

## ORIGINAL CIVIL.

*Before Chaudhuri J.*

1918

March 21.

BALMUKUND RUIA

v.

BISSENDROYAL\*

*Parties—Procedure and Practice—Addition of third party-defendant—  
Civil Procedure Code (Act V of 1908) s. 128 (2) (e) ; O. I, r. 10 (2).*

The second defendant in a suit applied for leave to add a third party as defendant. The plaintiff objected :—

*Held*, that the power to add a third party is discretionary, but is widely exercised even though the addition may add new issues ; if, however, serious embarrassment or inconvenience be caused to the plaintiff the addition is not effected.

*Held*, also, that although in this case new issues arose between the added defendant and the original defendants, serious inconvenience would not be caused to the plaintiff if his position was safeguarded by the following provisions :—(i) that the issues between the plaintiff and the original defendants should be tried first ; (ii) that no delay should take place in the determination of those issues ; (iii) that if the plaintiff succeeded in obtaining a decree against the original defendants, such decree was not to be stayed pending the determination of the issues between the defendants.

APPLICATION on behalf of Balmukund Ruia, the plaintiff.

On the 17th August, 1917, Balmukund Ruia instituted a suit against Bissendoyal and Baijnath for recovery of Rs. 20,000 as principal due on four *hundis* drawn by Baijnath in his firm of Bissendoyal Baijnath upon the plaintiff's firm in favour of the Bank of Bengal and accepted and paid by Balmukund Ruia. Under the provisions of O. XXXVII of the Civil Procedure Code, the suit was placed on the list of

\* Application in Original Civil Suit No. 1033 of 1917.

undefended causes. On the 19th November, 1917, both the defendants applied for and obtained leave to defend: Bissendoyal's defence was that the defendant Baijnath was not a partner of the firm of Bissendoyal Baijnath, and had no authority to draw the *hundis* on behalf of the firm, and Baijnath's that the *hundis* were drawn with the plaintiff's knowledge for the accommodation of one Pannalal Murarkar, that at the dates of the execution of those *hundis* it was expressly agreed by and between the plaintiff, Baijnath and Pannalal Murarkar, that neither Baijnath nor the firm of Bissendoyal Baijnath would be called upon to pay the amounts of the said *hundis* or any portion thereof, that the plaintiff and Pannalal Murarkar would indemnify Baijnath and the firm of Bissendoyal Baijnath, against any claim in respect of the said *hundis*, that the said *hundis* were guaranteed by the said Pannalal Murarkar, that all the monies received by Baijnath in respect of the said *hundis* were paid with the plaintiff's knowledge to the said Pannalal Murarkar, and that Baijnath was therefore not in any way liable to pay the amounts of the said *hundis*. On these allegations Baijnath applied for leave to add Pannalal Murarkar as a party-defendant to this suit, and on the 10th January, 1918, an order was made *ex parte* adding him as a defendant. On the 19th January, 1918, this order was served on the plaintiff. The plaintiff, thereupon, applied for an order that the said order of the 10th January, 1918, should be vacated.

*Mr. C. C. Ghose*, for the defendant Baijnath, in support of the order directing that a third party be made a defendant in the suit against him, referred to O. I, r. 10 (2) of the Civil Procedure Code, corresponding to R. S. C. O. XVI, r. 11, and to s. 128 (2) (e) of the Code: *McCheane v. Gyles* (1) and *Caister v. Chapman* (2).

(1) [1902] I. Ch. 287.

(2) (1884) W. N. (Eng) 31.

1918  
BALMUKUND  
RUIA  
v.  
BISSENDROYAL.

1918  
BALMUKUND  
RUIA  
v.  
BISSENDROYAL.

Reliance was also placed on *Finlay & Co. v. Scott & Son* (1) and *Furness Withy & Co., Ltd., v. Pickering* (2) as to whether application for addition of third party could be *ex parte*.

*Mr. B. L. Mitter*, on behalf of the plaintiff, objected to the addition of a third party as defendant; but waived his objection provided that he was not prejudiced, and that provision was made to safeguard his position.

*Cur. adv. vult.*

CHAUDHURI J. This is a suit on *hundis*. Originally there were two defendants. One of them Bissendoyal got leave to defend on the ground that Baijnath the other defendant had no authority to draw any *hundi*. An application was then made to me on behalf of Baijnath also for leave to defend, and I made an order on his application, that Pannalal Murarkar who is said to have guaranteed acceptance of the four *hundis* in suit should be added as a party defendant. It was alleged that the defendant had obtained an indemnity from Pannalal Murarkar and the plaintiff, that he was not to be made liable. I made the order following the procedure which had been adopted in the case of *Furness Withy & Co., Ltd., v. Pickering* (2). The application for addition of a party was made under Order I, rule 10 (2) which corresponds to the English Order XVI, rule 11. The present Code provides under section 128 (2) (e) that rules may be framed relating to procedure, where the defendant claims to be entitled to contribution or indemnity over against any person whether a party to the suit or not. No rules have yet been framed by this Court. In England rules have been framed restricting third party procedure to the cases referred to in section 128 (2) (e), namely, to cases of contribution and indemnity.

(1) (1884) W. N. (Eng.) 8. (2) [1908] 2 Ch. 224.

The power to add such a party is discretionary, but is widely exercised, even though the addition of new parties may add new issues; but if the plaintiff objects, and serious embarrassment or inconvenience be caused to him, the addition is not effected. The allegations before me make a *prima facie* case of indemnity. No doubt in addition, to the issues as between the plaintiff and the original defendants, if the new defendant is added, new issues will arise as between the added defendant and the original defendants, but after carefully considering the matter I think serious inconvenience will not be caused to the plaintiff, if I safeguard his position by the following provisions: (i) that the issues as between him and the original defendant be taken first; (ii) that no delay takes place in the determination of those issues; (iii) if the plaintiff succeeds in obtaining a decree, such decree is not to be stayed pending the determination of the issues as between the defendants. Learned counsel, Mr. Mitter, who appeared for the plaintiff stated that if those safeguards were provided for, although he objected to the addition of the additional defendant, yet he would not press his objection. The proceeding against the third party so far as the defendants are concerned, is an independent proceeding in which the defendants, who allege a right against the added party, are to be treated as the plaintiffs. I allow the added party to continue on the provisions above mentioned. Costs of this application will be costs in the cause; any additional costs which the plaintiff may have been put to, or may be put to, in consequence of the addition of the third party, are reserved.

O. M.

Attorneys for the plaintiff: *Pugh & Co.*

Attorney for the defendant: *K. C. Mukerjee.*

1918

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