1952 *Present :* **Gratiaen J. and Gunasekara J.**

MURUGAPPAN CHETTIAR, Appellant, *and* NADARAJAN CHETTIAR, Respondent

S. C. 42—D. C. Colombo, 20,470

Lis alibi pendens—*Stay of proceedings—Conditions precedent—Civil Procedure Code, s. 839.*

An order staying all proceedings in an action until the conclusion of a litigation which is pending between the parties in a foreign Court cannot be made except upon proper material. A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in a court in Ceylon if it is otherwise properly brought.

APPEAL from an order of the District Court, Colombo.

C. Thiagalingam, Q.C., with *S. Sharvananda* and *G. A. Thavathurai*, for the plaintiff appellant.

E. B. Wikramanayake, Q.C., with *S. Thangarajah*, for the defendant respondent.

Cur. adv. vult.

June 5, 1952. GRATIAEN J.—

This is an appeal from an order of the District Court of Colombo, dated 22nd November, 1950, directing that all proceedings in the present action should be stayed until the conclusion of a litigation which was pending between the parties in the Sub-Court of Sivaganga in India. Section 839 of the Civil Procedure Code certainly confers upon trial Judges in this Island an inherent jurisdiction to make orders of this nature upon proper material and in accordance with the well-recognised principles of the doctrine of *lis alibi pendens*. In *Ramen Chettiar v. Vyvaven Chettiar* [1] Wijeyewardene J. (Howard C.J. concurring) laid down the following rules which should guide a Judge who is invited to order a stay on the ground that the same *lis* is already pending between the parties in a foreign Court :—

" (1) The burden is on the party asking for the interference of Court to prove that he is doubly vexed by reason of two actions being brought against him.

(2) Where the two actions are brought in the same country there is a prima facie presumption of an intent to cause vexation.

(3) Where the party is sued in one country and also in a foreign country or where a party is sued in two countries subject to the same Paramount Power a Court will not presume an intent to cause vexation—

(*a*) in the absence of evidence that the plaintiff cannot obtain an additional advantage in continuing both his actions, or

(*b*) from the mere fact of inconvenience or additional expense caused to a party, or

(*c*) from the fact that by staying one action less evidence would have to be ultimately led in the first action. "

The plaintiff asks that the learned District Judge's order under appeal should be set aside because he has misdirected himself as to the matters which should have weighed with him in exercising his discretion to stay proceedings on the ground of vexation or abuse of process—a discretion which must, without doubt, be very cautiously applied. For our Courts are " freely open to all persons, including persons foreign to this country, seeking to enforce their rights . . . . in cases in which the Courts can properly exercise jurisdiction ". *Logan v. Bank of Scotland* [2]. The rule was stated thus by Scott L.J. in *St. Pierre v. S. American Stores (Gath and Chavis) Ltd.* [3] :—

" (1) A mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in an English Court if it is otherwise properly brought. *The right of access to the King's Court must not be lightly refused.* (2) In order to justify

[1] *(1940) 41 N. L. R. 371.*

[2] *(1906) 1 K. B. 141, 159.*

[3] *(1936) 1 K. B. 382, 398.*

a stay, two conditions must be satisfied, one positive and the other negative ; (*a*) the defendant must satisfy the Court that the continuance of the action would work an injustice to him because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way ; and (*b*) the stay must not cause an injustice to the plaintiff. *On both the burden of proof is on the defendant.* "

These observations are in conformity with those enunciated by Wijeyewardene J. in *Ramen Chettiar's case* (supra) and, with respect, they should always be borne in mind by a Judge who is called upon, in effect, to deny to a litigant the privilege of obtaining legal redress in proceedings over which our Courts are vested with jurisdiction.

The conclusion at which I have arrived is that the defendant, on whom the burden of proof clearly lay, has not adduced any evidence which would have justified a stay of the proceedings in the present action. The elements of vexation or oppressiveness or abuse of process have not been established. Still less has the onus been discharged of proving that the plaintiff would not derive any advantage by a continuation of the proceedings in this country in the normal way.

I now proceed to set out my reasons for deciding that the learned Judge's order should be set aside.

The present action was instituted by the plaintiff on 1st December,1948, against the defendant, who is his elder brother, for the recovery of two substantial sums of money aggregating over Rs. 160,000 and for certain additional relief upon these causes of action. The jurisdiction of the Court to entertain the action is not denied, and the defendant himself seems to concede that, in respect of the second cause of action on which he has admitted partial liability, the District Court of Colombo is the most convenient forum for an adjudication of the dispute (paragraphs 18 and 20 of the document P1). On that basis, a sum of money representing the amount of his admitted liability has been brought into Court to the credit of the action.

On 15th December, 1948, the plaintiff also instituted an action against the defendant and two others in an Indian Court upon several causes of action including, but not restricted to, the causes of action which form the subject matter of the present proceedings. We have no evidence before us as to the rules of procedure governing litigation in the Sub-Court of Sivaganga, but I find that the defendant's answer in the Indian case had specifically pleaded *inter alia* that the prior institution of this action in Ceylon is an absolute bar to the maintainability of the *lis* in India. If that be a valid plea, it certainly affords a most compelling argument against the application for a stay of the proceedings in the Ceylon case.

To return to the progress of the proceedings in the District Court of Colombo. The trial was originally fixed for 18th July, 1950 ; and both parties, who had attended Court with their respective witnesses, were ready to proceed with the action on its merits. Unfortunately, however, the case was postponed by the Court for want of time, and the trial stood adjourned for 22nd November, 1950. On that date, without any previous

notice to the plaintiff or his proctor, an oral application on the defendant's behalf was made for a stay of proceedings on the ground that the Indian litigation was still pending. The failure of the defendant to invoke the discretionary jurisdiction of the Court until long after the time when he could reasonably and properly have applied for a stay was itself a ground for rejecting his belated application. *Spencer Bower on Res Judicata, page 213.* But apart from that, the application was in my opinion entirely devoid of merit, and the trial should have been proceeded with on the appointed date for the following compelling reasons :—

(*a*) it was not proved or even suggested that any events had occurred *since 18th July, 1950 (on which date the defendant had expressed his willingness to submit to the Court's jurisdiction to try the case)*, which would operate to prejudice his position as a litigant in the Ceylon Court ;

(*b*) both parties had cited witnesses resident in Ceylon to support their respective cases, and these witnesses cannot be subpoenaed to attend the Sub-Court of Sivaganga in India ;

(*c*) the defendant had conceded in the document P2 that the transaction to which one at least of the causes of action relates " had arisen in Ceylon and has to be decided under the law governing in Ceylon " ;

(*d*) the defendant has also pleaded in P2 that, should the defendant obtain a money decree in India upon the second cause of action, that decree should direct payment to be made in Ceylon. If that be so, the final adjudication of the Indian Courts would not by itself conclude the litigation, and further proceedings in this Island would be necessary for the purpose of enforcing part at least of the Indian decree ;

(*e*) the trial in the present action would, but for the granting of the order applied for, have commenced on 22nd November, 1950, and been concluded, presumably, not very long afterwards ; by way of contrast, there was no evidence that the litigation in Sivaganga could reasonably have been expected to be brought to a speedy conclusion. (Indeed, 18 months have since passed, and it would appear that the Indian case has even at this date not reached a stage beyond the preliminary " framing of issues ".)

(*f*) should the plaintiff ultimately fail in his action in the Ceylon Courts, he would enjoy the advantage of preferring an appeal as of right to the Judicial Committee of the Privy Council ; that privilege is no longer enjoyed by litigants in India.

The learned District Judge does not seem to have had the advantage of being reminded of the reported decisions on the doctrine of *lis alibi pendens* —an omission for which the plaintiff's counsel, who had no previous notice of the defendant's application, was certainly not to blame. In consequence, the learned Judge has not given due weight to any of the material factors referred to by me, and his judgment proceeds solely upon his attempted

assessment of what he described as the " balance of conveniences ". In the result, the discretion which he purports to have exercised in crdering a stay of proceedings is vitiated by misdirection.

I would set aside the order under appeal and direct that the case be sent back for trial in the normal way. The appellant is entitled to his costs both here and in the Court below. The District Judge in fixing fresh dates of trial will no doubt pay due regard to the fact that this action was instituted nearly 4 years ago.

GUNASEKARA J.—I agree.

Order set aside.