

ORIGINAL CIVIL.

Before Panckridge J.

GOPALDAS MODI

v.

HANSRAJ.*

1930

Dec. 19.

Practice—Discovery of documents as between co-defendants—Code of Civil Procedure (Act V of 1908), O. XI, r. 12.

When, in an administration suit, an order for discovery of documents had been made at the instance of the plaintiff, and one of the defendants had failed to carry out that order, and subsequently a co-defendant made the present application to compel the defaulting defendant to disclose his documents,

held that, for a defendant to be entitled to an order for discovery, under Order XI, rule 12, against a co-defendant, they must be "opposite" parties within the meaning of rule 1 of that Order.

A defendant, who is not an "opposite party," cannot ask for an order of discovery against a co-defendant, nor can he avail himself of such an order made in favour of the plaintiff.

Birchal v. Birch, Crisp & Co. (1) and Marshall v. Langley (2) referred to.

APPLICATION.

This was an administration suit instituted on the 29th July, 1929, by one of the executors of the will of Raghumall Khandelwal, deceased, against the other executors, asking for the construction of the will, ascertainment of the rights of the parties, removal of the defendants on various grounds, an account of their dealing with the estate and other incidental reliefs. On the 16th of August, 1930, the plaintiff obtained an order of discovery against the defendants. One of the defendants failed to comply with this order. And another defendant, who had filed his affidavit of documents, brought on the present application to compel the defaulting defendant to carry out the order of the 16th August.

S. C. Roy for the applicant, Lala Dinanath.

K. P. Khaitan for the respondent, Lala Hansraj Gupta.

*Application in Suit No. 1517 of 1929.

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(2) [1889] W. N. 222.

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PANCKRIDGE J. This is a summons taken out by the defendant, Lala Dinanath, for an order that his co-defendant, Lala Hansraj, should, within 24 hours, file an affidavit of documents, and within 2 days, produce the documents therein referred to, and for the costs of this application.

The suit was instituted on July 29, 1929, by Gopaldas Modi, one of the executors of the will of Raghumall Khandelwal, who died on September 5, 1926, the other executors Lala Hansraj, Lala Dinanath and Gobardhandas, being the defendants, as also the widow of the testator. By the will, the widow was given power to nominate an executor and, in pursuance of that power, she nominated herself as executrix. All the executors, with the exception of the plaintiff, Gopaldas Modi, are related to the testator. It is said that, after probate was granted to the five executors, on January 10, 1929, Hansraj took charge of the Calcutta, Bombay and Karachi branches of the testator's business and Dinanath took charge of the Delhi branch of the business. Disputes have arisen among the executors, and in this suit the plaintiff asks for construction of the will, ascertainment of the rights of the parties, removal of the defendants against whom he alleges misappropriation of the assets of the estate, an account of their dealings with the estate, and an enquiry as to the nature of the estate and administration.

An order for discovery has been obtained against the plaintiff, whose affidavit of documents has been filed. The plaintiff, in his turn, obtained an order for discovery against the defendants and that was followed by a consent order, dated August 16, 1930. By that order, the defendants Hansraj, Dinanath and Gobardhan were directed to file their affidavits within two weeks, the suit to be heard *ex parte* against those in default.

The defendant Dinanath has filed his affidavit of documents, but the defendant Hansraj has failed to do so, and Dinanath now desires to compel Hansraj to carry out the terms of the order of August 16. I

should have been disposed to think that the language of Order XI, rule 12, was wide enough to confer upon a defendant the right to demand discovery from his co-defendant, but there is an abundance of authority in England which demonstrates that the construction that I was inclined to adopt is wrong. I need not refer to all the cases which learned counsel have laid before me, the latest of which is *Birchal v. Birch, Crisp & Co.* (1).

The cases appear to me to show this that the words "any party" and "any other party" in rule 12 contemplate opposite parties within the meaning of rule 1 of the same Order. It is conceded, however, that, if parties are to be opposite parties within the meaning of that rule, it is not necessary for one to be a plaintiff and the other to be a defendant. Parties can both be defendants and still be opposite parties within the meaning of the order, in which case one is entitled to an order for discovery against the other. But for them to be opposite parties, as I read the authorities, it is necessary that there should be an issue raised between them at the stage at which the order of discovery is demanded.

Mr. Roy has submitted to me that, in an administration suit, all parties are opposite parties within the meaning of Order XI of the Civil Procedure Code. I think the case of *Marshall v. Langley* (1) shows that this is not correct, because in that case Stirling J. refused to direct interrogatories as between co-defendants in a suit where an order of administration was asked for.

It seems to me that this suit is primarily an administration suit. It is true that construction of the will is asked for, but it has not been shown that there is anything with regard to the construction of the will as to which the defendants *inter se* are at variance and, even were it so, I doubt whether, to decide the question of construction, discovery is necessary; but, with regard to that point, I desire to express no opinion, because, as I say, it has not been

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demonstrated that there is an issue between the two defendants on the point. Removal of the defendants from the position of executors is also asked for, but again there is no issue here as between the two defendants. They are not sought to be removed for anything which it is suggested they have done jointly or in conspiracy, but the plaintiff desires to remove each of them on account of his individual delinquencies.

Then again accounts are asked for and it is clear that if administration is ordered it may very well be that, when it comes to taking accounts, a contest may arise between the defendants, and that at that stage each defendant will be entitled to discovery or inspection of the documents in the possession of his co-defendant. But that stage has not yet been reached. The sole question at the present stage is whether a case can be made out for administration by the Court.

In my opinion, on that question, there is no matter in issue between the defendants Hansraj and Dinanath of a nature to entitle either of them to an order of discovery against the other.

Finally it appears to me that if one defendant is not entitled to an order for discovery against his co-defendant, he cannot obtain it in an indirect fashion by insisting on the performance of such an order already obtained by the plaintiff, but not complied with.

In the circumstances, the application must fail and I dismiss it with costs.

Attorney for applicant: *N. C. Bural and Pyne.*

Attorney for respondent: *Khaitan & Co.*

O. U. A.