1941 *Present :* **Howard C.J. and Soertsz J.**

ACHI *et al v.* PALANIAPPA CHETTIAR

22—D. C. (Inty.) Colombo, 9,567

Commission to examine witnesses abroad—Application for commission to Pudukottah—Defendant resident in Pudukottah—Plaintiffs selection of Ceylon venue—Plaintiffs disentitled to commission.

Plaintiffs sued the defendant, who was described in the caption of the plaint, as presently resident in Pudukottah State, as executor *de son tort* of his father's (Muthappa Chettiar) estate in Ceylon upon an award obtained against Muthappa Chettiar in arbitration proceedings in British Malaya.

The plaintiffs applied for a commission to examine two witnesses in South India, one of whom was resident in Pudukottah.

***Held* that, as the plaintiffs had selected Ceylon as the venue for the trial, when they might have instituted proceedings in the Courts of Pudukottah and so facilitated the calling of their witnesses, they were not entitled to a commission to examine the witnesses in Pudukottah.**

***Ameresekera v. Cannangara* (14 *N. L. R. 333*), distinguished.**

APPEAL from an order of the District Judge of Colombo.

H. V. Perera, K.C. (with him *R. N. Ilangakoon*), for the defendant, appellant.

N. Nadarajah (with him *S. Mahadeva*), for the plaintiffs, respondents.

Cur. adv. vult.

July 4, 1941. HOWARD C.J.—

The only question that arises on this appeal is whether the learned District Judge was right in allowing an application made by the plaintiffs for the issue of a commission to the Chief Court of Pudukottah to examine two witnesses, one of whom is resident in the adjoining district of Ramnad and the other at Rayapuram in the said State. The proceedings that have led up to this action have run a strange course. In 1918, one Muthappa Chettiar, his brothers and the first plaintiff who were carrying on business in partnership in Perak in British Malaya appointed certain arbitrators to

divide the assets of the said business in Malaya. The arbitrators made an award dated January 4, 1918, whereby Muthappa Chettiar was ordered to pay a sum of Rs. 70,000 to the first plaintiff. It is alleged by the plaintiffs that this award was accepted and that Muthappa Chettiar died on December 26, 1935, leaving an estate in Ceylon and a sum of Rs. 34,800 with interest owing on the award. It is also alleged that the defendant, who is a son of Muthappa Chettiar, has intermeddled with the latter's estate in Colombo and constituted himself an executor *de son tort*. The first plaintiff is the widow and the second and third plaintiffs are the surviving children of Kennappa Chettiar who was a son of one of the brothers carrying on the said business in partnership with Muthappa Chettiar. Paragraph 13 of the plaint states that the first and third plaintiffs have always been out of Ceylon and the second plaintiff came to Ceylon in February, 1936. It is also to be noted that, although it is stated in the plaint that the defendant is resident in Colombo, he is also described in the caption "as presently of Vegupatti in Pudukottah State in South India". The petition in support of the plaintiffs' application for the Commission states that the two witnesses whose evidence is necessary to prove the award are two of the arbitrators who signed this document and they have both refused to come to Ceylon. Of the other persons with knowledge of the award two are dead and the other is in the Federated Malay States. In allowing the application for a Commission the learned District Judge has purported to apply the law as laid down in *Ameresekera v. Cannangara*[1]. It has, however, been contended by Mr. Perera in this Court that the learned District Judge, so far from applying the law as laid down in the judgment of Soertsz J., has completely misunderstood the *ratio decidendi* of that decision. It is, in the circumstances, necessary to institute a somewhat meticulous and careful comparison of the facts in the two cases. In *Ameresekera v. Cannangara* (*supra*) the plaintiff brought an action to recover sums by way of rent alleged to have been collected by the defendant. The defendant who was resident in England admitted that he had collected a certain amount by way of rent, but claimed that he had expended that sum and an additional amount in maintaining the plaintiff during his stay in England. The defendant claimed this additional sum in reconvention. He asked that his own evidence and that of three witnesses, one of them a Doctor, resident in England and testifying to the fact that the plaintiff had to be segregated in England as he was suffering from a contagious disease, should be taken on commission. The trial Judge refused the application for a commission 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. The Court of Appeal held that in refusing a commission the learned District Judge had misdirected himself and exercised his discretion wrongly. In

[1] *41 N. L. R. 333.*

giving the reasons of the Court for this decision Soertsz J. invited attention to the following points:—

(*a*) The defendant had been resident in England since 1926 and his intention was probably to continue to reside there;
(*b*) The claim was against the defendant and not by him;
(*c*) It could not be said that the defendant wished to avoid the risk of cross-examination in open Court;
(*d*) There was evidence that the voyage to Ceylon would be prejudicial to the defendant's health;
(*e*) Dr. Low was a professional gentleman and the Ramsdens were working people. It was unlikely they would come to Ceylon to give evidence;
(*f*) The expenditure incurred in procuring the attendance of these witnesses was out of all proportion to the nature and amount of the claim;
(*g*) The interests of justice would not suffer by the evidence referred to being taken on commission.

In the present case the plaintiffs who ask for a commission selected Ceylon as the venue for the trial whereas they might have instituted proceedings in the Courts of Pudukottah and so facilitated the calling of their witnesses. The fact that the defendant has property in Colombo does not make it imperative for the action to be instituted in Ceylon. Having obtained a judgment in the Courts of Pudukottah the plaintiffs could sue on it in the Courts of Ceylon. The witnesses are resident in Southern India and hence the distance they would have to travel to give evidence in Ceylon cannot be compared with the distance from England. Moreover the expense incurred in bringing these two witnesses to Ceylon is trivial compared with the expenses incurred in bringing three witnesses from England. Another factor that merits consideration in deciding whether it is in the interests of justice to grant a commission is the fact that the action of the plaintiffs is belated and there has been a delay of over twenty years in proceeding to enforce the award. In view of this long interval it is obvious that witnesses giving evidence in regard to the award will have considerable difficulty in recollecting the facts relating thereto and the circumstances in which it was made. Hence the necessity for close cross-examination of these witnesses. It is not possible to say that justice will not suffer if the trial Judge has not the opportunity of observing the bearing of such witnesses when giving evidence.

In view of the comparison instituted in this judgment it is clear that the facts in the present case reveal very slight similarity to those in *Ameresekera v. Cannangara*[1]. Bearing this in mind it is necessary to examine closely the reason given by the learned District Judge for granting the application for the issue of a commission. In his judgment he states as follows:—

> "There is a long chain of judicial authority on this point and the matter culminated quite recently in *Ameresekera v. Cannangara* (*supra*) where learned Counsel for the defence himself argued the question before

[1] *41 N. L. R. 333.*

the Supreme Court in appeal and got the law settled and clarified. I am unable to see any distinction between the law which was laid down in *Ameresekera v. Cannangara* and the present case. In my judgment on which the decision in *Ameresekera v. Cannangara* is founded I went through all the decided authorities and came to the conclusion that a commission should not issue. It has been pointed out that the Court should not take too technical a view of these matters and I do not propose to take a technical view in this case. In my opinion I am unable to distinguish *Ameresekera v. Cannangara* from the present case."

It must be borne in mind that the decision in *Ameresekera v. Cannangara* referred to by the District Judge set aside his order disallowing a commission. It is, therefore, somewhat peculiar that he should state that "in my judgment on which the decision in *Ameresekera v. Cannangara* is founded I went through all the decided authorities and came to the conclusion that a commission should not issue". In view of the fact that his decision was reversed by this Court it can hardly be said that "the decision" was founded on "his judgment" which reviewed "all the decided authorities". The learned District Judge also states "I am unable to see any distinction between the law which was laid down in *Ameresekera v. Cannangara* and the present case", whilst at the end of his judgment he states "I am unable to distinguish *Ameresekera v. Cannangara* from the present case". As already pointed out by me it is impossible to conceive of facts more dissimilar. With regard to the law laid down in *Ameresekera v. Cannangara*, Soertsz J. in his judgment in that case formulated the principle that "the exercise of a discretion vested in a Court must depend on the peculiar facts and circumstances of each case". He expressly stated that "case law is not of much assistance in a matter of this kind". It is, therefore, a matter for the deepest regret that the learned Judge should have misunderstood the decision in this case to the extent of stating that he "is unable to see any distinction between the law which was laid down in *Ameresekera v. Cannangara* and the present case".

A reference to the English decisions indicates that the Courts in England only grant a commission when it is necessary for the purposes of justice and that in the case of a plaintiff who has chosen the tribunal it is only in exceptional circumstances that the order can be obtained. Even taking a broad and liberal view, I am of opinion that to grant this application would be entertaining it lightly. Its grant would not, in the circumstances of this case, be conducive to the administration of justice. In granting it the learned District Judge has misdirected himself and exercised his discretion wrongly. His order granting the application is, therefore, set aside with costs in this Court and the Court below.

SOERTSZ J.—I agree.

Appeal allowed.