

1939

*Present : Moseley A.C.J. and Soertsz S.P.J.*AMERESEKERE *v.* CANNANGARA.

95—D. C. Colombo, 4,686.

*Commission to examine party—Defendant resident abroad—Application by defendant—Discretion of Court—Civil Procedure Code, s. 422.*

Under section 422 of the Civil Procedure Code a commission may be issued for the examination of a party resident outside the limits of the Court's jurisdiction.

An application for the examination on commission of a party ought not to be lightly entertained especially when it is made on behalf of the party, who is sought to be examined.

Such an application or an application for the evidence of witnesses to be taken on commission should not be granted unless it were supported on affidavits which clearly show that the commission would be conducive to the administration of justice.

**A** PPEAL from an order of the District Judge of Colombo.

*C. Thiagalingam*, for defendant, appellant.

*N. E. Weerasooria*, K.C. (with him *D. M. Weerasinghe*), for plaintiff, respondent.

*Cur. adv. vult.*

November 2, 1939. SOERTSZ S.P.J.—

This is an appeal from an order made by the District Judge of Colombo refusing to issue a commission for the examination of the defendant, and of certain witnesses, all of them resident in England.

The circumstances in which the application for a commission was made are these. The plaintiff who is the stepson of the defendant sued him, in this case, on several causes of action to recover large sums of money. One of the claims was for a sum of Rs. 12,698 which the plaintiff alleged was the amount of rents collected by the defendant in respect of certain houses and premises belonging to the plaintiff, and not accounted for to him. The defendant's defence is that he



collected a sum of Rs. 12,418 and not Rs. 12,698 as stated in the plaint, and that that amount and a sum of Rs. 809 over and above that amount were expended by him in maintaining, feeding and clothing the plaintiff during his stay in England and the defendant claims in reconvention the additional sum I have referred to. The defendant's attorney has submitted an affidavit in support of the allegations in the answer that a large sum of money was spent "on account of clothing, food, light, heating, house rent and medical attention to the plaintiff". It is in regard to these matters that the defendant asked that his evidence, the evidence of Dr. Low and the evidence of Mr. and Mrs. Ramsden be taken on commission. Dr. Low's and the Ramsdens' evidence, it is said, will show that the plaintiff was suffering from a highly contagious disease, and that he had to be segregated and put in charge of attendants.

The learned trial Judge refused the application because he thought that in view of the claim in reconvention the Court should have the defendant and his witnesses before it so that their evidence might be assessed properly with reference to the kind of witnesses they appeared to be, and to the manner of their giving evidence. The Judge also thought that the statement made in the affidavit that the defendant's state of health made it inadvisable for him to embark on a voyage to Ceylon was belatedly made, and that there was no direct evidence to show that Mr. and Mrs. Ramsden were unwilling to come to Ceylon. There was only the attorney's statement to vouch for that.

Now applications such as this are left in the discretion of the Court, for it to allow or refuse as the facts and circumstances of each case seem to require. There are no hard and fast rules, and where a trial Court has exercised the discretion vested in it substantially in a manner conducive to justice, a Court of appeal will not interfere merely because if it had been the original Court it would have exercised this discretion differently. Mr. Weerasooria stood on that principle. But after careful consideration I have reached the conclusion that the trial Judge has misdirected himself, and has exercised his discretion wrongly. One of the reasons given by him is that there is a claim in reconvention and that therefore it is necessary that he should have the defendant and his witnesses in front of him. It is, of course, desirable that in every case which has to be tried the parties and their witnesses should, during the pendency of the trial, live and move and have their being so to speak, in the presence of the Judge who has to adjudicate between them, but obviously there must arise cases in which what is desirable is not attainable conveniently. Hence our section 422 of the Civil Procedure Code, and kindred provisions in other systems of law. Section 422 provides that "any Court may in any action issue a commission for the examination of *any person* resident beyond the local limits of its jurisdiction". These are very wide words and make it possible for the parties themselves to be examined on commission. But as Taylor says in his work on *Evidence* "motions for this purpose (i.e., for examination on commission of the parties themselves) ought not to be *lightly* entertained especially when made on behalf of the party who is sought to be examined . . . . The application should not be granted unless it were supported by



affidavits clearly stating that the commission would, under the circumstances, be conducive to the administration of justice . . . . A less stringent rule would inevitably lead to the pernicious practice of parties going abroad to avoid the risk of cross-examination in open Court”.

In the case of *Mohideen v. Mohamadu*<sup>1</sup> a commission was refused where the witnesses sought to be examined in that way were witnesses to nine promissory notes which were being impugned as forgeries. That is quite understandable. In *Moorhouse v. Caffoor*<sup>2</sup> a commission issued to examine the plaintiff, where it was apparent that the plaintiff's duties prevented him from returning to Ceylon except at a large sacrifice of time and money, and he was not wilfully avoiding the Ceylon Courts.

In the case before us, so far as the defendant is concerned, he has been resident in England continuously from 1926. He says it is his intention to continue to reside there, and that seems probable. The claim with which we are concerned is a claim brought against the defendant not by him and it cannot be said that he desires to remain abroad to avoid the risk of cross-examination in open Court. What is more, there is material before us to show that the defendant has been advised medically that it will be prejudicial to his health to voyage to Ceylon and back. I cannot help feeling that the trial Judge took too technical a view of the matter when he remarked that this fact had not been brought properly to his notice and that it was so brought belatedly. In cases where a Court is exercising a discretion vested in it, it may well, I think, take a more liberal view. It seems to me that the affidavit of the attorney who is the local representative of the defendant, and the medical certificate show that the defendant's health is as it is said to be. In my opinion, therefore, it cannot be said that if we entertain this application for the defendant's evidence to be taken on commission we shall be entertaining an application for a commission lightly.

The position in regard to Dr. Low and Mr. and Mrs. Ramsden is even stronger. One is a professional gentleman, and the others are working people, and it is unlikely that they will agree to come to Ceylon to give evidence in this case. I cannot pay serious attention to the objection made that these witnesses have not themselves said that they will not come to Ceylon for the purpose of this case. The attorney says they are unwilling and he must be understood to be speaking on instructions he has received from the defendant. On the probabilities of the matter too, one may assume that they have refused to come to Ceylon. But even if they should be willing to come, the expenditure that would be incurred in getting them out is such that it is out of proportion to the nature and amount of the claim. The sole question involved is whether the defendant has incurred all the expenditure he says he has. It seems clear that he must have incurred some expenditure. My view in a case like this is that the interests of justice will not suffer by the evidence referred to being taken on commission. The Judge will no doubt, in adjudicating upon the claims, bear in mind that the evidence for the defence was placed before him in this manner, and that the plaintiff has not had the advantage of subjecting those witnesses to cross-examination

<sup>1</sup> 1 Br. 234.

<sup>2</sup> 1 Tamb. 10.



in open Court in the presence of the trial Judge. We were referred to certain English and local cases in support of the contentions put forward on the two sides, but case law is not of much assistance in a matter of this kind where the exercise of a discretion vested in a Court must depend on the peculiar facts and circumstances of each case. On a broad view of the circumstances of this case, and of the nature of the evidence sought to be procured by means of a commission, I am of opinion that the defendant's application should be allowed.

I would, therefore, set aside the order dismissing the application and send the case back with the direction that a commission do issue at the expense of the defendant to such a Court or person as the trial Judge may deem fit for this evidence to be taken on commission. The appellant will have the costs of this appeal and of the argument on the point in the Court below, but whatever the ultimate result of this case, he must bear the cost of the commission including such additional costs as the plaintiff will have to incur in procuring representation for himself before the commission appointed to take the evidence the defendant desires to adduce.

MOSELEY A.C.J.—I agree.

*Order set aside*

