

(1961) 04 MAD CK 0023
In the Madras High Court

P.S. Pattabhiraman and Others

APPELLANT

Vs

Ganapathy Kannappa Mudaly and Others

RESPONDENT

Date of Decision : 21-04-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10

Citation : (1961) 74 LW 821 : (1962) 1 MLJ 246

Hon'ble Judges : Ramachandra Iyer, J; Ramachandra Aiyar, J

Bench : Division Bench

Judgement

Ramachandra Iyer, J.—This Civil Revision Petition is filed against the order of the District Munsif, Sholinghur, in I.A. No. 327 of 1959 in O.S. No. 32 of 1959, declining to issue a Third Party notice under the provisions of Order 8-A, Civil Procedure Code.

2. Subramania Pillai, the deceased father of the petitioners, executed, on nth February, 1950, in favour of one Chinna Munuswami Mudali, a promissory note for a sum of Rs. 3,000. The respondent claiming that he obtained an assignment of the promissory note and thereby became a holder in due course, filed a suit against the petitioners, the sons of the executant, for the recovery of a sum of Rs. 4,750. Chinna Munuswami Mudali was not made a party to the suit.

3. The petitioners raised various contentions to the claim. They alleged that a number of payments had been made to the original payee, Chinna Munuswami Mudali, and on his behalf to his two undivided sons, Kalathiswaran and Shanmugam in respect of which no credit had been given; they also denied that the respondent was a holder in due course. There was a further plea that Chinna Munuswami Mudali himself agreed in July, 1956, to receive only 10 annas in the rupee of the balance due on the promissory note, and that, on proper taking of accounts, not more than Rs. 700 would be due. The petitioners followed up their written statement with an application, I.A. No. 327 of 1959, under Order 8-A, Rule 1, Civil Procedure Code, for the issue of a Third Party Notice to Chinna Munuswami Mudali and his two undivided sons. On notice being taken to the

Third Parties, both the respondent and the Third Parties opposed the application.

4. The suit, as stated earlier was filed by the respondent claiming to be a holder in due course of the promissory note. Any payment made by the maker or his legal representative to the original payee but not appearing on the promissory note cannot properly be pleaded against him. Such a plea would, however, become relevant, if it were proved that the respondent was not a holder in due course. In that case, there would, indeed, be no necessity for adopting the Third Party procedure, for the petitioners would get relief against the respondent himself in regard to any payments, made by them to the original payee. It is only if the respondent is found to be a holder in due course, and the petitioners are compelled to pay once over what is proved to have been paid over to the original payee, any question of recourse against the payee can at all arise. As the issue relating to the respondent being a holder in due course will have to be decided only in the suit, the application for the issue of directions to Third Parties is stated to be made by the petitioners by way of abundant caution, that is, in the event of the Court holding that they would not be entitled to plead any payments made to the original payee, other than those endorsed on the promissory note itself.

5. The only question, therefore, to be decided at the present stage is whether the petitioners would be entitled to contribution or indemnity against the Third Parties, in the event of the Court holding that the respondent is not a holder in due course. That question is a simple one. But, unfortunately, the learned District Munsif has misunderstood the nature of the jurisdiction, to be exercised in the case; holding that the procedure prescribed under Order 8-A, Civil Procedure Code, would not be available to decide complicated questions, he permitted the parties to file about 51 documents, and after considering them came to the conclusion that most of the payments alleged related to other transactions between the parties, and dismissed the petition on the ground that there was no question to be tried as to the liability of the Third Party defendants to make contribution or indemnity.

6. The procedure adopted by the learned District Munsif can hardly be commended. The Court was not concerned, at this stage, about the truth of the petitioners' case. Indeed, such a finding at this stage, however summary it may be, will cause a great prejudice to the defendants in the fair trial of the suit. Another reason given by the learned District Munsif for not granting the application was that the case would involve complicated questions. I do not see how a mere plea of discharge can be said to involve any complicated question. That apart, the decision of the Privy Council in *Eastern Shipping Co. v. Quah Bang Kee* L.R. (1924) A.C. 177, shows that a Court should not refuse to adopt the Third Party procedure merely because the case raised a question of some difficulty. Further I am not satisfied either that the conclusion of the learned District Munsif on the materials now available can at all be said to be correct. In my opinion, however, it is unnecessary to investigate the question relating to the

truth, of the payments now. I, therefore, set aside that portion of the order of the learned District Munsif which involves the finding that the alleged payments, pleaded by the petitioners, are not related to the suit promissory note.

7. But the main question to be decided still remains, namely, whether this is a case in which a Third Party notice should issue. Order 8-A, Rule 1, CPC states:

Where a defendant claims to be entitled to contribution from or indemnity against any person not already a party to the suit (hereinafter called a Third Party), he may, by leave of the Court, issue a notice (hereinafter called a Third Party Notice) to that effect sealed with the seal of the Court. The notice shall state the nature and grounds of the claim. Such notice shall be filed into Court with a copy of the plaint and shall be served on the Third Party according to the rules relating to the service of summons.

The rules relating to Third Party procedure are based on the procedure prevailing in the English Courts, which have been adopted on the Original Side of the Madras-High. Court under Order 5-A of the Original Side Rules. The rule is an exception to the principle that the plaintiff is dominus litis entitled to choose the person, against whom he should sue. A strict application of that rule in all cases might involve the questions in the suit being tried again, possibly with different results. A familiar example would be a case of indemnity. Suppose A conveys a property to B, agreeing to indemnify the latter against any claim that may be proved to exist on it. B subsequently is faced with a claim by C in a suit, B can plead the title of A. But, if he loses in the contest, his remedy would be to proceed against A under the indemnity. The decision in the previous suit between C and B would not preclude A from showing that he had really a good title to the property, and, if he succeeds the result would be that B would lose his property in favour of C as a result of the first litigation and would not get indemnity as a result of the second. In such a case, it is but desirable that there should be one binding adjudication between the three persons and to achieve that purpose all the parties should be brought before the same Court, and the common question arising between them, namely, the title of A, should be adjudicated once for all. Order 8-A, Civil Procedure Code, provides for impleading a Third Party so as to enable the Court to decide the substantial question involved in the presence of the Third Party. But the impleading of a Third Party might, in certain cases, tend to delay or even embarrass trial of the suit. There should therefore be a proper balancing of two considerations: (1) the plaintiff's right to choose the party against whom he wants relief and the avoidance of unnecessary issues in a suit which would tend to delay and embarrass the trial and (2) avoidance of the possibility of conflicting judgments and if possible to render justice to the defendant without in any way affecting the plaintiff's rights. Order 1, Rule 10, Civil Procedure Code, enables the Court to implead necessary or proper parties. That provision would not enable the granting of relief to the defendant against the party so added. Order 8-A achieves this. But in the application of that rule the Third Party need not be a necessary or proper party to the plaintiff's suit:

nor need there be any privity of contract between him and. the plaintiff. Order 8-A, Rule 1, Civil Procedure Code, restricts the application of the rule to cases where the defendant would be entitled to contribution or indemnity against a Third Party. Before a Third Party Notice could issue, it is necessary to see whether the defendant is entitled to an indemnity or contribution from a Third Party. This principle does not depend on the right of the plaintiff to choose any one of the parties liable to him as a defendant. in the suit : but it is for the protection of the defendant. For example, the holder of a promissory note is not bound to sue all the parties liable to him, namely, the maker and endorsers. But he may select such party to the instrument as he may think best. for the purpose of recovering the amount due to him. But that cannot prevent the defendant from applying under Order 8-A, Rule 1, Civil Procedure Code, to implead a person who would, be liable to contribute for the plaintiff's claim or indemnifying him against it. In *Uthaman Ckettiar v. Tkiagaraja Pillai* AIR 1956 Mad. 155, Panchapakesa Ayyar, J., has held that suits on promissory notes and negotiable instruments stand on a different footing from other suits, and that Third Party Notices can only be issued to them when justified by the contents of the promissory note, etc. Relying on this decision, the learned Counsel for the respondent contends that Order "8-A, Civil Procedure Code, will never apply to the suits on promissory notes. I do not think that the "earned Judge even intended to lay down any such broad proposition. In that case, the maker of the promissory note pleaded that certain persons other than the maker, whose names were not mentioned in the promissory note, were also liable under it and he sought Third Party Notices for obtaining contribution from them. That application was rejected. It can be implied from the observations of the learned Judge that Third Party Notices can be issued if justified by the contents of the promissory note itself. Take for example a case of a suit filed by the endorsee of a promissory note against his endorser alone, leaving out the maker. Justice of the case may require that the endorser defendant, who has got a right of indemnity against the maker, should be allowed to adopt the Third Party procedure as against the maker. There is nothing in Order 8-A, Civil Procedure Code, which restricts its application to suits other than those laid on negotiable instruments. In *V.M. Chockalingam Chettiar Vs. T.A.S.V. Alagammai Achi and Another*, , Raghava Rao, J., while holding that the mere fact that a suit for recovery of money on deposit would get enlarged in its scope by the issue of a Third Party Notice would not be a relevant ground for refusal of an application under Order 8-A, Civil. Procedure Code, observed that, in a suit on negotiable instruments, different considerations might possibly arise. I am unable to treat that observation as justifying the argument that Order 8-A would not apply to suits on negotiable instruments.

8. But the more important question to be determined is whether the present case comes within Order 8-A, Civil Procedure Code. The claim of the petitioners against the Third Parties is that they have fraudulently omitted to give credit to various sums paid by them before the assignment of the promissory note in

favour of the respondent. Such, a claim would be in the nature of damages. I do not see how any question of contribution or indemnity can arise on the facts alleged. Mr. Rangaswami Iyengar, the learned Counsel for the petitioners, referred, in this connection to the decision in *Eastern Shipping Co. v. Quah Bang Kee* L.R. (1924) A.C. 177 and contended that an indemnity need not necessarily be as a result of a contract, but can either be implied or arise by reason of other circumstances. In the case cited above, Lord Wrenbury stated at page 182:

A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that, either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnify need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall be indemnified by the party requesting him; it may arise (to use Lord Eldon's words in *Waring v. Ward* 7 Ves. 332, 336., a case of vendor and purchaser) in cases in which the Court will " independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation of the vendor.

Reference was also made to *S. Subulal Sahib Vs. N. Perianna Pillai*, , where it was held that an application under Order 8-A, Rule 1, Civil Procedure Code, would lie, even if there had been no privity of contract between the plaintiff and Third Party.

9. The question then is whether there is such relationship between Chinna Munuswami Mudali and his sons on the one part and the petitioners on the other, in respect of which the law attaches legal or equitable duty to indemnify. Section 32 of the Negotiable Instruments Act declares that, in the absence of a contract to the contrary, the maker of a promissory note would be liable to pay the amount due thereunder according to the apparent tenor of the note. Section 37 states that the maker of a promissory note would be liable as a principal debtor to other parties to the promissory note. For example, the successive endorsers would be liable as sureties for the maker in respect of the claim by the holder. Section 38 states -

As between the parties so liable as sureties, each prior party is, in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party.

In other words, where a promissory note passes from hand to hand and several persons endorse the note in succession, each of them is liable as a principal debtor to the person who ultimately becomes a holder. As between the maker

and endorser, the endorser would be liable as a surety, the maker being liable as principal debtor. Therefore, if a holder collects money from the endorser, the latter can proceed against the maker as the principal debtor liable to indemnify him. The converse is not, however, correct. That is to say, if the maker is made liable, he cannot proceed against the endorser as if the latter were the surety, as the liability under the note is always and ultimately that of the maker. Where the endorser negotiates the promissory note for the full value without giving credit to any payments that he might have received from the maker which were not endorsed on the note the case is one where the payee or endorser fraudulently negotiates the note for the full value. That would not prevent the holder in due course from collecting the money due on the promissory note according to its tenor. If the maker is put to a loss on account of fraudulent act of the payee or endorser, his remedy would be in the nature of damages, and not amounting to any equitable claim of indemnity. The claim is therefore not one for indemnity or contribution, express or implied. Again a surety cannot be brought under these rules as a Third Party by the principal-debtor for the reason that there is no right of indemnity against the surety in favour of the principal debtor. Conversely however where a surety is impleaded, he could bring in the principal debtor as the latter would be bound to indemnify the former on payment to the creditor. It follows that the maker, who is in the position of a principal debtor, not having any right of indemnity against the original payee or endorser would not have any right to proceed against the latter under Order 8-A, Rule 1, Civil Procedure Code. The omission of the payee to give credit to payments made which results in a damage to the maker on payment to a holder in due course being in the nature of damages, cannot come within that provision. The defendant's application therefore fails.

10. But, at the same time, I am of opinion that Chinna Munuswami Mudali should be impleaded as a party to the suit, in order to facilitate a fair adjudication of the questions that arise in the suit. If it were to be held that the respondent is not a holder in due course, it would then become relevant to consider what were the payments made by the petitioners to the respondents. The presence of Chinna Munuswami Mudali would be proper in those circumstances. It cannot be disputed that, In a suit on the promissory note, the original payee or an endorser would be proper party vide Order 1, Rule 6, Civil Procedure Code. But the same cannot be said in regard to his sons. The suit is laid on a promissory note, at the instance of an endorsee. The only parties that could be impleaded are those whose names are mentioned in the note. Further according to the petitioners, the sons of Chinna Muniswami Mudali received the payment only as the agent of the latter. They would not be proper parties in a suit on the promissory note. I direct that Chinna Muniswami Mudali be impleaded as a party to the suit under Order 1, Rule 10, Civil Procedure Code. The order of the lower Court is accordingly modified.

11. No order as to costs.

12. And the case having been set down this day for being mentioned in the presence of the said advocates, the Court made the following:

It is stated that the defendant had paid Court-fee in respect of a claim against the Third Party. As I have held that the Third Party procedure will not apply to the present case, the Court-fee paid should be refunded to him it will be done accordingly.