
(1927) 10 MAD CK 0033
In the Madras High Court

A. Krishnaswami Aiyar

APPELLANT

Vs

Tatha Raghaviah Chetty and Another

RESPONDENT

Date of Decision : 04-10-1927

Acts Referred:

Citation : (1927) 53 MLJ 679

Hon'ble Judges : Venkatasubba Rao, J

Bench : Division Bench

Judgement

Venkatasubba Rao, J.—This application is made under Order 5-A of the Original Side Rules. These provisions relate to what is known as

third party procedure"" and were framed only recently and I understand that this is the Erst application made in this Court under this Order.

2. The plaintiff's action is one to enforce a mortgage created by the 1st defendant and the latter claims indemnity as against the 2nd defendant. The

facts which according to the 1st defendant give rise to his claim are these : The 2nd defendant is the elder brother of the 1st and they had a sister

by name Sitamma. She wanted to help the 1st defendant who was in difficulties and with that object entrusted the 2nd defendant with a sum of Rs.

50,000 directing him to redeem the suit house which was the ancestral house of the 1st defendant and thus free it from the suit mortgage to which it

was subject and hand it over to the 1st defendant. The latter who is the applicant asks that the question raised should be determined in this action

under these rules and that a decree should be passed in his favour against the 2nd defendant.

3. On the facts alleged by the applicant there can be no doubt that the transaction amounts to a trust. This word is thus defined in Section 3 of the

Indian Trusts Act:

A "trust" is an obligation annexed to the ownership of property, and arising out of a confidence reposed in and accepted by the owner, or declared

and accepted by him, for the benefit of another, or of another and the owner.

4. Sitamma is the author of the trust, the 2nd defendant is the trustee, the 1st defendant is the beneficiary, the sum of Rs. 50,000 is the trust money

and the beneficial interest of the 1st defendant is his right against the 2nd defendant as owner of the trust property. It seems to me that all the

ingredients necessary to constitute a trust are present in this case but the more important question to decide is, is the claim of the 1st defendant

against the second, a claim to damages or a claim to indemnity? It is well settled that the third party procedure is applicable only to claims to

indemnity and not to claims to damages. See *B. & D. Land Company v. L. & N.W. Railway Company* (1886) 34 Ch. Div. 261. Is then a cestui

que trust entitled to indemnity as against his trustee? The English cases establish that a right to indemnity may arise in several ways.

(a) First, it may be created by express contract, that is, if it is given in terms by the contract itself between the two parties.

(b) Secondly, it may arise by implied contract, that is, if the true inference to be drawn from the facts is, that the parties intended such indemnity

even if they did not express themselves to that effect. As an instance, if A requests B to do a thing for him and B by reason of doing that act is

subject to some liability, then from A's request to do the act, the law implies a contract by him to indemnify B for the loss.

Now in the case of contracts, right to indemnity must be carefully distinguished from right to damages. A right to indemnity is given by the original

contract, whereas a right to damages arises in consequence of the breach of that contract. These two rights are confounded and one reason for the

confusion is, that when a contract is broken, indemnity is often found to coincide with the measure of damages. In those cases, whether the right is

called right to indemnity or right to damages practically the same result follows, and it is forgotten that these two words express two fundamentally

different legal ideas.

(c) The position of the parties is such that either in law or in equity there is an obligation on the one party to indemnify the other.

(d) If there is a state of circumstances to which the law attaches a legal or equitable duty to indemnify.

[Cases (c) and (d) are generally treated as falling under "implied contract".]

(e) A right to indemnity may be given by statute. These are some of the cases--the enumeration may not be exhaustive--where a right to indemnity arises.

5. We are now concerned with Clause (c), that is, where the Court comes to the conclusion from the position of the parties that either in law or in

equity there is an obligation cast upon the one party to indemnify the other. To this class belongs the case of trustee and cestui que trust. From the

position the parties occupy, a trustee has a right to be indemnified by the cestui que trust against liabilities which he has incurred. "It is settled," say

their Lordships of the Privy Council, in *Hardoon v. Belilios* (1901) AC 118 at 121

that speaking generally absolute beneficial owners of property must in equity bear the burdens incidental to its ownership and not throw such

burdens on their trustees.

6. The reason is stated in these words:

The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can show

some good reason why his trustee should bear them himself. The obligation is equitable and not legal (p. 123).

7. The right to indemnity thus exists on the part of a trustee as against his cestui que trust. Does the converse right exist, that is to say, has a cestui

que trust a right to indemnity as against his trustee? That is the question I have to decide.

8. That such a right exists has been decided by the Judicial Committee of the Privy Council in *Eastern Shipping Co. v. Quah Beng Kee* (1924) AC

177. After enumerating the cases where a right to indemnity exists which have been very fully dealt with in *B. & D. Land Company v. L. Sr N.W.*

Railway Company (1886) 34 Ch. Div. 261 and which have been referred to by me above, their Lordships observe thus:

The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his cestui que trust. This class of cases was

particularly discussed by Lord Lindley in *Hardoon v. Belilios* (1901) AC 118. The present case is the converse.

9. The facts of that case were these : The owners of a wharf granted a Shipping Company a right to berth their ships at that wharf subject to certain liability for damage caused. The defendant, the Managing Director of that Company, gave instructions without the company's authority that a ship which he himself Had chartered for his own benefit should berth at the wharf. Owing to the unskilful way in which the ship was unloaded the wharf collapsed. The owners of the wharf sued the Shipping Company for damages and the latter served a third party notice upon the Managing Director and claimed that he should indemnify them against any damages for which they should be held liable. The question that arose was whether the Shipping Company had against their Director a right of indemnity. Their Lordships thus proceed:

Beng Kee (the Managing Director) has been found to stand in fiduciary relation to the Eastern Shipping Company, and the latter claim indemnity from him in respect of liability imposed upon them by his abuse of powers in the exercise of which he owed them a duty and was responsible as a trustee of those powers. He was not a trustee in the full sense of that word. No property was vested in him. But he was a trustee of his powers in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the company in respect of his exercise of those powers.

10. The passage which I find most helpful is the following:

The nearest simile that was put in argument was that of a trustee in the fullest sense of the word who abuses his powers; say the trustee of real estate with power to mortgage who mortgages for his own benefit and in breach of his duty as trustee and puts the mortgage money into his own pocket. In such a case an action would lie in the Chancery Division for a declaration that the defendant was guilty of breach of trust and was liable to indemnify the cestui que trust against the mortgage, and for an order that he do redeem the mortgaged property and indemnify the cestui que trust against the mortgage debt.

11. The facts of the present case seem to closely resemble the facts of the case put. The trustee in the latter case wrongfully mortgages the beneficiary's property and applies the money to his own use. In the present case the trustee wrongfully appropriates the trust money and fails to

utilise it in redeeming the beneficiary's property. If in one case the cestui que trust has a right to be indemnified, it seems to me that in the other

case he has equally that right. I therefore decide this point in favour of the applicant.

12. I have now dealt with the main question raised, but there are some subsidiary points which have been argued and I shall now proceed to deal with them.

13. It is contended for the 2nd defendant that the application has been made too late and that the delay is fatal to it. Under the English rules, it may

be taken as settled that the application cannot be made until after the defendant has entered an appearance in the action. It should further be

made promptly and as a rule before the defence is delivered, so that the notice may be served within the time limited for delivering the defence.

(See The Yearly Practice of the Supreme Court for 1927, Vol. I, p. 236.) Rule 1 of Order 5-A of the Original Side Rules in effect reproduces this

provision in regard to the service of the notice. The 2nd defendant contends that this provision has been infringed. For dealing with this point, it

may be useful to glance at the rules. They provide that where a defendant claims to be entitled to contribution or indemnity over against any person

not a party to the suit, he may by leave of the Court or Judge issue a notice (called the third party notice) to that effect sealed with the seal of the

Court. Such notice shall generally be served within the time limited for delivering the defence. This is the procedure to be adopted when the [party

against whom relief is claimed by the defendant is not a party to the suit. But where the defendant claims relief against my other defendant already

on the record, the rule applicable is Rule 8 of Order 5-A. In this case the same procedure is to be adopted as if the last-mentioned defendant were

a third party with the exception that no leave of the Court is required for service of the notice. *Towse v. Loveridge* (1883) 25 Ch. Div. 76. Bearing

these rules in mind let us see what has happened in the present case. The plaint was filed on the 20th January, 1927, the 1st defendant filed his

written statement on the 26th February, 1927 and the 2nd defendant filed his statement on the 19th April, 1927, on which date the present rules

came into force. The application for the issue of the third party notice could, of course, not be made before the 19th of April, as such procedure

was unknown on the Original Side before that date. The time for filing the written statement of the 1st defendant had expired on the 26th of

February. Under the rules, strictly, the third party notice ought to have been served before that date. But in this case, that course was impossible as

this procedure did not then obtain on the Original Side. The Court closed for the long vacation on the 7th of May and re-opened on the 18th of

July. The case was posted before me for the settlement of issues on the 19th. On that day, on behalf of the 1st defendant it was said that he

intended to claim under the third party procedure, indemnity from the 2nd, on the allegations already made in the 1st defendant's written statement.

The latter had no defence to the plaintiff's action and I passed a decree on the 19th in favour of the plaintiff against the 1st defendant. The 2nd

defendant's vakil then raised the contention that the question between the defendants inter se could not be gone into in this action and that this must

be tried as a preliminary point. I accordingly made an order on the same date adjourning the case a fortnight for deciding this question. Generally,

no doubt, the third party notice must be served within the time I have mentioned, but Rule 1 shows that in special cases the delay may be excused,

for according to that rule the notice shall be served within the time mentioned ""unless otherwise ordered by the Master or Registrar."" This is a very

fit case for an order being made excusing the delay. Within a few days of the rules coming into force, the Court was closed and the application was

made on the next day after the re-opening. Both the English rules and our rules give a discretion to the Judge to extend the time and in this case I

am prepared to exercise the discretion in favour of the applicant. Such delay, as there has been, is excusable as the rules were new and it took

some time for the parties to become aware of them.

14. To make my statement of facts complete, I must advert to one circumstance. The suit as originally filed was against the 1st defendant alone. He

applied on the 21st February, 1927 that the present 2nd defendant should be brought on the record as a party and the Registrar made an order on

the 22nd directing the 2nd defendant to be impleaded and he was accordingly brought on the record. It will be seen that at that time there were no

rules relating to the third-party procedure. The 1st defendant's application was supported by an affidavit in which he set forth his claim to

indemnity as against the 2nd defendant. But on those allegations he suggested that the decree in favour of the plaintiff should be passed both against himself and the 2nd defendant. It was in this manner that the 2nd defendant came on the record. These facts are entirely irrelevant for determining the questions that have been raised but I have set them out in order to remove any confusion that may arise on account of the somewhat peculiar facts of this case.

15. It is next urged by the 2nd defendant that in the exercise of my discretion I must dismiss him from being a third party to the action. It is undoubtedly true that the judge has a discretion whether he will give directions or not. Per Lord Esher in *Baxter v. France* (1885) 1 QB 591.

16. The very object of the third party procedure is to prevent multiplicity of actions. Some good reason must therefore be shown for the course which I am asked to adopt. If the third party proceedings will prejudice, embarrass or delay the plaintiff, the Court may refuse to give directions.

17. As neither of the defendants had any objection to a decree being passed in favour of the plaintiff on the suit mortgage such a decree was already passed and the ground therefore that the plaintiff will be prejudiced or embarrassed does not exist. The Court may refuse to adopt this procedure for another reason, namely, that the whole dispute between the defendant and the third party cannot be disposed of in the action itself.

For instance, if the claim of the defendant against the third party is in part a claim to indemnity within the meaning of the third party procedure and in part to damages, this procedure will not cover the latter claim and it would remain therefore to be tried between the defendant and the third

party in another action. In such a case the Court holds that the third party procedure is inapplicable [*Baxter v. France* (1895) 1 QB 591 already cited]. Then the question remains, is the mere fact that the case presents some difficulty, a reason for refusing directions as has been urged for the

2nd defendant? The decision of the Privy Council in *Eastern Shipping Company v. Quah Beng Kee* (1924) AC 177 (to which I have already referred) shows clearly that the Court will not refuse to apply the procedure merely because the case raises a question of some difficulty. The trial

Judge there held that the right claimed against the third party was only a right to damages and not to indemnity and that therefore the procedure

was not applicable. The Appellate Court affirmed this judgment. The Privy Council taking a different view held that the right was a right to indemnity and applied the third party procedure . Can there be a clearer case than this to show that the mere fact that some doubtful question arises is not a reason to refuse to apply these rules? *Baxter v. France* (1895) 1 QB 591 does not decide differently. In that case the Court refused to apply the procedure for various reasons, one reason being that the question raised was complicated and difficult. The discretion having been exercised by the Court of First Instance, the Court of Appeal refused to interfere. Apart from this consideration, I do not find that the question raised in the present case is so difficult or complicated that I must decline to adopt the procedure. In my opinion, the point is, as I have shown, covered by clear authority.

18. It is next urged that the 1st defendant has not made out a prima facie case and that on that ground his application fails. The question is, what is meant by a prima facie case? In *Carshore v. N. E. Railway Co.* (1885) 29 Ch. Div. 344 Cotton, L. J., observes:

If it could be shown that their claim, if substantiated, was not one for indemnity, but for something else, it would have been different; " but this is a claim for indemnity within the meaning of the rule.

19. Fry, L. J., makes an observation to the same effect. The question to be asked is, on the facts alleged, does a right to indemnity exist? If this right is made out, the applicant has a prima facie claim and the Court will not enquire closely into the"" merits of that claim. *Bacon, V. C*, thus puts it tersely in the following passage:

There is no doubt that the defendants were clearly right in talking out this summons; and to go into the nature of the indemnity would be a most idle and absurd thing for me to do. The rule is sufficient; the rule is plain; it is a case where an indemnity has been given. [*Edison and Swan United Electric Light Co. v. Holland* (1886) 33 Ch. Div. 497.]

20. The Court might come to a different conclusion if the claim is entirely frivolous. *Carshore v. N. E. Railway Co.* (1885) 29 Ch. Div. 344.

21. In the result I am of the opinion that no valid ground has been shown for my refusing to give directions.

22. There remains one further question to be dealt with. For the 2nd defendant it

is urged that there have been some irregularities in the procedure adopted and that therefore the application should be dismissed. [I think this argument is scarcely tenable. When indemnity is claimed against a defendant who is already a party to the suit, I have pointed out that no leave of the Court is necessary to serve the notice. In this case, on the 19th of April, the 1st defendant gave notice to the 2nd defendant in Court that he intended to apply under the rules relating to the third party procedure. As a matter of fact, such an application was then and there made in Court and in the presence of the 2nd defendant, but the bar not having become familiar with these rules a written notice was not then served on him although this defect was later remedied. Is the absence of the written notice fatal to the application? I hold, in the circumstances, that it is not.

23. If the defendant desires the third party proceedings to continue, he must take out a summons for directions as to the further proceedings. On the hearing of this summons, the third party or the defendant already on the record as the case may be, may object that the case is not one in which the third party procedure is applicable. The second irregularity complained of occurred in the taking out of the summons for directions. On the day the case was taken up for hearing the 2nd defendant's objections, there was not before me a formal summons for directions. But it is obvious that every one came to the Court for arguing this very question, for, according to the order of the 19th July, that was the question that was to be argued and decided. The 2nd defendant was not prejudiced for he not only knew that this question was reserved by that order, but he actually came to Court to argue that very question. To cure the defect, a formal Judge's summons has since been filed and, in the circumstances, I must disallow the objection.