
(1973) 09 AP CK 0009

In the Andhra Pradesh High Court

Case No : Civil Revision Petition No. 384 of 1972

Saripalli Nookanna and Another

APPELLANT

Vs

Ramisetty Venkata Rao and Another

RESPONDENT

Date of Decision : 07-09-1973

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 107(2)

Citation : AIR 1974 AP 284

Hon'ble Judges : A.V. Krishna Rao, J

Bench : Single Bench

Advocate : Koka Raghava Rao, for the Appellant; R.V. Prasad Amicus Curiae, for the Respondent

Judgement

A.V. Krishna Rao, J.—This Civil revision petition raises the question whether it is open to a defendant, who is the appellant in the appeal, to invoke Order 8-A, Civil P. C., which provides for third-party procedure for the first time in appeal without any such application being made in the trial court.

2. The necessary facts may be stated. O. S. No. 163 of 1960 on the file of the court of the District Munsif, Peddapuram , was filed against the petitioners in this civil revision petition. The suit was filed on the foot of a promissory note which was resisted by the petitioners on the ground that the suit promissory note was not supported by consideration and that on 11-5-1967 a registered mortgage bond for Rs. 10,000/- was executed in favour of the plaintiffs brother and towards excess interest in respect of that mortgage the suit promissory note was nominally executed in favour of the plaintiff. It was urged that the said mortgage bond was made that the suit promote was cancelled . The trial court decreed the plaintiff's suit and the defendants preferred an appeal in A. S. No. 58 of 1965 on the file of the court of the Subordinate Judge, Kakinada. During the pendency of the appeal, I. A. No. 2692 of 1971 was filed by the petitioners, appellants in the appeal, under the Order 8-A of the CPC to implead Ramisetty Paparao, brother of the plaintiff, as a defendant. The allegations in the petition were that the suit

promissory note was devoid of consideration and that it was executed only in connection with a mortgage bond executed only in connection with a mortgage bond executed in favour of Ramisetty Paparao which contained an endorsement that the suit promissory note was discharged, that Ramisetty Paparao without returning the suit promissory note, got the plaintiff to file the suit against the defendants and that Ramisetty Paparao was liable to pay the said amount to the defendants in the event of the suit of the plaintiff being decreed on the promissory note. The appellate Court dismissed that application on the grounds ; Firstly, that the application under O. 8-A, was not maintainable at the stage of the appeal ; and secondly, on the facts no question of contribution or indemnify arose as between the proposed third party and the defendants . In this revision, the conclusions of the court below on both the points is challenged.

3. Point No. 1 : Is it open to the defendant to file an application under O. 8-A Civil P. C. to implead a third-party claiming contribution or indemnify from him at the stage of appeal ?

4. Order 8-A, Civil P. C. entitling the impleading of third party obtains only in Andhra Pradesh, Kerala and Madras by reason of the Amendments made by the High Courts. Third party procedure has been recognised for a long time in England. In Madras about the year 1927, Order 5-A of the Original side Rules was framed based upon the English Rules. Soon after the framing of Order 5-A of the Original Side rules of the Madras High Court by which third party procedure was introduced, the rule came to be considered by Venkatasubba Rao, J. in 43 . While referring to the English rules governing third-party procedure, the learned Judge had observed as follows :--

"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. 1 , P. 236 , Rule 1, Order 5-A , original side rules in effect reproduces this provision in regard to the service of the notices. Defendant 2 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."

5. The third-party procedure is enacted firstly with the object of preventing the same question being tried twice over where there is a substantial question raised as between plaintiff and the defendant in the action and as between a defendant and a third person. Secondly, to prevent multiplicity of actions and to enable the court to settle the disputes between the parties to the suit and the third-party in

one action. The third party procedure can be invoked only when the defendant claims contribution or indemnity from the third-party. The third-party may be a defendant already on record or may be a person who is issued under Order 8-A , Rule 1, Civil P. C. the court under Rule 5, even after the third-party enters appearance has to be satisfied that there is a question to be tried as to the liability of the third-party to make the contribution or pay the indemnity claimed in whole or in part. The court may after the third-party enters appearance refuse to give directions in that behalf. Further, in the matter of the conduct of the trial, the court may direct that the question of such liability as between the third-party and the defendant giving the notice shall be determined at the trial of the suit or after the trial of the suit as between the plaintiff and the defendant. The court may consider it advisable to do so, to avoid embarrassment or prejudice to the plaintiff. Ordinarily, if the conditions for invoking the third-party procedure exist, the court will not refuse to issue third party notice. Even after the leave is granted for the issuance of such a notice to the third-party , the court has got the option to reject the application for the addition of the third-party to the proceeding. On a reading of the several provisions of Order 8-A, it is manifest that the procedure is to be invoked during the trial of the suit only i.e., only in the original court. It is true that there is nothing in Order 8-A, Civil P. C. which says that at what stage it should be filed. But Rule 5 of Order 8-A , makes it clear that the application should be made before the trial because that rule empowers the court to try the question of the liability as between the third party and the defendant at the trial of the suit or to relegate it to a stage after the trial of the suit if the circumstances so justify the course.

6. In *Thiruvannamalai Adhinam Sri Daivasigamani, In re* (1955) 68 Mad LJ 371 , Ramaswami , J had observed as follows :--

"There is no restriction in regard to the point of time when a defendant may ask for the issue of a third party notice under Order VIII-A, Civil P. C. But naturally the application should be made at a stage of the proceedings when it is possible there may still be a trial of action between the plaintiff and the defendant."

7. I adopt the aforesaid observations which lead me to say that it is not possible to contemplate Order 8-A being invoked at the stage of appeal when it cannot be said anything exists which could not be called a trial of action between the plaintiff and the defendant. The several rules contained in Order 8-A, clearly envisage its application only during the pendency of the Original suit as between the plaintiff and the defendant and not after the trial is closed and judgment of the court has been delivered in the suit. That this is so, becomes plain when we bear in mind the observations in the Judgment : of *A. Krishnaswami Aiyar Vs. Tatha Raghaviah Chetty and Another*, to which I have referred. The English Rules require that after the defendant entered his appearance in the action, he should act promptly and as a rule before he delivers his defence. No doubt, Order 8-A does not require that the defendant should invoke it before he files issuing notice or even after issuing a notice whether or not to give the directions contemplated by Rule 5 of

Order 8-A , Civil P. C. It has been laid down that if the third party proceedings will prejudice, embarrass or delay the trial of the suit, the Court would be exercising a proper discretion in refusing to allow the defendant to invoke the procedure laid down under Order 8-A. I have, therefore, no hesitation in coming to the conclusion that it is not open to a defendant in a suit either after the trial is concluded as between the original parties to the suit or at the stage of appeal from the decree of the original court to seek to resort to third-party procedure, whatever the result of the suit be.

8. It was argued that under Sec. 107(2) of the CPC , an appellate court enjoys the same powers and shall perform as nearly as may be the same duties as are conferred and imposed by the Code on Courts of original jurisdiction . I do not think that Section 107, Civil P. C. can come to the aid of the petitioners because the whole scheme of the procedure prescribed the pendency of the suit in the original court. The whole procedure laid down under O. S-A clearly manifests that the provisions were intended to be availed only during the pendency of the suit.

9. It is immaterial whether the defendant is an appellant or a respondent in the suit for the purpose. The appellant's counsel has placed strong reliance in support of his contention, that the provisions of Order 8-A could be resorted to not only at the stage of appeal, but also where the appeal is disposed of , on a decision of Ramaprasad Rao , J. in *Concord of India Insurance Co. Ltd. v. Kaveri Ammal* , (1967-2 Mad LJ 446). In that case, the plaintiff's husband was killed in a motor accident. A suit was filed against the 1st defendant, the driver and the 2nd defendant the Insurance Company, who was the insurer of the Lorry. The plaintiff gave up the 2nd defendant after the issues were framed. During the trial, the 1st defendant filed an application to set aside the ex parte decree. An endorsement was made on behalf of the 1st defendant that he was not claiming any relief against the 2nd defendant. The ex parte decree was set aside and the suit posted for trial. At the stage, the 1st defendant filed an application for issue of a notice to the 2nd defendant as a third party under the provisions of Order 8-A , Civil P. C., Notice was issued to the 2nd defendant, who entered appearance and leave was granted to implead the 2nd defendant and there was a decree against the 1st defendant. The 1st defendant had preferred an appeal and the same was dismissed. Two days after the dismissal of the appeal , he filed an application for direction to the 2nd defendant to meet the decree amount and the other expenses incurred by him on the foot of his liability as an insurer. That application was resisted by the 2nd defendant raising several objections. It was urged on behalf of the 2nd defendant that by reason of the endorsement made in the original court that no claim would be made against the 2nd defendant , he could not seek any relief in the appeal ; secondly, only leave was granted by the trial Court to issue third party notice, but no directions whatsoever were given and therefore the application in the appellate court was incompetent and that the 2nd defendant was a party to the suit and therefore third party procedure could not be invoked as against him. Yet another ground was taken by the 2nd defendant that in any case directions for indemnity could not be taken after the

appeal itself was disposed of. What however concerns us in the case is what the learned Judge decided about the tenability of the application under Order 9-A, Civil P.C. after the appeal was disposed of. Ramaprasad Rao, J. on this question, after extracting Order 8-A, Rule 5, Civil P.C. observed that the appeal was a continuation of the suit and that the defendant could ask for directions for contribution or indemnity by a third party even after the appeal is disposed of. Reliance was placed upon the words "or at or after the trial of the suit" occurring in Rule 5, Order 8-A, Civil P.C. Apparently the learned Judge meant that the words "after the trial of the suit" meant not only after the judgment of the trial Court was delivered, but also at the stage of appeal and even after the appeal is disposed of. That is because even after the disposal of the appeal by the appellate court, it would be a stage "after the trial of the suit". I find myself unable to agree with this view of the learned Judge. The words "at or after the trial of the suit" occur in the context of the question to be tried as to the liability of the third party to make the contribution or pay the indemnity claimed. That question can be tried by the court at the trial of the suit between the plaintiff and the defendant or later. If the Court does not choose to try the case as between the defendant and the third party, it can postpone the trial as between the third party and the defendant and try that question after the trial between the plaintiff and the 1st defendant is over. Ramaswami, J in Thiruvannamalai Adhinam Sri Daivasigamani, In re (supra) had observed thus (at page 376):-

"If the Court finds that the matters cannot be properly tried together with the original action, then it is open to the court to order that the questions arising between the third party and the assured be tried in such manner at or after the trial of the suit as the court may direct."

10. The learned Judge relied upon a few English decisions for this proposition. I am inclined to think that the words "at or after the trial of the suit" only meant that in cases the court felt that the questions raised between the defendant and a third party are of great complexity or would embarrass the plaintiff in the trial of the suit or cause any other difficulty, the court may try those questions after the suit is tried between the parties to the original action. The construction placed by Ramaprasad Rao, J. in *Concord of India Insurance Company Ltd. v. Kaveri Ammal* (supra) upon the words "at or after the trial of the suit" cannot be interpreted to have the effect stated by the learned Judge. A reading of Rule 5 of the order 8-A, Civil P. C. clearly does not support the view expressed by the learned Judge. Even assuming that at the appellate stage, Order 8-A, civil P. C. could be invoked, still I find it difficult to understand how the same could be invoked after the appeal itself is disposed of, when the court so far as the controversy in the appeal is concerned has become functus officio by disposing of the same. In the above Madras case, the 1st defendant-appellant perhaps would have been able to invoke Rule 5 of Order 8-A, Civil P. C. at the appellate stage i.e. before the appeal was disposed of, on view of the fact that the trial court had issued the notice to the third party. It is of course very doubtful whether after he had given up the 2nd defendant, he could have done so. thereafter, even after

the issuance of the notice under Order 8-A, the defendant did not press for any direction contemplated by Rule 5. In this case, I, therefore, hold that the application to invoke third party procedure is untenable at the appellate stage and that it was rightly dismissed by the lower court.

11. The above conclusion of mine is sufficient to dispose of the revision by dismissing it. It is not necessary for me to deal in this revision with the question whether the defendant had established the right to invoke the third party procedure, there being a claim against the third party which could be characterised as one for contribution or indemnity.

12. The civil revision petition, therefore, fails and is dismissed. I think Mr. R. V. Prasad for the assistance rendered as amicus curiae.

13. Revision dismissed.