
(1988) 03 BOM CK 0041

In the Bombay High Court

Case No : Appeal No. 23 of 1978 and Suit No. 942 of 1973

Bomi Munchershaw Mistry

APPELLANT

Vs

Kesharwani Co-operation Housing Society Ltd. and Others

RESPONDENT

Date of Decision : 11-03-1988

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 16
Constitution of India, 1950 — Article 215

Citation : (1988) 3 BomCR 238

Hon'ble Judges : V.V. Vaze, J;S.K. Desai, J

Bench : Division Bench

Advocate : F.S. Nariman, R.A. Dada, B.R. Zaiwalla, F.E. Divetri and R.F. Nariman, instructed by Payne and Co, for the Appellant; D.R. Dhanuka, G.A. Thakkar, S.H. Doctor, Aspi Chinoy and Jimi Awasia, instructed by Ambubhai and Diwanji for respondent No. 1, Mahendra H. Shah and Arif Bookwalla, instructed by Wadia Gandhi and Co. for respondent Nos. 2 and 3, for the Respondent

Final Decision : Allowed

Judgement

V.V. Vaze, J.—To no man we shall deny justice", promised King John at Runnymede, beside the River Thames, on 14th June, 1215 which promise along with others became the great Chapter of English liberty. The spacious promise drafted in general terms opened the doors of the English Court to each and every person but like all over-inclusive promises, this one from the Monarch could flood the courts with frivolous and vexatious claims resulting in the abuse of the process of Court. To stem such a possible tide, the courts of Record assumed to themselves certain powers to block at the early stages complaints which if allowed to proceed to trial would result in abuse of the process of the Court which power was continued by Article 215 of the Constitution as respects High Court. It is one such exercise of the power to order a complaint to be struck out that forms the subject matter of this appeal.

2. Munchershaw Pherozechaw Mistry was one of the Settlers as well as a Trustee of a Deed of Settlement dated 17th March, 1951. His son Bomi Munchershaw

Mistry-the plaintiff-appellant claims to be the beneficiary and a reversioner in reminder of a moiety share of the corpus of the trust and in view of deaths of various other persons mentioned in the Deed of Settlement, now claims that the corpus of the Trust property and estate has become divisible between the heirs of Munchershaw Pheroreshaw Mistri viz., Bomi Mistry (himself), Shernavaj Munchershaw Mistri and Geeta (alias Dhun) Hari Chainani.

3. C.S. No. 2/590 and C.S. No. 2A/590 of Malabar and Cumballa Hill Division as the distinctive sub-dividing alphabet A suggests belonged to one owner, Ratanchand Hirachand. C.S. No. 2-A/590 was purchased by a Trust created by the Deed of Settlement on which stands a building known as "Maneck Abad". Formerly on C.S. No. 2A/590 existed a bungalow known as "Ratan Villas Bungalow", out houses, servant quarters and garages. The height of the garages was about 13 feet 11/2 inches Ratanchand Hirachand the original owner of C.S. No. 2/590 sold the former property by a Conveyance dated 20th March, 1951 to Munchershaw P. Mistry and the Trustees of the Deed of Settlement. Ratanchand Hirachand covenanted not to build any structure at any time higher than the existing garages, on his remaining land. Later on, i.e. on 31st March, 1967 the remaining property which later on was numbered C.S. No. 2A/590 as well as C.S. No. 2/590 was sold to Kesharwani Co-operative Housing Society. Bomi Mistry discovered that the Society which has purchased the adjoining land has encroached upon a strip of land shown in yellow hatch line on the map Exhibit "B" and filed Suit No. 891 of 1970 in the Ordinary Original Civil Jurisdiction of this Court, making the Society, the Trustees of the Deed of Settlement and other heirs of Munchershaw Mistry as party defendants.

4. Thereafter Bomi Mistry filed Suit No. 942 of 1973 (in which the present Notice of Motion was taken out) in this Court in its Ordinary Original Civil Jurisdiction against the Society. A receiver was appointed by this Court in another Suit No. 304 of 1954 filed by Ratanchand Hirachand the vendor of the Conveyance dated 20th March, 1951 by which C.S. No. 2-A/590 was sold to the Trustees of the Deed of Settlement and one Zaveri who had acted as a confirming party of a Conveyance purporting to be dated 31st March, 1967 executed by one Lalchand Hirachand in favour of the Society. Bomi Mistry alleges in Suit No. 942 of 1973 that the Society is not entitled to build in breach of the covenant limiting construction to a height of 13 x 1 1/2 ", and alleges that a Conveyance actually executed in November 1967 was fraudulently ante-dated to 31st March, 1967 with a view to evading payment of capital gains tax. Plaintiff Bomi Mistry apprehends that the Conveyance dated 31st March, 1967, if left outstanding, will cause him serious injury and cast cloud upon and impair the title of the trust property and prayed that the Conveyance may be declared void and the Society may be ordered to deliver up the same for cancellation.

5. Suit No. 942 of 1973 was consigned to the Long Causes List and for some four years the defendants did not even file a Written Statement. On 30th November, 1977, the Society took out a Chamber Summons No. 678 of 1977 praying for

orders that the plaint be struck off from the record of the Court as the matters therein contained are scandalous, frivolous, vexatious and/or an abuse of the process of the Court. On 10-1-1978 Deshmukh, J., (As he then was) made the Chamber Summons absolute in terms of the prayers that the plaint should be struck off the records which gives rise to the present appeal.

6. A brief resume of the development of equity jurisprudence of specific relief may not be in apposite. Before 1st July, 1859 there were no less than nine different systems of Civil Procedure simultaneously in force in Bengal which were all founded on the Charter of George the III dated 26th March, 1774. The Civil Procedure of the Company's Courts originated in a Code of regulations passed by Lord Cornwallis, in 1793 and the Code practise of the Courts was more similar to that of the Court's of equity than of common law. ("Stokes Anglo-Indian Codes", Vol. II page 382). In these Courts there were written pleadings which consisted of a plaint, an answer, a reply and a rejoinder. The parties were not restricted to any particular form, but each told his story in his own way. The result was that the pleadings were argumentative voluminous and full of irrelevant matters and repetitions. The CPC of 1882 declared the jurisdiction to try all suits of a "civil nature" excepting those of which their cognisance is barred. The Code took pains to explain that a suit in which the right to property or an office is contested. Is a suit of civil nature, although the right may be depend on the decision of questions as to religious rites or ceremonies, and this rule corresponded with that followed by the English Courts with regard to dissenting religious bodies. All the same, the Courts did not give relief, when by so doing they would recognise an immoral custom, *Chinna Ummavi v. Tegarai Chetti*, 1 Mad. 168 as where the dancing girls or a temple sued to enforce a monopoly of the gains of prostitution. The Code, unlike its counter part of the Code of Criminal Procedure, did not contain a rule that a judge shall not try any case in which he is personally interested, but the rule was followed by Judges of High Courts as a principle of natural justice.

7. As observed above. The procedure of the Civil Courts was founded on the pattern of the Courts of equity and a Court of equity, without deciding upon the rights of party were administering to the ends of justice by assuming a jurisdiction inter alia (i) to restrain assertion of doubtful rights in a manner productive of irreparable damage; (ii) to prevent injury to a third person by the doubtful title of others and; (iii) to put a bound to vexatious and oppressive litigation, and (iv) to prevent multiplicity of suits ("Story's Equity Jurisprudence", Vol. 1 page 23). It was very common on Courts of equity to entertain suits for the purpose of removing cloud resting upon the plaintiff's title. This was done upon the ground that it is for the interest of both parties, that the precise state of the title to the estate be known to all who are acting bona fide; and if not, that a mere colourable and pretended claim is a fraud upon the real owner and as such should be extinguished.

8. When the Bill which later-on became Specific Relief Act, 1877 was being

drafted, an intentional departure was made from the English Law which barred the Courts from making declaratory decrees only in cases where the plaintiff, being able to seek further relief than a mere declaration of right, omits to do so. It authorises the Court to make declaration of future rights, provided only such rights are vested. The Bill as originally drafted contained an illustration which supposed A to be in possession of land and B to be threatening him with litigation, and which proceeded on the theory that A would have no right to declaratory relief. Mr. Pitt Kennedy, who was Standing Counsel to Government when the Bill was being debated before the Council, raised strong objection to the inclusion of the illustration in the Act :

"Illustration does clearly illustrate the section, but why should A not have the power to quiet his title ? The claim is a serious invasion of his rights, and would no doubt lower the selling value of his property; why should he not have the power of putting B to the alternative of renouncing or proving his claim, at the cost of B, if B had advanced it rashly or maliciously ? Doubtless, this section does follow the decisions on the English Act and the Procedure Code, but this Bill is to amend as well as to define ; and so far as I can discover, such powers would be no novelties in law : The Scotch action of declarator is I believe precisely pointed at such cases. In my own experience, I have known of great difficulties being imposed on a family by the existence of a supposed defect of title in a portion of the family property, which much complicated the testamentary arrangements of the father, and which could easily have been set at rest if effective powers analogous to the Scotch declarator had existed, though the doubt was quite insoluble for the time under English Procedure." (Stoke's Angle Indian Codes", Vol. 1. P. 934, 935)

9. Mr. Pitt Kennedy persuaded the Council to make a departure from the English law and introduce an Indian reflex of the Scotch action of such declarator :

"It is generally of grave importance for every man to know precisely his pecuniary position, and serious difficulties might often be avoided if this could be accomplished. I confess myself unable to discover why, when others advance a claim to property which one believes to be his, whether in possession or not, he should not have the power of settling the point at the earliest period instead of being obliged to wait till his evidence may be lost, and to keep his arrangements for family uncertain. The old rule was based, as far as I can discover, on the (possibly not unnatural) dislike of Judges to be troubled with the decision of a point of difficulty if they could in any way avoid it. One singular illustration of the length to which this was carried is to be found in Bull v. Pritchard, in which the same will was construed as respects the personality by Lord Giffard in 1826 (1 Russ. 213), and as regards freeholds by Sir J. Wigram twenty years afterwards (5 Hare 567), with a precisely similar result." .

10. Mr. Hobhouse the Law-member, when presenting the report of the Select Committee, said that he could not answer Mr. Pitt Kennedy's argument, and he could add something to it from his own experience. When he was practising at

the Chancery Bar, it not unfrequently happened that people desired to have some question settled for the purpose of family arrangements and that there was extreme difficulty, sometimes insuperable, sometimes superable only by the exercise of great professional craft, in finding out how to get up an actual conflict of present rights, so as to compel the Court to decide the question at issue. That is how the illustration in the draft bill came to be omitted.

11. The debates in the legislature which form one of the legitimate aids to construction-show that it was the Scotch law of declarator that was sought to be introduced in the Specific Relief Act and not the English Law of equity which gave no relief from a mere threat to someone's title to property after asserting a hostile claim.

12. Mr. F.S. Nariman and Mr. Mahendra Shah, the learned Counsel appearing before us, have taken us through a scholarly peregrination of the case of law on the question whether a person like Bomi M. Mistry, who is not a party to the Conveyance executed in favour of the Society, can file a suit for a declaration that the said Conveyance is not binding on him in as much as it does not expressly refer to the unrestrictive covenant in his favour. The authorities cited by them can be divided into three groups. The first group, Balbhadra v. Musst. Bhawani ILR 1907 Cal. 853: (858) 11 C.W.N. 956 ; Kalu Ram Vs. Babu Lal and Others, 5 ; Suraj Ket Prasad Vs. Chandra Mul and Others, ; Manick Lal v. Shiva Jute Bailing 52 C.W.N. 389; Vemana Venkama Naidu and Others Vs. Sayed Vilijan Chisty and Others, ; Chodipalli Masenu Vs. Gampala Narasamma, ; B. Rajgorhia v. Central Bank of India 76 C.W.N. 807 , Kedar Prasad Vs. Ganga Prasad and Others, , holds that persons other than the parties to the instrument can sue for cancellation. The second group; Maung Ba Maung v. Maung Ba Yin and another AIR 1939 Ran. 332; Krishnaveni Ammal and Another Vs. M.D. Soundararajan and Others, ; Bandaru Subbaraidu Vs. Alluri Satyanarayana Raju and Others, ; Naisha Ghose v. K. Siddek Ali AIR 1963 Ass 4; Debi Prasad and Others Vs. Smt. Maika and Others, ; takes contrary view while the third group, Badri Narain v. Kodi AIR 1915 Cal. 423 ; V. Thanappa Chetty Vs. Arcot Govindaswami Naicker and Another, ; Sukh Lal and Others Vs. Devi Lal and Others, ; Ouseph Skaria of Naduvilaparambil and Others Vs. Cherian Joseph of Pooppallil and Others, ; State of Punjab Vs. Giani Bir Singh and Another, steers the middle course by holding that persons other than parties to the instrument can ask for a declaration that the document is invalid or void but not ask for cancellation.

13. The excellence of the arguments on either side offered an invitation to us to deal with and distinguish these cases which invitation was difficult to resist. However, it will have to be appreciated that as yet no written statement has been filed in this Suit No. 942 of 1973 and a detailed discussion of the cases cited at the Bar would, under the circumstances, be premature and likely to prejudice the fair trial of the suit if at all we hold that the suit should proceed. Hamstrung as we are under the circumstances, we do not propose not do we feel it necessary to distinguish the facts of each case and pronounce prematurely on the question

as to whether Bomi M. Mistry's present suit is maintainable. Suffice it to say that the cleavage of opinion brought to surface by these authorities lends credence to the argument of the learned Counsel for the appellant that, taken at the lowest, Bomi M. Mistry has atleast an arguable case.

14. The bed-rock upon which is founded the exercise of the right to strike off a pleading is stated succinctly by Fletcher Moulton Lord Justice in *Dyson v. Att. Gen.* (1911)1 K.B. 419:

"To my mind it is evident that our judicial system would never permit a plaintiff to be "driven from the judgment seat" in this way without any Court having considered his right to be heard, except in cases where the cause of action was obviously bad and almost incontestably bad".

15. The words "frivolous or vexatious" either separately or in conjunction, are often used interchangeably with the term "abuse of the process of the Court". The demonstrable facts and circumstances in which the power was exercised can be counted on fingers. Such as when an action was brought to obtain revocation of letters of administration after nearly ninety years, *Willis v. Earl Beauchamp* (1880)11 P.D. 59, or when a frivolous defence was raised denying the claim when evidence showed that in prior proceedings the defendant had substantially admitted all the facts in the statement of claim, *Remington v. Scoles* (1897)2 Ch. 1. Or when the Court would be indirectly lending its imprimatur on an alleged existing custom for an association of women to enjoy a monopoly of the gains of prostitution *Chinna Ummavi and others v. Tegarai Chetti & others* 1 Mad. 168. *Law v. Deainlev* (1950)1 All.E.R. 124, as a result of betting transactions into which he had entered as agent for the defendant, the plaintiff made certain payments to a bookmaker. In an action brought by the plaintiff against the defendant to recover the money paid, he based his claim inter alia on an account stated between the parties, relying on two accounts stated, i.e., one as between the bookmaker and himself and the other as between himself and the defendant. What was being relied on in this case was an account stated in the full sense that is an account in which there were items on either side which, it had been agreed, should be considered as, to some extent, cancelling out each other; and that the balance thus arrived at was agreed. In these circumstances, Denning, J., in Chambers, refused to strike the action out. In the appeal Court, Tucker, L.J., and Cohen, L.J., were disposed to strike the action out but Lawrence, L.J., thought that there was a point capable or worthy of being argued and that, accordingly, the action should be allowed to proceed. Tucker, L.J., who was in the majority in the Appeal Court observes :

"It was clearly impossible to strike out an action in limine if two learned Judges thought that there was something to be argued. A plaintiff cannot " be driven from the judgement seat" by a majority judgement. I should have said that, even if only one judge thought that there were something to be argued, the action clearly could not be struck out."

As a result of the rather curious position in this case, the action was allowed to go to trial. Thereafter, when the position of law became clear, viz., that an agreement by itself is void u/s 18 of the Gaming Act, 1945, and that an action cannot be maintained on an account stated in respect of these bets, the Court felt that the plaintiff has no reasonable cause of action.

16. The present long Cause Suit No. 942 of 1973 for declaration and cancellation of an instrument was filed on 21st September, 1973 on the Original Side of this Court. As the defendants is not file written Statement, the plaintiff took out a Notice of Motion on 18th September, 1974, being Notice of Motion No. 801 of 1974 for judgement for want of Written Statement. This was countered by the Society on 4th October, 1974 by another Notice of Motion viz., Notice of motion No. 860 of 1974 praying that the plaint be rejected under Order 7, Rule 11, as it does not disclose any cause of action, Even though the Defendants' Notice of motion for rejection of the plaint was pending, when the plaintiff's Notice of motion No. 801 of 1974 came up for hearing, the defendants were ordered to file Written Statement by 20th December, 1974 failing which the matter was ordered to be on Board for ex parte decree. The plaintiff was given time to enable him to take suitable proceedings to amend the plaint and the defendants were ordered to file their Written Statement failing which the matter was again to be on Board for ex parte decree.

17. On 24th April, 1975 Chamber Summons No. 244 of 1975 was taken out by the Society praying that the plaint be rejected as it does not disclose any cause of action and/or the institution of the suit "is an abuse of the process of the Court and the suit is vexatious and frivolous". The words "abuse of the process of Court" were not in Order 6, Rule 16 when this Chamber Summons was taken out but were incorporated by an amendment made on 1-2-1977. on 27th September, 1977, the matter was argued at length and Rege, J., passed the following order :-

"No order on Chamber Summons save and except that the defendants do pay to the plaintiff costs of the Chamber Summons. This would not prejudice the defendants from taking any of the contentions raised in this Chamber Summons in the Written Statement or in any other proceedings."

18. An attempt was made by the Society for speaking to the Minutes of the Order which proved in fructuous. Aggrieved Society filed Appeal No. 197 of 1977, alleging that the learned Judge erred in failing to appreciate that the suit was an abuse of the process of the Court, which appeal coming up for hearing on 11th November, 1977 was not admitted by the Division Bench. The defendants were ordered to file Written Statement by 1-12-1977. A day before the expiry of this period i.e. on 30th November, 1977, another Chamber Summons being No. 678 of 1977 was taken out by the Society praying that the plaint be struck off the record of the Court as the matters therein contained are scandalous frivolous, vexatious and/or an abuse of the process of the Court, which, as already stated, was made absolute be Deshmukh, J., on 10th January, 1978, giving rise to the present appeal.

19. The above narration indicates that though the words "abuse of the process of the Court" occurred for the first time on 1-2-1977 in Order 6, Rule 16 of the Code of Civil Procedure, this power was immanent in and arose from a High Court being a Court of Record under the Letters Patent as well as Article 215 of the Constitution. Rege, J., as well as the two learned Judges of the Appeal Court refused to strike the plaint off the record on the ground that it was an abuse of the process of the Court. This power of taking a plaint off the record of the Court as well as the allied power of punishing for contempt which are the attributes of a Court of record, will have to be exercised with utmost caution and only when the Court is absolutely sure that the plaintiff does not have an arguable case at all. The exercise of the power though arising in Civil Procedure, can be said to belong to the realm of criminal jurisprudence and any benefit of the doubt must go to the alleged contemner or the plaintiff whose plaint is to be branded as an abuse of the process of the Court. That explains, why Tucker, L.J., in *Law v. Dearnley*, (supra) felt reluctant to strike the action off the record even though his view was shared by the majority.

20. In *Jelson Estates Ltd. v. Harvey* (1984) 1 All.E.R. 12. an order of interlocutory injunction was passed restraining a defendant by himself or his servants or agents, from blocking up or obstructing a certain plot of land and the plaintiff took out a Notice of motion seeking punishment of the defendant for Contempt of Courts for breach of the injunction order. When the Notice of motion came before the Judge, he made the following order :-

"UPON MOTION made by Counsel for the plaintiff for an order that the defendant do stand committed to prison for his contempt in disobeying the order dated 7th February 1983THIS COURT DOES NOT THINK FIT TO make any order on the said Motion."

It appears that the Judge found that the notice of motion was not in order and that if the plaintiffs wished to proceed they must get their tackle in order and serve a Notice of motion that complied with the rules. The plaintiffs having done so, the defendant pleaded on the authority, *Danchevsky v. Danchevsky* No. 2 (1977) CA. T 416-A, that for the purposes of proceedings for contempt of Civil Court by disobedience of its order, the criminal rules governing the defences of *autrefois convict* and *autrefois acquit* should avail the contempt if he has previously been in jeopardy of punishment for the contempt for which it is sought to punish him. It was held that as the Court did not pass any order as such on the notice of motion, the defendant was not at any time in jeopardy and the second notice of motion was maintainable.

21. As the content of Article 215 of the Constitution bears out, the power to punish for contempt is one of the powers of the High Court being a Court of record and it is arguable that like the civil contempt proceeding even the proceeding for taking a plaint off the record of the Court would put the plaintiff in jeopardy or at any rate a second proceeding would be barred if not on the principles of *autrefois acquit*, then at least on principle of *res judicata*. However,

as happened in Jelson's case, here also no order on merit as such has been passed by the trial Judge and hence a second application invoking the powers of the Court to prevent the abuse of its process would not be barred.

22. To say that a second action for striking out the plaint on the allegation that it is an abuse of the process of Court is not the same thing to say that the Court cannot take notice of the fact that Rege, J., and the two learned Judges of the Appeal Court had not passed any order striking out the plaint. This fact can be taken into account for a limited purpose of concluding that the three learned Judges, upon reading the plaint in question, did not regard the plaint as prima facie indicating an abuse of the process of Court.

23. Mr. Mahendra Shah, has relied on Narandas Karsondas Vs. S.A. Kamtam and Another, , which in turn follows the Privy Council case of AIR 1931 196 (Privy Council) for the proposition that in India, there is no distinction between legal and equitable estates, and under the Indian law, there can be but one owner that is, the legal owner. This Statement was made by the Court in relation to a contract entered into between the mortgagee and a proposed purchaser, and it was observed that there is no equity in a property created in favour of such purchaser. However on the basis of this general proposition Mr. Shah argues that the present suit by Bomi Mistry is incompetent as no estate vests in him and if at all suit were to be filed it would be by the Trustees. Trusts, in the strict sense in which that term is used by English lawyers, that is to say, confidences to the existence of which a double ownership, a "legal" and an "equitable" estate are necessary, are unknown to Hindu and Muhammadan law. The system of benami, or the enjoyment of the profits of property held by another in trust for the beneficiary, was familiar to the people of India before the introduction of British Rule, and the implied trusts, in case of a benami purchase were recognised and established in the Judicial Committee. Similarly u/s 40 of the Transfer of Property Act, right of a person to restrain the enjoyment of the property of another has also been recognised as enforceable right. Under sections 91 and 94 of the Trusts Act such right can be specifically enforced against the transferee with notice. The subsequent development after 2-10-1980 have clothed the plaintiff with an absolute title to a share in the trust property.

24. It has been urged that the present Suit No. 942 of 1973 is a frivolous one, in as much as, if at all Bomi Mistry was entitled to any relief on the basis of a restrictive covenant running with the land, he could have amended the plaint in Suit No. 891 of 1970 already pending on the original side of this Court by incorporating suitable amendments. This suggestion begs the question; in the first place, if the defendant can agitate in this suit that it is an abuse of process of Court, they could likewise, agitate the same thing in Suit No. 891 of 1978 should the plaintiff attempt to incorporate the prayers by suitable amendments. Secondly, and more importantly, remains the question whether the amendment, if attempted, will at all be allowed by the Court, because the vendor being not a party in Suit No. 891 of 1970, may understandably resist his being joined as

party and on the ground that the Suit No. 891 of 1970 which essentially is one of encroachment, would become bad for mis-joinder of causes of action and parties should relief on the basis of restrictive covenant be added there in.

25. The record unmistakably points out that the defendant society is vehemently denying the existence of a restrictive covenant running with the land at any rate its running with the land sold to them. Bomi Mistry who is presently occupying a flat in the trust property situated in C.S. No. 2A/590 will have to watch helplessly a multi-storeyed building coming up before his own eyes in an adjoining plot over which he claims that, in view of a restrictive covenant the height of the building cannot exceed 13" 11/2. In these premises, there is a very real cloud over Bomi Mistry's title and he having an arguable case, cannot be driven from the judgement seat.

26. A recent judgement of the House of Lords, *Williams & Humbert Ltd. v. W. & H. Trade Marks (Jersey) Ltd. & others* (1986) 1 All.E.R. 129 in which the House upheld an action to strike the defence, deserves to be noted (though the judgements was delivered after the arguments in this Appeal were concluded).

27. A Spanish company controlled by one "M" was the holding company of an English Company W & H Ltd. and two Spanish banks. In 1988, the Spanish State compulsorily acquired all the shares in the Spanish Company and the banks and thus indirectly assumed control of the English company W. & H. Ltd. The Spanish Government caused W. & H. Ltd. to institute proceedings, for the recovery of Trade- marks of W & H Ltd., which, according to them, were improperly diverted by "M" to a Jersey company. They also caused the Spanish company and the two banks to recover assets against one "M" who was controlling the Spanish company for recovery of 46 Million improperly diverted. The defendants in the Trade-Marks action, pleaded that the proceedings were an attempt by the Spanish Government to enforce a foreign penal Law. Similarly, "M" applied for leave to plead that Spanish law was penal and therefore ought not to be recognised or enforced in England . The House of Lords upheld the trial Judge's ruling by which he allowed W & H Ltd.'s application to strike out the defence in the Trade-Marks action and dismissed "M's application to amend his defence on the ground that the plea that the Spanish Law was penal and unenforceable was rightly struck down by the trial Judge.

28. Lord Templeman, with whom the other Law Lords agreed observed :-

" If an application to strike out involves a prolonged and serious argument the judge should, as a general rule, decline to proceed with the argument unless he not only harbours doubts about the soundness of the pleading but, in addition, is satisfied that striking out will obviate the necessity for a trial or will substantially reduce the burden of preparing for trial or the burden of the trial itself."

In the present case I am afraid neither of the two conditions, viz. doubts of the soundness of pleadings or obviating the necessity for a trial or reduction in the burden or preparing for the trial are likely to be achieved because the sister suit

is already pending.

29. I would, therefore, allow the Appeal, set aside the order of the learned Single Judge dated 10-1-1978 by which he had made the Chamber summons No. 678 of 1977 absolute in terms of prayer (a) resulting in striking off the plaint from the record of this Court, Costs, costs in the cause.

S.K. Desai, J.—Speaking for myself and having had the benefit of considering the pleading in the other suit on the basis of which relief is sought for, by the defendants in the present suit. I might have been inclined to uphold the order of the Single Judge. However, having had the benefit of going through the judgment of my brother Vaze, J., and particularly because of his strong observations, I think I must concur in the ultimate conclusion reached by him, viz., to allow the Appeal.

2. My attention has been drawn to judgements to the effect that if any judge feels that the plaintiffs should not be non-suited at the there should stage on technical considerations, that view must prevail and not the contrary view. The reason for such an approach is obvious. Great prejudice can be caused to the plaintiffs by non-suited them whereas only inconvenience and expense will be suffered by the defendants by allowing the suit to go on. In addition such inconvenience could be relieved if suitable directions could be obtained for trial of both the suits together or one after the other by the same Court.

Subject to these observations, I agree with the ultimate conclusion reached by my brother Judge although I do not fully agree with all that he has observed.