
IN THE DISTRICT COURT OF COLOMBO

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

PLAINTIFF

No. 3231/Spl.

- VS -

HOTEL DEVELOPERS (LANKA) LIMITED, formerly known
as LANKA JAPAN HOTELS LIMITED, and of No. 16, Alfred
Place, Colombo 3.

DEFENDANT

AND

In the matter of an Application for addition of
Parties under Section 18 of the Civil Procedure
Code.

BETWEEN

Nihal Sri Ameresekere of 167/4, Sri Vipulasena
Mawatha, Colombo 10.

PLAINTIFF-PETITIONER.

AND

1. Hotel Developers (Lanka) Limited, formerly known
as Lanka Japan Hotels Limited and of No. 16, Alfred
Place, Colombo 3 and presently of 1000, Echelon
Square, Colombo 1.

DEFENDANT-RESPONDENT

2. Gamini Christopher Bernard Wijeyesinghe,
of 8A, Gregory's Road, Colombo 7,
3. Rajanayagam Nalliah Asirwatham,
of 27/1, Unity Place, Colombo 3.
4. Anthony Nirmal Fernando,
of No. 10/2, Gower Street, Colombo 5,
5. Ranjeevan Seevaratnam,
of 17, Rheinland Place, Colombo 3,
6. Saravanapavan Sirikananathan,
of 7, Ramakrishna Road, Colombo 6,
7. Mohamed Reyaz Mihular,
of 7, St. Kilda's Lane, Colombo 3,
8. (Ms.) Marie Premila Senewiratne,
of 102/5, Cotta Road, Colombo 8,
9. Pathiranage Yohan Srineth Perera,
of 251, Kewalapitiya Road,
Hendala, Wattala,

10. Chandranath Priyanka Jayatilake,
of 15, Park Avenue, Colombo 8, and

all of whom are carrying on business in partnership
under the name, style and firm of FORD, RHODES,
THORNTON & CO., at 32 A, Sir Mohamed Macan Markar
Mawatha, Colombo 3.

RESPONDENTS

On this 14th day of February 1994

The PETITION of the Plaintiff-Petitioner above-named appearing by J.W.D.Perera, practising under the name and style of DE SILVA & PERERA, with his Assistant Vernon St. Gooneratne, his Attorneys-at-Law, states as follows :

1. (a) The 2nd to the 10th Respondents above-named are the Partners of M/s. Ford, Rhodes, Thornton & Co, Chartered Accountants of 32A, Sir Mohamed Macan Markar Mawatha, Colombo 3., which Company have been the Auditors of the Defendant-Respondent above-named from its inception,
 - (b) The 2nd to 8th and 10th Respondents reside and the principal place of business of the said Ford, Rhodes, Thornton & Co., is also situate in Colombo within the jurisdiction of this Court,
 - (c) The Defendant-Respondent above-named is the Owning Company of the Colombo Hilton Hotel and is owned in the majority by the Government,
 - (d) The aforesaid 2nd to the 10th Respondents, hereinafter referred to as the Auditors were also the Reporting Auditors to the Prospectus issued by the Defendant-Respondent on 06.03.'84 in connection with the construction of the said Colombo Hilton Hotel, for which purpose the Government had issued State Guarantees.
 - (e) The said Auditors have certified the Audited Accounts of the Defendant-Respondent for the Year ended 31.03.'90, (hereinafter sometimes called and referred to as the said Accounts), which Accounts is the subject matter of this Action and has been enjoined by Court.
2. The Plaintiff-Petitioner filed this Action against the above-named Defendant-Respondent and averred, inter-alia, that;
 - (a) The Defendant-Respondent was promoted, amongst others, by Mitsui & Co. Ltd., and Taisei Corporation, both of Japan (hereinafter sometimes called and referred to as "Mitsui/Taisei") to build and operate the Colombo Hilton Hotel, inter-alia, having 452 Guest Rooms, in two Towers going up to 22 floors, with covered car parking for 400 Vehicles, as stipulated in its Prospectus dated 06.03.1984,
 - (b) Kanko Kikaku Sekkeisha Yozo Shibata & Associates of Japan (hereinafter sometimes called and referred to as "KKS") were the Architects, whilst Mitsui/Taisei undertook to build, equip and furnish the said Hotel, on a fixed price turn-key basis, as set out in the several Agreements/Contracts entered into in such regard,
 - (c) Since the said Mitsui/Taisei had failed to build, equip and furnish the said Hotel, as had been agreed upon, the Plaintiff-Petitioner filed D.C. Colombo Action No. 3155/Spl on 13.09.'90 against Mitsui/Taisei and KKS, in the form of a Derivative Action in Law, including the Defendant-Respondent and its Directors as Defendants in conformity with the form and style of such an Action. The said Derivative Action had been instituted on behalf of the Defendant-Respondent in its right, for its benefit and in its interest,

- (d) In the aforesaid Derivative Action the Plaintiff-Petitioner prayed, inter-alia, for Interim Injunctions against the said Mitsui/Taisei and KKS and the Defendant-Respondent and the Learned District Judge issued Enjoining Orders on 18.09.'90 preventing any payments, whatsoever, to Mitsui/Taisei and/or KKS, including also under the aforesaid State Guarantees,
- (e) After the issuance of the aforesaid Enjoining Orders, the matter of the said Accounts of the Defendant-Respondent for the year ended 31.03.1990 came up before its Board of Directors in October 1990 and the Plaintiff-Petitioner, drawing specific attention to the facts disclosed in the aforesaid D.C. Colombo Action No. 3155/Spl, pointed out that the said Accounts had several serious and material errors and that they should be appropriately checked and verified with a full and factual disclosure to the Shareholders of the Defendant-Respondent,
- (f) As a consequence of the above, the Secretary Ministry of Finance had also intimated by his Letter dated 19.11.1990 that the Auditor General had advised that the said Accounts should disclose the factual position regarding the aforesaid Action filed by the Plaintiff-Petitioner,
- (g) The Plaintiff-Petitioner pointed out to the Board of Directors that he had instituted the aforesaid action as a Shareholder in the right of the Defendant-Respondent and on its behalf and that accordingly there is a conflict of interest between the Defendant-Respondent and Mitsui/Taisei and that it would be therefore improper for Mitsui/Taisei to participate in the deliberations into the said Accounts,
- (h) However, the Directors of the Defendant-Respondent, Mitsui/Taisei and the aforesaid Auditors, acting jointly and/or severally certified the said Accounts to be adopted by the Shareholders of the Defendant-Respondent, disregarding the Plaintiff-Petitioner's several objections thereto and rejection thereof, and acting further in contempt of the aforesaid Enjoining Orders that had been issued by Court in the aforesaid Action D.C. Colombo No. 3155/Spl and the opinion given by the Auditor-General as aforesaid,
- (i) The Plaintiff-Petitioner further stated that the said Accounts did not give a full and factual disclosure as aforesaid and that the Defendant-Respondent would not be able to continue operating with the obligation to service such over-stated debts, fraudulently claimed by Mitsui/Taisei, without compelling the Defendant-Respondent to go into liquidation,

and prayed, inter-alia, for the following relief ;

For an Order directing the Defendant-Respondent to make full and factual disclosure in the Directors' Report with respect to the state of the Company's affairs, particularly its inability to pay the liabilities as shown on the Balance Sheet, the true and correct financial position of the Company and the facts pertaining to the said D.C. Colombo Action No. 3155/Special

3. On 15.01.'91 the learned District Judge granted and issued Enjoining Order in this Action preventing the tabling and adoption of the said Accounts at any Annual General Meeting as was also prayed for in the Plaint in this Action.
4. Thereafter the parties agreed that both the Inquiry into the Application for the issue of the Interim Injunction and the Trial in this Action be taken up together.

5. Plaintiff-Petitioner states that;

- (a) In the aforesaid D.C. Colombo Action No. 3155/Spl, the Learned District Judge, after Inquiry, granted and issued on 28.10.'91 Interim Injunctions, as prayed for by the Plaintiff-Petitioner and further, inter-alia, made the following observations;
- *there is no acceptable basis, at present, for making payments to Mitsui/Taisei*
 - *the other Defendants, the Directors, as persons having connections and showing interest concerning the Company, acting to obtain monies, had not readily acted to conduct a correct examination*
 - *the said persons having prevented such correct examination were attempting to, howsoever, effect the payment of monies*
 - *whether, these persons are exercising the influence, that they have gained in society, to prevent the raising of questions concerning the matters of work in connection with the Contracts and the Prospectus etc*
 - *the collaboration of the said persons, was adverse to the interest of the Shareholders of the Company, and that they were acting through such collaboration, in a manner amounting to defeat the interests of the shareholders of the Company*
- (b) Though the Defendant-Respondent did not file Objections to the issuance of such Interim Injunction in the aforesaid D.C. Colombo Action No. 3155/Spl, the General Manager of the Defendant-Respondent in his Affidavit filed with the Objections in this Action, has expressly stated that the Defendant-Respondent had filed Objections in the aforesaid D.C. Colombo Action No. 3155/Spl, which is false to his knowledge. The Defendant-Respondent was only represented by Mr. Shibly Aziz P.C. the then Addl. Solicitor General, who was present throughout the said Inquiry without demur to the issue of the Interim Injunction against the Defendant-Respondent.

6. The Plaintiff-Petitioner states that;

- (a) The Defendant-Respondent however did not seek to canvas the said Order granting such Interim Injunction in the Court of Appeal.
- (b) Mitsui/Taisei and KKS thereafter made Applications to the Court of Appeal, seeking to set aside the said Order granting such Interim Injunctions mainly on the right of the Plaintiff to bring such an Action and Their Lordships of the Court of Appeal allowed the said Applications for Leave to Appeal against the said Order,

7. The Plaintiff-Petitioner states that;

- (a) The Plaintiff-Petitioner thereupon filed an Application for Special Leave to Appeal to the Supreme Court against the said Order of the Court of Appeal and after Hearing, their Lordships of the Supreme Court presided by His Lordship the Chief Justice, upheld the aforesaid Order of the Learned District Judge granting the aforesaid Interim Injunctions and further, inter-alia, made the following observations in Their Judgment handed down on 02.12.'92;
- *the Plaintiff has succeeded in establishing that he has a legally enforceable right and that there is a serious question and prima-facie case of fraud and wrong-doer control, and that the Company is entitled to the reliefs claimed - [One of the reliefs claimed being that Mitsui/Taisei and/or KKS are not entitled to any payments whatsoever]*

- *the Plaintiff has a reasonable and real prospect of success, even in the light of the defences raised in the pleadings, objections and submissions of the Defendants*
- *the Plaintiff's prospect of success was real and not fanciful and that he had more than merely an arguable case*
- *it might be pointed out that it could not entirely be a matter of indifference to the Government the Government made itself eventually responsible for the repayment of the monies borrowed by the Company*
- *Interim Injunctions were granted to prevent the "siphoning out of money" from the Company and the Country*

A true copy of the Judgment of the Supreme Court dated 02.12.'92 is annexed hereto marked "X1" and pleaded as part and parcel of this Petition.

8. The Plaintiff-Petitioner states that;

In the meantime on 11th March 1991 the Defendant-Respondent filed its Answer in the aforesaid D.C. Colombo Action No.3155/Spl and, inter-alia, had expressly admitted;

- (a) in paragraph 51 therein, that it did not have the original Architectural Plans, and
- (b) in paragraph 54 therein, that it did not have an account, or a reconciled inventory of its fixed assets supplied by Mitsui,

and further stated without a prayer therein, that the Defendant-Respondent will take immediate action to protect its interest and that of its Shareholders, should the Court find that averments made by the Plaintiff are legitimately entitled to succeed.

A true copy of the said Answer is annexed hereto marked "X2" and the relevant paragraphs therein are marked X2(a) and X2(b) respectively and the same are pleaded as part and parcel of this Petition.

- 9. (a) On or about 27.04.'92, the Plaintiff-Petitioner served Interrogatories on the Defendant-Respondent in this Action, who pursuant thereto filed Answers on 19.11.'93 to such Interrogatories by the Affidavit of its General Manager dated 22.04.'93.
- (b) In such Answers the Defendant-Respondent further admitted that it did not have
 - the original Architectural Plans,
 - the original Inventory Schedule or a reconciled Account thereof
 - and evades the question of Bills of Quantities & Final Measurements.

10. The Plaintiff-Petitioner states that;

- (a) The said Interrogatories were served with a view to enabling the Court to ascertain upon what material propositions of fact or of Law, the Plaintiff-Petitioner and the Defendant-Respondent are at variance to enable issues to be recorded on which the right decision of the Action, appears to Court to depend,
- (b) The Defendant-Respondent in its Answers to a number of such Interrogatories on several material matters has specifically stated that such matters had to be answered by the aforesaid Auditors.

11. The Plaintiff-Petitioner states that;

- (a) The said Auditors were present at material Board Meetings when the subject of the said Accounts was taken up for deliberation prior to its certification.
- (b) Prior to the certification of the said Accounts he, as a then Director of the Defendant-Respondent, wrote several Letters/Memoranda to the aforesaid Auditors,
- (c) Prior to the certification of the said Accounts the Defendant-Respondent addressed Letters dated 19.11.'90 and 20.11.'90 requiring the aforesaid Auditors to examine and report on the several material issues raised by the Plaintiff-Petitioner in relation to the verification of the Fixed Assets of the Defendant-Respondent and the said Accounts prior to its certification, whereas the said Auditors a few days thereafter on 28.11.'90 certified the said Accounts without carrying out any such examination and/or reporting,

True Copies of the said Letters dated 19.11.'90 and 20.11.'90 are annexed hereto marked X3(a) and X3(b) respectively and the same are pleaded as a part and parcel of this Petition,

- (d) After the certification of the said Accounts the Plaintiff-Petitioner addressed further Letters to the aforesaid Auditors,
- (e) After the institution of this Action the Plaintiff-Petitioner addressed further Letters to the aforesaid Auditors, more particularly Letters dated 06.02.'91 and 11.02.'91

True Copies of the said Letters dated 06.02.'91 and 11.02.'91 are annexed hereto marked X4(a) and X4(b) respectively and the same are pleaded as a part and parcel of this Petition,

- (f) The aforesaid Auditors deliberately failed and neglected to act on and/or to answer any of the aforesaid Letters.
- (g) Notwithstanding the fact that the Plaintiff-Petitioner had pointed out as aforesaid that there is a conflict of interest between the Defendant-Respondent and Mitsui/Taisei, the said Auditors deliberately failed and neglected to disclose that they were also the Auditors of Mitsui Construction Co. Ltd. at that time.

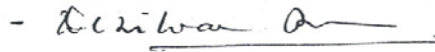
12. The Plaintiff-Petitioner states that;

- (a) In view of the Answers given by the Defendant-Respondent to the Interrogatories, asserting that the Auditors have all the relevant material necessary for the answers to very material Interrogatories relevant to the framing of the issues in this Action, it is fit and proper that the said Auditors be made a party to this Action,
- (b) Relevant documents, materials and informations that are necessary for the easy and expeditious disposal of all the matters involved in this Action are in the possession and control of the said Auditors and such matters and informations are of the personal knowledge of the aforesaid 2nd to 10th Respondents, being the Partners of the aforesaid Auditors,
- (c) It was and is the statutory duty, obligation and responsibility of the aforesaid Auditors, as had been required by the Companies Act No. 17 of 1982, the Securities Council Act No. 36 of 1987 (now amended as the Securities & Exchange Commission Act) and the prescribed Standards of the Institute of Chartered Accountants of Sri Lanka, to have audited and certified the said Accounts as stipulated therein,

- (d) The aforesaid Auditors by their aforesaid conduct and actions and by implication have deliberately failed and neglected to comply with such statutory duties, obligations and responsibilities as aforesaid,
 - (e) The Plaintiff-Petitioner is entitled to seek an Order of Court directing the rectification of the said Accounts making a full and factual disclosure as aforesaid to the Shareholders of the Defendant-Respondent and the investing public and/or as to whether or not such Auditors should be allowed to continue as Auditors.
13. In the premises aforesaid, the Plaintiff-Petitioner states that the presence of the aforesaid Auditors before the Court is necessary in order to enable the Court to effectually and completely adjudicate upon and settle all the questions involved in this Action.
14. An affidavit from the Plaintiff-Petitioner in support of the averments referred to herein is filed herewith and pleaded as part and parcel of this Petition.

WHEREFORE the Plaintiff-Petitioner prays;

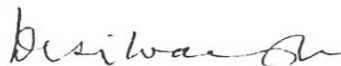
- (a) that the 2nd to the 10th Respondents, being Partners of the Firm of Auditors of M/s. Ford, Rhodes, Thornton & Co., be added as Defendants to this Action.
- (b) that Notice of this Application be issued on the Respondents above-named,
- (c) for costs, and
- (d) for such other and further relief as to this Court shall seem meet.



Attorneys-at-Law for the Plaintiff-Petitioner.

Documents filed with the Petition

- i. Affidavit of the Plaintiff-Petitioner.
- ii. Judgement of the Supreme Court dated 02.12.'92 marked X1.
- iii. The Answer filed by the Defendant-Respondent on 11.03.'91 in D.C. Colombo Action No. 3155/Spl marked X2
- iv. Defendant-Respondent's Letters dated 19.11.'90 and 20.11.'90 marked X3(a) and X3(b) respectively.
- v. Plaintiff-Petitioner's Letters dated 06.02.'91 and 11.02.'91 marked X4(a) and X4(b) respectively.



Attorneys-at-Law for the Plaintiff-Petitioner.