(1927) 10 MAD CK 0007

In the Madras High Court

A. Krishnaswami Ayyar APPELLANT

Vs

Thatha Raghaviah Chetty and Another RESPONDENT

Date of Decision : 04-10-1927

Acts Referred:
Trusts Act, 1882 — Section 3

Citation : 107 Ind. Cas. 423 : (1927) 26 LW 687

Hon'ble Judges : Venkatasubba Rao, J

Bench : Single Bench

Judgement

Venkatasubba Rao, J.—This application is made under Order V-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 first application made in this Court under this order.

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

The facts which according to the first defendant give rise to his claim are these: The second defendant is the elder brother of the first and they had a

sister by name Sitamma. She wanted to help the first defendant who was in difficulties and with that object entrusted the second defendant with a

sum of Rs. 50,000 directing him to redeem the suit house which was the ancestral house of the first defendant and thus free it from the suit

mortgage to which it was subject and hand it over to the first 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 bis favour against the second 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 second defendant is the trustee, the first defendant is the beneficiary, the sum of Rs. 50,000 is the trust

money and the beneficial interest of the first defendant is his right against the second 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 first

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 Birmingham & District Land Co. v. L. & N.W. Ry. (1887) 34 Ch. D. 261 : 56 L.J. Ch. 956 : 55

L.T. 699 : 35 W.R. 173. 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.

5. 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.

6. 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) A.C. 118 : 70 L.J.P.C. 9 : 49 W.R. 209 : 83 L.T. 573 : 17 T.L.R. 126 ""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."" 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."" Page 123 Page of (1901) A.C.--[Ed.].

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)

A.C. 177 : 93 L.J.P.C. 72 : 130 L.T. 462 : 40 T.L.R. 109. After enumerating the cases where a right to indemnity exists which have been very

fully dealt with in Birmingham & District-Land Co. v. L. & N.W. Ry. (1887) 34 Ch. D. 261 : 56 L.J. Ch. 956 : 55 L.T. 699 : 35 W.R. 173 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) A.C. 118 : 70 L.J.P.C. 9 : 49 W.R. 209 : 83 L.T. 573 : 17 T.L.R. 126. 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 second 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, page 236). Rule 1 of Order V-A of the Original Side Rules, in effect reproduces

this provision in regard to the service of the notice. The second 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 any other defendant

already on the record, the rule applicable is Rule 8 of Order V-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 (1884) 25 Ch.

D. 76 : 53 L.J. Ch. 499 : 49 L.T. 466 : 32 W.R. 151. 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 first defendant filed his written statement on the 26th February, 1927, and the second 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 first 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 first defendant it was said that he intended to claim under the third party procedure, indemnity from the second, on the

allegations already made in the first 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 first defendant. The second 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 first defendant alone.

He applied on the 21st February, 1927, that the present second defendant should be brought on the record as a party and the Registrar made an order on the 22nd directing the second 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 first defendant''s application was supported by an affidavit in which he set forth his

claim to indemnity as against the second defendant. But on those allegations he suggested that the decree in favour of the plaintiff should be passed

both against himself and the second defendant. It was in this manner that the second defendant came on the record. These facts are entirely

irrelevant for determining the questions that have en 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 second 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 (1895) 1 Q.B. 591 : 64

L.J.Q.B. 337 : 14 R. 265 : 72 L.T. 183 : 43 W.R. 341. 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. 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 Q.B. 591 : 64 L.J.Q.B. 337 : 14 R. 265 : 72 L.T. 183 : 43 W.R. 341 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 second defendant? The decision of the

Privy Council in Eastern Shipping Co. v. Quah Beng Kee (1924) A.C. 177 : 93 L.J.P.C. 72 : 130 L.T. 462 : 40 T.L.R. 109 (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 Q.B. 591 : 64 L.J.Q.B. 337 : 14 R. 265 : 72 L.T. 183 : 43 W.R.

341 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.

16. It is next urged that the first 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. North Eastern Ry. (1885) 29 Ch. D. 344 : 54 L.J. Ch. 760 : 52 L.T. 232 : 33 W.R. 420 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.

17. 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:

18. There is no doubt that the defendants were clearly right in taking 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 Electric Light Co.

v. Holland (1887) 33 Ch. D. 497 : 56 L.J. Ch. 124 : 55 L.T. 587 : 35 W.R. 178.].

19. The Court might come to a different conclusion if the claim is entirely frivolous, [Carshore v. North Eastern Ry. (1885) 29 Ch. D. 344 : 54 L.J.

Ch. 760 : 52 L.T. 232 : 33 W.R. 420.].

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

21. There remains one further question to be dealt with. For the second 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 first defendant gave notice to the second defendant tin Court that he intended to apply under the rules relating to the third

party procedure. As a matter of a fact, such an application was then and there made in Court and in the presence of the second 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.

22. 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 second 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 second 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.

23. The second defendant shall file his written statement on or before the 18th. Post the case for issues on the 19th.

