1940 *Present :* **Howard C.J. and Wijeyewardene. J.**

RAMEN CHETTIAR *v.* VYRAVEN CHETTIAR.

37—D. C. Ratnapura, 6,472.

Concurrent actions—One action brought outside Ceylon—Application to stay proceedings in Ceylon—Burden on applicant—Evidence relating to law and procedure in foreign court—No advantage to plaintiff—Inconvenience and expense no ground for application—Civil Procedure Code, s. 839.

A Court has power to order that the proceedings in an action in Ceylon be stayed pending the decision of a concurrent action in a Court outside Ceylon, where the matters in dispute in the transactions are substantially the same.

But the Court will not exercise this power where (*a*) there is no material on which the Court could form an opinion as to the law and legal procedure in the Court outside Ceylon, and (*b*) there is no material before the Court justifying the finding that by proceeding with the action the plaintiff cannot obtain any advantage from it which he would not obtain in the foreign Court.

The fact that if the application is not granted it would cause the defendant inconvenience and expense is not by itself ground for the exercise of the inherent powers of the Court.

THIS was an appeal from an order of the District Judge of Ratnapura directing that the proceedings in the present action be stayed pending the final decisions in two cases in the Chief Court of the Pudukkottai State.

The plaintiff instituted the present action against the defendant to have it declared that the defendant held three-eighth shares of an estate called "Morning Site" in trust for the plaintiff and for an order against the defendant to render an account of the profits and income of the estate until the execution of a conveyance in favour of the plaintiff. The defendant filed answer pleading that the conveyance had been taken in the defendant's name pending the payment of the purchase price by the plaintiff of his shares of the property but that the plaintiff had subsequently renounced his rights to the property.

The application on which the learned District Judge made the order appealed against was made on the following grounds :—

(*a*) That the plaintiff has instituted the present action to harass and oppress the defendant.

(*b*) It is convenient and necessary to have all the issues tried in the High Court of Pudukkottai, as all the parties are permanent residents of that State.

(*c*) The defendant will be put to unnecessary expense and hardship in getting ready for two trials on the same subject-matter in Pudukkottai and Ceylon.

N. E. Weerasooria, K.C. (with him *J. A. T. Perera*), for plaintiff, appellant.—The relief claimed in the two suits is not the same. Even if the issues are substantially the same, the Court should clearly see that in staying an action it does not do injustice. It is true that where there are two actions for the same matter in two Courts in the same country, such a proceeding is primâ facie vexatious and the Court will generally put the plaintiff to his election and stay one of the suits. But if one of the actions is in a foreign country where there are different forms of procedure and different remedies, there is no presumption that the multiplicity of actions is vexatious, and a special case must be made out to induce the Court to interfere—*McHenry v. Lewis*[1]. The meaning of "vexatious" is discussed in *Peruvian Guano Company v. Bockwoldt*[2] and *Cohen v. Rothfield*[3].

[HOWARD C.J. referred to *Carter v. Hungerford*[4].]

There is no evidence that the procedure in Ceylon and Pudukkottai is identical. Nor do we know whether the law regarding immovable property is the same in the two countries.

The Reciprocal Enforcement of Judgments Ordinance (Cap. 79) has not been extended to the State of Pudukkottai.

H. V. Perera, K.C. (with him *N. Nadarajah* and *C. Renganathan*), for defendant, respondent.—The order appealed from is one staying the action at Ratnapura pending the determination of the two actions in India. It amounts to no more than a postponement. The result of the Pudukkottai action goes to the root of the present claim. The order of the District Judge is an eminently reasonable one.

[1] *(1882) 22 Ch. D. 397.*
[2] *(1882) 23 Ch. D. 225.*
[3] *(1919) 120 L. T. 434.*
[4] *(1915) 59 Sol. J. 428.*

A narrow view should not be taken of the inherent powers which a Court has for regulating its own proceedings and internal management. Section 839 of the Civil Procedure Code; *Hukm Chand Boid v. Kamalanand Singh*[1]; *D. C. Inty. Jaffna, 11,503 (S. C. No. 139)*[2]; *Chitaley and Rao's Code of Civil Procedure, p. 1024.*

Pudukkottai has already been selected by the plaintiff as a suitable venue, the deed under consideration was executed there, the acts of undue influence are alleged to have taken place there, and all the witnesses are there. In these circumstances, it will be quite unfair to proceed with the action at Ratnapura.

N. E. Weerasooria, K.C., in reply.—Stay of action is possible only when the two actions are exactly similar.

The scope of section 839 of the Civil Procedure Code has been considered in *Fernando et al. v. Cadiravelu*[3].

There is no provision in law to suspend a case indefinitely until a connected case is decided—*Fernando v. Curera*[4]; *Tillekeratne et. al. v. Keerthiratne*[5].

No evidence has been led by the defendant to show that there is no advantage gained by proceeding with the action in Ceylon. The burden is on him to establish that the later action is vexatious—*Hyman v. Helm*[6].

Cur. adv. vult.

February 1, 1940. WIJEYEWARDENE J.—

This is an appeal against the order of the District Judge directing the proceedings in the present action to be stayed pending the final decisions in cases bearing Nos. O. S. 1,624 of 1933 and O. S. 547 of 1937 in the Chief Court of Pudukkottai State. The plaintiff instituted the present action on July 10, 1937, against the defendant to have it declared that the defendant held three-eighth shares of an estate called "Morning Site" in trust for the plaintiff and for an order against the defendant to render an account of the profits and income of the estate from January 11, 1931, until the execution of a conveyance in favour of the plaintiff in respect of the three-eighth shares. It is stated in the plaint that the defendant entered into a notarial agreement No. 1,636 of January 15, 1931, with the then owner of the property and that in pursuance of the agreement the defendant purchased the property by deed No. 1,091 of December 22, 1933. The plaintiff pleads that the defendant held the deed of agreement in respect of the three-eighth shares in trust for the plaintiff and that it was intended that the deed of conveyance should operate in favour of and for the benefit of the plaintiff with regard to those shares which the plaintiff says are held and possessed by the defendant in trust for him.

The defendant filed his answer on December 13, 1937, stating—

(*a*) that it was agreed to purchase the property "in the proportions of one-fourth share each to the plaintiff and one Muttiah Chettiar and the remaining half share to the defendant";

[1] *I. L. R. (1905) 33 Cal. 927.*
[2] *S. C. Minutes of 24.1.40.*
[3] *(1927) 28 N. L. R. 492.*
[4] *(1896) 2 N. L. R. 29.*
[5] *(1935) 14 C. L. Rec. 142.*
[6] *(1883) 49 L. T. 376.*

(*b*) that the deed of conveyance "was taken in the name of the defendant pending the payment by the plaintiff and Muttiah Chettiar of their shares and on payment of their shares of the purchase price the defendant had to convey to the plaintiff and Muttiah Chettiar their shares in the said estate";

(*c*) that in March, 1933, the plaintiff wanted to be released from his liability to pay his share of the purchase price and agreed to Muttiah Chettiar taking over his share;

(*d*) that the plaintiff thereafter executed the deed of release of March 18, 1933, "renouncing *inter alia* his rights in and to the said estate".

It is somewhat difficult to understand the plea in paragraph (*b*) above if by the deed of release the plaintiff intended to renounce his rights to the estate. The deed of release was executed in March, 1933, and the defendant has not made it clear in his pleadings why in December, 1933, the conveyance was taken "pending the payment by the plaintiff and Muttiah Chettiar of their shares of the purchase price".

The plaintiff instituted action O. S. No. 1,624 in the Chief Court of Pudukkottai State on October 5, 1933, against the present defendant and Muttiah Chettiar asking for a "cancellation" of the deed of release of March 18, 1933, on the following grounds as set out in the issues framed in that action:—

(*a*) "Is the release deed void, because it was bought in fraud of plaintiff's right when he was not of sound mind and body by the exercise of undue influence?"

(*b*) "Is the release deed void, because it was subject to the condition that it was not to be enforced if the plaintiff recovered?"

The defendants filed answer in that action referring to a partnership V. E. R. M. of which the plaintiff and the defendants were partners, denying the allegations of the plaintiff with regard to the deed of release and pleading that "the plaintiff can only bring an action for the dissolution of the partnership and the action brought only to cancel the release deed is not proper". In this answer too there is an averment to the following effect—"the estate called 'Morning Site' was purchased from the partnership business V. E. R. M. In that too first defendant (Muttiah Chettiar) is entitled to one-fourth share. The other partners too are entitled to shares in that according to their respective shares". It is again difficult to reconcile this allegation with the statement made in the present action that before the execution of the deed of conveyance, it was agreed about March, 1933, that the property should be held in equal shares by the plaintiff and Muttiah Chettiar.

The issues were framed in the Pudukkottai action No. 1,624 on December 11, 1933, and judgment was delivered on January 3, 1937, dismissing the plaintiff's action with costs. It appears from an affidavit filed by the plaintiff that he has appealed against the judgment of the Chief Court of Pudukkottai State, that the appeal has not been heard, and that a party dissatisfied with the decision of that appellate Court has a right of appeal to another Court of appeal. During the pendency of that action the defendant appears to have given to the plaintiff a writing dated August 22,

1938, agreeing to render an account to the plaintiff of the income derived from the three-eighth shares claimed by the plaintiff and to execute a transfer of those shares of the estate in favour of the plaintiff. There is a dispute between the plaintiff and the defendant on the question whether that writing was given subject to certain conditions on the occurrence of which alone the writing was to have legal effect.

I shall now proceed to consider the action No. 547 instituted by the plaintiff against the defendant and Muttiah Chettiar in the Chief Court of Pudukkottai State on April 13, 1937. That action has been brought to establish the rights of the plaintiff as based on the agreement of August 22, 1938, referred to by me earlier in the judgment. The plaintiff asks for judgment, declaring him entitled to a one-fourth share in the business carried on under the vilasam of V. E. R. M. and R. M. V. E. and three-eighth shares of "Morning Site".

According to an affidavit filed by the defendant in the present action answers have been filed in action No. 547 and that case has now been set down for trial. There is no evidence on record to show whether the trial of that action has commenced.

The application on which the learned District Judge made the order appealed against was filed in the District Court of Ratnapura in October, 1938. The grounds on which the application is made are set out in the defendant's petition as follows :—

(*a*) The plaintiff has instituted the action in the District Court of Ratnapura to harass and oppress the defendant.

(*b*) It is convenient and necessary to have all the issues raised by the plaintiff tried in the High Court of Pudukkottai as all parties are permanent residents of Pudukkottai State.

(c) The defendant will be put to unnecessary expense and great deal of hardship in getting ready for two trials on the same subject-matter in Pudukkottai and in Ceylon.

The plaintiff has filed a counter-affidavit, stating that in filing the present action he acted bona fide in the exercise of his legal rights and without any intention of harassing the defendant.

At the inquiry before the District Judge the Counsel for the defendant tendered in evidence certified copies of (*a*) the plaint in case No. 547 of the Chief Court of Pudukkottai; (*b*) the plaint, answer and issues in case No. 1 524 of the Chief Court of Pudukkottai, and (*c*) the judgment in case No. 1,624 of the Chief Court of Pudukkottai "for the limited purpose of showing what the findings were on the issues framed". No other evidence was led before the District Judge.

I have no doubt that this Court has the power to make an order staying an action in a Court in Ceylon pending the final decision in another action between the parties where the matters in dispute in the first case are directly and substantially in issue in the second case (*vide* Civil Procedure Code, section 839). But as these inherent powers are very wide and indefinable a Court has to guard against an arbitrary exercise of such powers. While conceding the existence of such powers the learned Counsel for the appellant cited certain authorities as indicating the limits within which such powers should be exercised. He referred us to

McHenry v. Lewis [1], *Peruvian Guano Co. v. Bockwoldt* [2], *Cohen v. Rothfield* [3], and *Hyman v. Helm* [4], in which the Courts had to consider applications for restraining parties from proceeding in connected actions. In *McHenry v. Lewis* the Court dealt with the application of a defendant sued in the English Court to stay the proceedings in view of an action pending in the United States of America, Jessel M.R. pointed out that very different considerations arose where both the actions were brought in England and where one of them was brought in a foreign country. He said :—

> "In this country where the actions are by the same man in Courts governed by the same procedure, and where the judgments are followed by the same remedies, it is primâ facie vexatious to bring two actions where one will do . . . . It is by no means to be assumed, in the absence of evidence, that the mere fact of suing in a foreign country as well as in this country is vexatious".

In *Peruvian Guano Co. v. Bockwoldt* (*supra*), an English company sued a firm of French merchants in the English Courts for the delivery of cargoes of seven ships or in the alternative for damages. Shortly after the institution of the action, the ships which were in British waters were removed by the direction of the defendants to ports in France and the cargoes were taken possession of by the defendants. The plaintiffs thereupon commenced proceedings in France for the recovery of the cargoes of six of the ships. Refusing an application by the defendant that the plaintiff should be ordered to elect between the two actions, Jessel M.R. gave as one of the reasons the fact that the matters in dispute were not identically the same. He said :—

> "Supposing the plaintiff elected to go on with his French action for the six (ships) and in England for one . . . . what good would that be to anybody ? The two actions would go on, and all that is suggested is that a witness or two less would be required possibly, not necessarily, in carrying on the litigation. That is not a ground for putting a man to his election . . . . It is no sufficient reason to stop a plaintiff to say that you can have a little less evidence in one action or try it in a less expensive mode".

In the same case, Lindley L.J. said :—

> "The Court here is not and cannot be alive to all the advantages which a person may expect to derive from suing in a foreign Court. The Court does not know with accuracy unless the matter is brought to its attention what reasons there may be for preferring one Court to another."

Bowen L.J. expressed his view as follows :—

> "We have no sort of right, moral or legal, to take away from the plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries why should this Court interfere and deprive him of it."

[1] *(1882) 52 L. J. Ch. 325.*
[2] *(1883) 23 Ch. D. 225.*
[3] *(1918) 120 L. T. 434.*
[4] *(1883) 49 L. T. 376.*

In Cohen v. Rothfield (*supra*) there were cross suits between the parties in England and Scotland and the Court laid down the principle that the burden was on the party making the application for stay of proceedings to satisfy the Court of the existence of a state of things justifying the Court's exercise of its powers. In the course of his judgment Scrutton L.J. said :—

"It is obvious, for instance, that an action in South Africa where the Dutch procedure prevails, Mauritius or Quebec where French procedure exists, Malta with its peculiar law, or Scotland with its Roman procedure may produce quite different results from an English action. It appears to me that unless the applicant satisfies the Court that no advantage can be gained by the defendant by proceeding with the action in which he is plaintiff in another part of the King's Dominions, the Court should not stop him from proceeding with the only proceedings which he as plaintiff can control."

In *Hyman v. Helm* [1] Bowen L.J. said :—

"A man may wish to sue abroad as well as in England both because he has superior facility of execution abroad and also because of superior facility of procedure before execution and before judgment . . . . I think it lies on the persons who wish to put an end to concurrent litigation here and abroad to make out a case of oppression. It does not do simply to say 'Why should the action go on in two places at the same time ?'"

There remains also the case of *Carter v. Hungerford* [2], to which the attention of Counsel was drawn by My Lord the Chief Justice. A full report of the case is not available to me but from a brief note given in the Annual Practice I find that it decided that a Court should not ordinarily stay an action where there is an action in a foreign court dealing with the same subject matter in which the English plaintiff is defendant.

No doubt the application in the present action is not for an absolute but conditional stay of the proceedings and to that extent the present applications differ from the applications made in the cases considered by me. In the absence, however, of any definite authority on the question of the Court's jurisdiction in respect of an application to stay proceedings pending an action in a Court outside Ceylon. I think it desirable to be guided to some extent by the principles that may be deduced from the English cases to which I have referred. The principles deducible from the authorities cited in the course of the argument before us may be summarized as follows :—

(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 primâ facie presumption of an intent to cause vexation.

[1] (1883) 49 L. T. 376.

[2] (1915) 59 Sol. J. 428.

(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 present application is made by the defendant in view of two cases pending in the High Court of Pudukkottai. Now Pudukkottai is a Native State outside British India. It is not clear whether the whole Code (Indian) of the Civil Procedure, 1908, is in force in that State. Section 1 of the Code shows that some of the sections do not extend even to what are known as Schedule Districts in British India. The pleadings filed in the High Court of Pudukkottai certainly differ so largely from the pleadings that are normally filed in our Courts that one is left in doubt whether there are any provisions there similar to sections 46 (*a*) and 77 of our Code of Civil Procedure. Moreover there is the fact that the Indian Code of Procedure differs in many particulars from our Code. I may also add that the Reciprocal Enforcement of Judgments Ordinance (Cap. 79) of Volume II. of the Legislative Enactments has not been extended to the State of Pudukkottai. The defendant has failed not only to lead definite evidence of the procedure obtainable in the State of Pudukkottai but also to furnish any material on which the Court could form an opinion as to the law and the legal remedies in that State.

It is clear from a perusal of the pleadings in the various cases that the decisions in the Pudukkottai cases will not do away with the necessity of continuing the proceedings in the present action. Assuming that the finding of the High Court of Pudukkottai with regard to the validity of the deed of release may be pleaded as *res judicata* it will still be open to the plaintiff to prove a trust relying on circumstances arising after the deed of release. It is not conceded by the plaintiff that the High Court of Pudukkottai had jurisdiction in case No. 1,624 to give a decision as to the scope of that deed, and the plaintiff may contend that the deed of release has no bearing on the matters in dispute in the present action. In this connexion I may refer to what I observed earlier that some of the allegations in the defendant's answer do not appear to be reconcilable with the plea that by the deed of release the plaintiff renounced his rights to "Morning Site".

We do not know anything about the state of the cause lists in Pudukkottai, but we know that the action 1,624 which was instituted in 1933 was decided by the Chief Court in 1937, and that before finality could be reached the proceedings would have to go before two Appeal Courts. In these circumstances there is no material before us to justify our holding that by proceeding with the present action the plaintiff will not get a decision more expeditiously.

The defendant has stated that if his application is not granted, it would cause him inconvenience and expense. That is hardly a ground to justify a Court in exercising its inherent powers where the two actions are not both in Ceylon. Besides making a mere statement that the intention of the plaintiff in instituting the present action was to harass him, the defendant has made no effort to satisfy the Court that the plaintiff cannot obtain any advantage from the present action which he would not obtain in the Pudukkottai cases.

I do not think in the present action it is desirable that we should exercise the powers vested in this Court and support an order staying the proceedings pending the final decision of the cases in the Pudukkottai Court.

I would therefore allow the appeal and set aside the order of the learned District Judge. The appellant is entitled to the costs of the appeal and the costs of the inquiry in the lower Court.

HOWARD C.J.—I agree.

Appeal allowed.