permanent injunction</u>, the court should have in mind when deciding on an interim injunction, but not the final judgment. The section does not stop after saying, "Where…it appears (a) from the plaint that **the plaintiff**

demands and **is entitled to a judgment**," but qualifies the word "judgment" by words, "against the defendant, **restraining** the commission or continuance of **an act or nuisance"** [at page 39 et. Seq.]

(11) What is said in section 54(1)(a) and what was explained towards the latter part in paragraph (10) above, is what Lord Diplock said in American Cyanamid case [1975] when his lordship said,

> ""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". [at page 43]

(12) In De Mattos vs. Gibson 1859 referred to by Mr. Andrew Gore, an interim injunction was issued in a case on contract and equity without deciding the three questions the court identified. [at page 49 et. Seq. and especially page 52 where the propositions are summarized]

(13) Herbage vs. Times Newspaper Ltd., 1981, Bonnard vs. Perryman, 1891 and Felix Dias Bandaranayake vs. The State Film Corporation 1981 were on defamation. Bonnard vs. Perryman was followed in both the other cases. Applying the standard of a prima facie case in such cases, [*as per what was summarized in paragraphs (08) and (09) above also*] was correct. But applying that standard in every case, especially in cases that are governed by contract is not right. [at page 52 et. Seq.]

(14) Sir Denys Burkley in Herbage vs. Times Newspaper Limited 1981 clearly explained the impossibility of issuing an interim injunction in defamation cases. **He said, if the interim injunction is issued and, if application were made to commit the defendant for contempt of court for breach of the interim injunction, the judge hearing the contempt application has to decide what the court must decide at the end of the case.** The

same principle applies in cases where there are two competing patents. [at page 54 et. Seq.]

(15) The same situation mentioned in paragraph (14) above arise in patent cases, which is epitomized by the case of Challender vs. Royle, 1887 [facts given at page 55 to 57 above] The difference between cases such as patent and defamation and other cases is this: **The cause of action in patent and defamation cases is the same as the complained act of nuisance** ["nuisance" *in the language of section 54(1)(a) of the Judicature Act*] **so unless the court decides the whole case, it cannot be determined whether that alleged nuisance is an infringement of the rights of the plaintiff.** In other cases, for example in **Preston vs. Luck 1884**, the cause of action was for specific performance, which depended on the question whether the agreement covered all the patents or British patents only, but the alleged nuisance was Luck parting with them, which could be stopped without deciding the main question. [at page 40 et. Seq.]

(16) In **Powell and others, Assignees of Thomas Lloyd vs. Ann Lloyd, 1827,** in which again the cause of action was for specific performance of an agreement by a bankrupt with his assignees [*the plaintiffs*] and the alleged nuisance was bankrupt's mother's executors attempting to change the possession of the estate, Alexander L. C. B., said,

> **"I cannot admit the proposition, that the plaintiffs, in order to continue the injunction, must shew a right to a specific performance, it is, in my opinion, enough to shew some colour of right**;..." [page 47 to 49]

So, if the act of nuisance ["nuisance" as *in terms of section 54(1)(a)*] the plaintiff wants to restrain is also the cause of action, an interim injunction could be issued very rarely and the prima facie case test or even a strong prima facie case test is justified. But it is not so in other cases, especially when there is an agreement or contract and if the court can satisfy on the standard laid down in Powell and others, Assignees of Thomas Lloyd vs. Ann Lloyd, 1827 and by Lindley L. J.,

in Preston vs. Luck 1884, then the interim injunction should be issued on balance of convenience.

In the circumstances, it is decided not to extend the three interim orders issued by this court, which stayed the operation of the interim order issued by learned High Court judges and stayed proceedings before that court.

There is no order on costs.

Judge of the Court of Appeal.

Hon. Neil Iddawala J.,

I agree.

Judge of the Court of Appeal.