

*Present:* Bertram C.J. and Ennis J.

1913.

MARSDEN *v.* HABIBHOY.

59—D. C. (Inty.) Colombo, 46,928.

*Commission to examine witnesses — Discretion of Judge — Power of Supreme Court to review the discretion of District Judge.*

The question whether or not a commission shall issue to examine witnesses abroad is in the discretion of the Judge. But it is in the power of the Supreme Court to review that discretion.

“The question in each case is a question of fact, on which the Court must form its determination.”

**T**HIS was an application for a commission to examine witnesses in Bombay. The facts are set out in the following affidavit:—

I, Sydney George Alexander Julius, Proctor of the Honourable the Supreme Court of Colombo, make oath and say as follows:—

1. I am the defendant above named.
2. That the Honourable the Supreme Court has allowed my application that fresh evidence be called in this case to prove the execution by the plaintiff of an agreement with the late Ahemedbhoy Habibhoy in April, 1913.
3. That it will be necessary to record the evidence of the following witnesses:—
  - (1) The Superintendent of Stamps of Bombay, to produce his books for 1913 showing the sale of the stamped paper on which the agreement sought to be proved was written.

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- (2) Jatashankar Kashiranan, the stamp vendor, who actually issued the said stamped paper.
- (3) Abdulrehman A. Dharmsey, who is the man who wrote the receipt for Rs. 60 given by plaintiff on the date the alleged agreement was signed, and which payment is referred to in the agreement.
- (4) Pabanjee G. Mulle, the attesting witness to the alleged agreement.
- (5) Hurjeevan Cullianjee, the bookkeeper who issued the money and made the entries regarding the payment of Rs. 60 to the plaintiff, and also for the said stamped paper.

4. All the above witnesses are residents of Bombay, and none of them is under my control, and their attendance cannot be compelled by process of this Court.

5. I am informed, and verily believe, that none of the said five witnesses, except the bookkeeper, is in the employ of the receivers appointed by the Bombay High Court in the administration suit for the administration of the late Ahemedbhoy Habibhoy's estate in British India. The fifth witness, the bookkeeper, does not know English, and the books are voluminous and written by him in Gujerati, and can be produced in Bombay, and it will probably not be necessary to forward the original books to this Court, but I can cause to be produced certified copies and official translations of the relevant entries.

6. The first and second witnesses are, respectively, a Government official and a Government licensed stamp vendor. The former evidence will be purely documentary, and his books being Bombay Government records cannot be sent to this Court. The latter is carrying on business as a licensed stamp vendor, and it would not be possible to induce him to come to Colombo to give evidence, and his evidence will be purely formal.

7. The third and fourth witnesses were employed in the late Ahemedbhoy Habibhoy's office. The former is a grandson of the late Ahemedbhoy Habibhoy, and I am informed by the receivers that he is unwilling to come to Colombo, and that they have no means of compelling him to do so. The latter left the employment of the late Ahemedbhoy Habibhoy prior to his decease, and I anticipate that it will not be possible for either the deponent or any of the deceased's heirs or the receivers to induce him to come to Colombo.

SYDNEY JULIUS.

The learned District Judge made the following order:—

After the judgment in this case the defendant, having discovered fresh evidence, made an application to the Supreme Court, and the judgment of this Court was set aside *pro forma*, and the case was sent back to this Court to enable the defendant to adduce the fresh evidence and the Supreme Court directed that this Court could then adjudicate on the case after considering that evidence.

The defendant now applies for a commission to be issued to Bombay to record the evidence of certain witnesses with reference to the fresh evidence which he was allowed to lead.

The plaintiff is a resident of Bombay. The defendant is a solicitor practising in this Court, and is sued as administrator of the estate of one A. Habibhoy, also of Bombay.

The action appears to have been brought in this Court as the defendant is a resident in Colombo, within the jurisdiction of this Court (paragraph 2 of the plaint).

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The late Habibhoy was the proprietor of the Spinning and Weaving Mills at Wellawatta, in Colombo, and plaintiff's cause of action was in respect of an agreement with Habibhoy to employ the plaintiff as manager of the mills.

Plaintiff was engaged by Habibhoy in Bombay. The agreement is alleged to have been entered into in Bombay. In fact, the plaintiff in his evidence admitted this.

The defendant has since the last trial found that this agreement was in writing, and it is to prove this agreement that defendant moves for the commission.

The witnesses to the agreement are residents of Bombay, and cannot be compelled to attend this Court. Three of the witnesses whom defendant wishes to examine are to give evidence of a formal nature, and plaintiff does not seriously object to a commission in respect to these witnesses.

The most material witnesses, however, are the two witnesses to the agreement itself: Dharmsey, who wrote the alleged agreement, and Mulle, the attesting witness to the alleged agreement.

These two witnesses are not in the employ of the receivers appointed by the Bombay High Court for the administration of Habibhoy's estate in India. They were employed in Habibhoy's office at one time. Dharmsey is a grandson of Habibhoy, but he is not willing to come to Ceylon. Mulle left the employ of Habibhoy before Habibhoy's death. Neither of these can be compelled to come to Ceylon.

The defendant is a stranger to these witnesses, and he is sued only in his representative character.

The plaintiff, himself a resident of Bombay, has chosen the Ceylon forum.

Although it is an ordinary case, it will be the best course for witnesses to be examined before the Judge who has to adjudicate; still I consider the circumstances of this case are such that the discretion of the Court can very properly be exercised in allowing a commission to issue to Bombay to have the five witnesses examined. Plaintiff will be at liberty, after due notice, to have any witnesses, or the plaintiff himself, examined at Bombay.

I allow the defendant's application. Costs of this application to be costs in the cause.

W. WADSWORTH.

*A. St. V. Jayawardene*, for the appellant.

*Bawa, K.C.*, and *Hayley*, for the respondent.

September 5, 1918. BERTRAM C.J.—

This is an appeal against an order of the District Court of Colombo directing a commission to issue for the examination of certain witnesses in India. The case as regards the evidence which is required is a somewhat peculiar one, and has come before the Court

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under somewhat peculiar circumstances. It is a case in which the plaintiff has already recovered judgment, but in which that judgment has been set aside *pro forma*; because of the alleged discovery of fresh evidence subsequent to the trial. The evidence consists of a document which, on the face of it, requires a most careful examination, not only as to the document itself, but also as to the circumstances connected with it, inasmuch as it consists partly of a typed agreement, and partly of two signatures appended to a separate sheet of paper, which is itself undated. As I have said, it is clearly in the interests of justice that all persons who can speak to the circumstances under which it is alleged that the document was drawn up should be carefully examined. It is, moreover, in the interests of justice that they should be examined before the Judge who has to try the case.

There is another circumstance to which my attention has just been called by my Brother Ennis, and that is, that the signature of the witness to the document purports to be given for the purpose of attesting the signature of Mr. Ahemedbhoj Habibhoy, who does not in fact sign the document; whereas the signature of the only party who is supposed to have signed the document, namely, the plaintiff in this case, purports to be the signature of a witness. These points may no doubt be explained. But it is desirable, if possible, that the explanation should be given before the court of trial.

We have been referred to numerous authorities. Some of these authorities deal with the question of judicial discretion. I do not think those authorities assist us very much. Undoubtedly the question as to whether or not a commission shall issue is in the discretion of the Judge in this sense, that the Judge is not bound to issue it merely because it is asked for. It is also in the discretion of the Court to issue it in another sense, that is to say, that the Judge has to weigh the circumstances and decide according to his judgment of those circumstances. But it is also in the power of the Supreme Court to review that discretion, and among the cases cited are cases where that discretion has been reviewed.

The other authorities refer to the question of the issue of a commission to examine a witness who is abroad, and who is said not to be able or not to find it convenient to attend. There are very strong cases both ways. There are two cases in which the opinion was expressed that, in spite of the fact that it is most desirable that the Judge who has to try an issue of fact should see the witnesses, nevertheless, a commission ought to issue. Those cases are *Langen v. Tate*<sup>1</sup> and *In re Boyes*,<sup>2</sup> where Fry L.J., in a case in which a claim was made under very suspicious circumstances, and where it was very desirable that a particular witness should be subjected to a searching cross-examination, intimated that he would have been

<sup>1</sup> (1883) 24 Ch. D. 522.<sup>2</sup> (1882) 20 Ch. D. 760.

disposed, nevertheless, to issue a commission, but for the fact that the English rules with regard to cross-examination are not observed in France. On the other hand, there is an extremely strong case in which a commission was refused (*Berdan v. Greenwood* <sup>1</sup>), in which the Court, notwithstanding the fact that there was a good reason to believe that the attendance of a foreign witness at the trial could only be made at the risk of his life, declined to issue a commission. The only conclusion we can draw from these strongly conflicting authorities is that the question in each case is a question of fact, on which the Court must form its own determination.

All that we have in this case is that there are certain witnesses in India, and that it is said that one of them is unwilling to come, and that as to another, those who represent the plaintiff in this country anticipate that it will be difficult to procure his attendance. On that Mr. Jayawardene very aptly draws attention to the case of *Lawson v. Vacuum Brake Co.* <sup>2</sup> It is there said: "If an application is made for the examination of a witness abroad, instead of his attending in this country to give evidence at the trial, it is the duty of the party making that application, when making it, to bring before the Court such circumstances as will satisfy the Court that it is for the interest of justice that the witness should be examined abroad." The judgment from which that passage is cited goes on to criticise the vagueness of the evidence in which the application is supported. The evidence in this case is certainly not less vague than in the case of *Lawson v. Vacuum Brake Co.* <sup>2</sup> On the contrary it is distinctly more vague than in that case.

Under the circumstances, I do not think that the respondents to this appeal have satisfied the onus which lies upon them to support their application by definite and forcible evidence.

I am of opinion that, with regard to the third and fourth witnesses, their attendance in Colombo is required in the interests of justice, and as regards the fifth witness, who is in charge of the Gujerati books, and probably has no personal knowledge of the alleged transaction. I think, like that of the other witnesses, his evidence might well be taken on commission. I am, therefore, of opinion that the order of the District Judge should be varied in the manner I have indicated.

The appeal should be allowed, with costs.

ENNIS J.—I agree.

. Appeal allowed.

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<sup>1</sup> (1880) 20 Ch. D. 764 (footnote).

<sup>2</sup> (1884) 27 Ch. D. 137.