1952 *Present :* **Swan J.**

P. M. SILVA, Appellant, *and* L. B. M. J. PERERA, Respondent

S. C. 52—C. R. Kanadulla, 3,850

Execution—Mandatory decree—Application for enforcement of it—Separate action not maintainable—Damages claimable—Civil Procedure Code, ss. 334, 335, 344, 839.

A separate action cannot be maintained when it claims relief for which the appropriate remedy is an application for execution under section 334 of the Civil Procedure Code.

Ismail v. Ismail (1920) 22 N. L. R. 190, doubted.

Vindictive damages cannot be awarded under section 335 of the Civil Procedure Code in an application made under section 334 for enforcement of a mandatory decree.

APPEAL from an order of the Court of Requests, Kanadulla.

H. W. Tambiah, for the defendant appellant.

W. D. Gunasekera, for the plaintiff respondent.

Cur. adv. vult.

[1] *(1950) 51 N. L. R. 496.*

November 7, 1952. SWAN J.—

This appeal raises an important question as to whether rules of Civil Procedure can be brushed aside in order that substantial justice may be done. Justice must always be done, it must always be substantial, but it must be done according to law.

Undoubtedly the recently introduced Section 839 of the Civil Procedure Code copied from Section 151 of the Indian Code states that :—

> " Nothing in this Code shall be deemed to limit or otherwise affect the inherent power of the Court to make such orders *as may be necessary for the ends of justice*, or to prevent abuse of the process of the Court. "

But do the inherent powers of the Court extend so far as to ignore or set at nought the rules laid down in the Code ?

The facts relevant to this appeal are as follows. In case No. 3,523 of the Court of Requests of Kanadulla the plaintiff had sued the defendant for declaration of title to a right of cartway, for the removal of an alleged obstruction and for damages. That case was settled, and of consent decree was entered declaring the plaintiff entitled to a right of footpath from the point B to the point A marked in plan No. 4162 dated 20. 2. 50 and made by D. D. Gunasekera, Licensed Surveyor. The decree ordered the defendant to " remove the brick wall at the point B due south to a width of 3 feet to permit the plaintiff to enter his rear garden through the said gap ". The decree also provided that there should be no costs or damages.

On 10. 9. 51 the plaintiff instituted this action bearing No. 3,800 of the same Court pleading the decree in the earlier case and alleging that the defendant had refused to allow him the use of the footpath, and had failed and neglected to remove the brick wall as ordered and decreed.

The defendant filed answer admitting the terms of settlement and the decree in the earlier case but denying that he had failed to comply therewith. He denied that the plaintiff had suffered any damages, and specially pleaded that the decree was *res judicata* and precluded the plaintiff from claiming damages.

On the date of trial it was admitted that the defendant had removed the brick wall only on 12. 11. 51. There is a note in the record, apparently made by the learned Commissioner, that the only matters for determination were damages and costs. The case proceeded to trial on the following issues :—

1. What damages is the plaintiff entitled to as a result of the defendant refusing to remove the brick wall as agreed in case No. 3,523 ?
2. Was the plaintiff placed in possession of the footpath in terms of the decree in case No. 3,523 ?
3. Does the decree in case No. 3,523 operate as *res judicata* barring the plaintiff from claiming any damages ?

Certain evidence was led for the plaintiff. The defence called no evidence, but authority was cited in support of the contention that the plaintiff was precluded from claiming damages, and the learned Commissioner reserved his judgment.

On 12. 12. 51 the learned Commissioner delivered an " order " in which he upheld the defendant's plea of *res judicata*, but proceeded to treat the action as an application under Section 334 of the Civil Procedure Code and purporting to act under Section 335, awarded the plaintiff a sum of Rs. 300 as " pecuniary loss " sustained by him by reason of the defendant's default in obeying the decree in case No. 3,523. In so doing the learned Commissioner said he was relying on *Ismail v. Ismail* [1]. In that case Bertram C.J. (with whom Sampayo J. agreed) held that when an action is brought claiming relief for which the appropriate remedy is an application under Section 334 the Court has power to deal with the action as though it were such an application.

The Indian case which was cited to the learned Chief Justice and which he followed as establishing a salutary principle was *Biru Mahata v. Shyama Churn Kawas* [2]. In that case a suit had been brought for restitution of property wrongly taken in execution of a decree in a previous suit. It was held that a separate suit did not lie because Section 244 of the Code (corresponding to Section 344 of our Code) required that all questions relating to the execution of a decree should be determined by order of the Court executing the decree and not by separate action. It should be noted that the District Munsif found for the plaintiff, and that it was only on appeal that the question was raised for the first time whether the suit was not barred by Section 244. The Appellate Tribunal took the view that inasmuch as the suit had been instituted in the Court which had jurisdiction to execute the decree in the previous suit it might be regarded as an application under Section 244.

I am doubtful whether the order made in *Ismail v. Ismail* [1] is correct. I have not been able to find a single case in which it has been followed. But assuming that the principle therein laid down is sound I find that the facts of that case are not even remotely similar to the facts that confront us here. In that case the defendant in the previous action had been ordered to effect certain repairs to a boiler within a specified period. The defendant failed to execute the repairs and the District Judge punished him for contempt of Court. The plaintiff then brought his second action claiming damages because the defendant had not complied with the order of the Court in the previous action. A preliminary issue was raised as to the maintainability of the second action and the District Judge answered this issue in the affirmative. On appeal it was held that the action could not be maintained. This Court also pointed out that the District Court had no power to punish the defendant for contempt. The case was sent back so that the District Judge might treat the action as though it had been an application under Section 334. I think this Court was merely indicating what was the plaintiff's appropriate remedy. What happened when the case went back to the lower Court I do not know. I imagine that action would have been taken in the earlier suit and not in the second suit which this Court held to be not maintainable.

[1] *(1920) 22 N. L. R. 190.* [2] *(1895) 22 Calcutta 484.*

Even if the learned Commissioner felt in the present case that he was bound by the decision in *Ismail v. Ismail* [1] he should have made order dismissing this action and dealt with the plaintiff's claim for relief now transformed into an application under Section 334 in case No. 3,523.

In any event the order awarding the plaintiff Rs. 300 as " pecuniary loss " cannot be sustained. The award appears to me to be more in the nature of vindictive damages than *pecuniary loss* which must be strictly compensatory. The plaintiff himself gave no evidence. The only witness called was the plaintiff's conductor. Although he stated that great inconvenience and damage resulted from the defendant's act he did not set out any specific damage or pecuniary loss ; and it transpired that the " great inconvenience " was that the lavatory labourer had to go through the house.

I set aside the order appealed from and direct that the plaintiff's action be dismissed. I would, however, make no order as to the costs of the action which was clearly misconceived, or of this appeal.

Order set aside.