ORIGINAL CIVIL.

Before Mr. Justice Venkataramana Rao.

1938, September 21.

L. VENKATAKRISHNAMA NAIDU (FIRST DEFENDANT), PETITIONER,

v.

R. NARAYANASAMI IYER AND FIVE OTHERS (PLAINTIFF AND DEFENDANTS 2 TO 5), RESPONDENTS.*

Original Side Rules, Madras, O. V-A.—Third party procedure prescribed by—Scope of—Suit for recovery of property on the ground that it is trust property—Defendant applying under O. V-A to implead his vendor who had covenanted for title and agreed to indemnify—Test to be applied in such a case—Civil Procedure Code (Act V of 1908), *O. I, r.* 10*—If the vendor a proper party under.*

A sale deed, in addition to the usual covenants for title, also contained a covenant for indemnity. In a suit by a plaintiff against the vendee to recover the property covered by the sale deed on the ground that it was trust property the vendee took out a third party notice against his vendor under Order V-A, rule 1, of the Original Side Rules. The vendor appeared and raised the contention that the claim of the vendee against him was only in the nature of a right to damages and as such the third party procedure was not applicable.

Held : The third party notice under Order V of the Original Side Rules could be issued in the present case.

Whether the property belonged to the trust or to the vendor's predecessor-in-title was a question which was common not only between the plaintiff and the vendee but also between the vendee and his vendor and in which all alike were interested, and therefore the vendor would be a person who would have to be cited to take part in the present litigation for the purpose of binding him by the decision on the question and preventing the possibility of any conflicting decision in an independent action by the vendee against his vendor.

* Application No. 1196 of 1938 in Civil Suit No. 48 of 1938.

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Held further: The vendor would be a proper property under Order I, rule 10, of the Code of Civil Procedure for the purpose of completely adjudicating upon the question of title to the property in the suit.

C. A. Seshagiri Sastri for *K. Sankaranarayana* and *R. Natesan* for petitioner.

T. Aravamuda Ayyangar for first respondent.

N. S. Srinivasan for second respondent.

R. S. Sankara Ayyar for S. Rajarama Sastri (third party).

A. Suryanarayana for T. Raghavendra Rao (third party).

JUDGMENT.

VENKATA-RAMANA RAO J.

VENKATARAMANA RAO J.—This is an application by the first defendant for directions under Order V-A, rule 5, of the Original Side Rules relating to third party procedure. The application is resisted by the plaintiff and by the respondents on whom notices under rule 1 have been served. The contention on behalf of the plaintiff is that the third party procedure is not applicable at all with reference to the persons who are now sought to be added as third parties or against whom notices have been served. The objection on behalf of the third parties is also similar except that, in addition to the above common contention, each raises a contention peculiar to himself. Though the application has been taken for giving directions against three respondents, Mr. Seshagiri Sastri on behalf of the first defendant has confined his application to T. S. Rajarama Sastri alone and did not press it as against the others. No directions need therefore be given in regard to them and the application must be dismissed as against them.

To appreciate the contentions it is necessary to state a few facts. The plaint seeks to recover property described in schedule A to the plaint as

trust property belonging to the deity Sri Tholasinga Perumal. The plaintiff's claim is that the property was endowed of the said deity by one Narasimhalu Chetti who by his will appointed his widow and another as executors to the said property. But his adopted son, one Venkataraghavalu Chetti, after the death of the executors, purporting to treat the said property as his private property in violation of the terms of the endowment, made several alienations, one of such being to one T. Raghavendra Rao. The sale in favour of Raghavendra Rao was effected in or about August 1915 of six grounds of vacant land which is part of the property comprised in schedule A. The said Raghavendra Rao sold the said property by a deed of sale, dated 31st March 1920, to T. S. Rajarama Sastri who by a sale deed, dated 14th March 1923, sold the said property to the the first defendant. The first defendant also purchased portions of the suit property from other persons who also claim to be either alienees from Venkataraghavalu Chetti or from persons who claim to be alienees from him. Thus, the first defendant became owner of over 9 grounds and 2,123 square feet, and on the entire plot of ground he has erected substantial buildings. The plaintiff seeks to ignore these alienations and sues for a declaration that they are null and void and not binding on the trust and to recover possession of the A schedule property from the first defendant and other persons who are in occupation of the same. The case of the first defendant is that he is a *bona fide* purchaser for value and that he is protected by covenants of indemnity which he took from his several vendors and, as he has got a right of indemnity against his vendors, he seeks to avail himself of the third party procedure and wants to have his vendors also made parties so that the question of their liability to him may also

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be determined in case he loses in the action. So far as Rajarama Sastri is concerned, the sale deed, dated 14th March 1923, in favour of the first defendant contains the following covenant:

"The said vendor (Rajarama Sastri) doth hereby covenant with the said vendee (the first defendant) that he has full right and title to convey the said land to the said vendee and also agrees to indemnify the said vendee against all loss or damage which the vendee may at any time sustain in consequence of any defect in the title of the said vendor to the said land or of the right of the said vendor to convey the said land."

Order V-A, rule 5, of the Original Side Rules runs thus:

"If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court, for directions, and the Court, upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and the defendant giving the notice, to be tried in such manner, at or after the trial of the suit, as the Court may direct, and if not so satisfied, may pass such decree as the nature of the case may require in favour of the defendant giving the notice against the third party."

The third party notice is issued under rule 1 which provides 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 a Judge, issue a notice (hereinafter called a third party notice) to that effect . . . ".

My learned brother, GENTLE J., has issued such a notice. The question therefore is—and it is open to the third parties to raise the question—whether the defendant is entitled to add them as third parties. The claim of the first defendant as against Rajarama Sastri is that not only must the latter pay the price the first defendant paid for the purchase of the land from him but also the value of the buildings which the first

defendant has erected thereon. It is contended on behalf of the plaintiff and on behalf of Rajarama Sastri that the claim is only in the nature of a right to damages and not a right to indemnity and therefore the third party procedure is not applicable. The rules relating to the third party procedure are based on English procedure and the decisions in England which bear on the point may usefully be referred to in dealing with the contention of the parties. Construing a rule in England, corresponding to rule 1 of Order V-A, BOWEN L.J. in *Birmingham and District Land Company* v. *London and North Western Railway Company*(1) observed thus :

"The rule, when it deals with claims to indemnity, means claims to indemnity as such either at law or in equity. In nine cases out of ten a right to indemnity, if it exists at all as such, must be created either by express contract or by implied contract ; by express contract if it is given in terms by the contract between the two parties."

The right to indemnity is here given in terms by the sale deed in favour of the first defendant. *Prima facie,* therefore, there is a right to indemnity against Rajarama Sastri. But it is contended that, though the term indemnity is used, what was intended to be expressed by the covenant was only a liability to damages which would arise from the breach of the covenant for title. No doubt, a covenant for title is not the same as a covenant for indemnity ; the measure of damages for breach of a covenant for title may not strictly be based upon a right to indemnity, but there is nothing to preclude a vendor agreeing to indemnify against all loss for defects of title, and, when such a covenant is expressly given, I do not see any reason why effect should not be given to it. In this case, in addition to the usual covenant for title there is also

(1) (1886) 34 Ch.D. 261, 274.

a covenant for indemnity. Even in cases where damages are claimed on the ground of a covenant for title, there seems to be authority for permitting a defendant to avail himself of the third party procedure. In *Page* v. *Midland Railway Company*(1) a purchaser was given relief under a covenant for title upon a third party notice in connection with a sale of land. Referring to this case, ROWLATT J. in *Marten* v. *Whale*(2) at page 550 points out that the point that the third party procedure was not applicable was not raised and he seems to be of the opinion that the third party procedure would not be applicable to cases of this sort, that is, where damages are claimed for breach of a covenant for title. In *Marten* v. *Whale*(2) the defendant, Whale, bought a motor car from one Thacker who had no title to it. The true owner brought an action against Whale for the detention of the car. The defence of Whale was that Thacker was in possession at the time and he passed a good title to it, but, in the event of its being held that he had acquired no title by the purchase, he claimed to be entitled to indemnity as against Thacker. Therefore Whale served upon Thacker a third party notice under the rules of the English procedure, Order XVI, rule 48. ROWLATT J. dismissed the notice in the view that no right of indemnity within the meaning of the rule would exist unless the remedy of the defendant against the third party was the same as that of the plaintiff against himself. He observed thus:

"Even if the measure of the damages is the same, it does not follow that it is an indemnity; and where it is not the same it seems to me impossible that it can be an indemnity. Assume that the plaintiff here had succeeded, the defendant would have had to give up this chattel, the motor car. He would be entitled to recover against Thacker on his warranty of title the money he had thrown away by paying him. But

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(1) [1894] 1 Ch. 11. (2) [1917] 1 K.B. 544, 550.

the right to recover that money is not a right of indemnity, because the money he paid Thacker is not the same thing as the motor car, and it may not represent the motor car. . . It seems to me the third party rule is inapplicable to the case of a claim in detinue for a specific chattel. Under those circumstances it seems to me that this third party notice was misconceived."

It may be that in a case of damages for detention of a specific chattel the right of the defendant to claim damages against his vendor may not be strictly viewed as a right to indemnity but merely as a right to damages for misrepresentation that he had authority to sell whereas in fact he had not. But I am unable to see, if there is a contract of indemnity either express or implied given by a vendor to his vendee, why such a right of indemnity would not fall within the terms of the rule. I am not able to find any reported decision where the test formulated by ROWLATT J. was applied in construing rule 48 of Order XVI of the English Rules of Practice—the rule which is now replaced by Order XVI-A, rule 1. On the other hand, I find that *Page* v. *Midland Railway Company*(1) is cited by the Editors of the Annual Practice, 1938 Edition, in their commentary on Order XVI-A, rule 1, of the Rules of the Supreme Court for the following proposition :

> "Covenantors for title in the usual form could, even under the old Rule 48, be brought in as third parties by their covenantees sued on the basis of a defect in title against which the latter had also covenanted, although the defect was known to such covenantees at the date of their covenant."

In a later case, *Baxter* v. *France* (*No.* 2)(2), where the claim was based on a right to indemnity conferred by the statute [the Conveyancing and Law of Property Act, 1881, section 7 (1) A] Lord ESHER M.R. was inclined to the view that, if the covenantee was

(1) [1894] 1 Ch. 11. (2) [1895] 1 Q.B. 591.

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claiming the value of the land which he would lose in the action and mesne profits which he may have to pay, the third party procedure would be applicable. This also seems to have been the view of LOPES L.J. and RIGBY L.J. But, in that case they dismissed the third party notice on the ground that the purchaser in that case claimed against his own vendor not only the price of the land and mesne profits but also the value of the buildings which he erected on the land. This claim according to the view of Lord ESHER and the other Lords Justices would not be a claim for indemnity within the rules but an independent claim for damages, and it would be very doubtful whether the indemnity given by the statute would cover such a claim ; and further Lord ESHER observed that

> "where an application to a Judge at chambers for directions involves the trial of such a preliminary question as whether in a case like this, on the true construction of such an enactment as section 7 of the Conveyancing and Law of Property Act, 1881, *a claim for indemnity arises, that alone is a sufficient* ground for refusing to give directions."

But in a case where a vendor covenants to indemnify against all loss or damage which the vendee might at any time sustain, the question would not be whether there is an indemnity at all, but whether the loss in respect whereof the covenant is given would include the value of buildings, and the question would be more a measure of damages. The object of the third party notice, as observed by JESSEL M.R. in *Swansea Shipping Co.* v. *Duncan*(1), is this :

> "The object of these enactments was to prevent the same question being tried twice over, where there is any substantial question common as between the plaintiff and the defendant in the action and as between the defendant and a third person" ;

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(1) (1876) 1 Q.B.D. 644, 649.

and in such a case, as JESSEL M.R. also observes, "the third person is to be cited to take part in the original litigation, and so to be bound by the decision on that question once for all".

To a similar effect FRY L.J. in *Carshore* v. *North Eastern Railway Co.*(1) observed:

"It is suggested that the plaintiff ought not to be embarrassed by the introduction of questions between the defendants and a third party. Possibly some delay may be caused by the third party proceedings, but the object of the rule is to enable the Court to try once for all an issue of fact in which all parties are alike interested."

In this case it cannot be doubted that whether the property belongs to the trust or to Venkataraghavalu Chetti is a question which is common not only between the plaintiff and the first defendant but also between the first defendant and Rajarama Sastri and in which all alike are interested, and therefore Rajarama Sastri would be a person who will have to be cited to take part in the present litigation for the purpose of binding him by the decision on the question, and preventing the possibility of any conflicting decision in an independent action between the first defendant and Rajarama Sastri. It seems to me also that, apart from any question of third party procedure, it would be open to the Court to add him as a proper party under Order I, rule 10, Civil Procedure Code, for the purpose of completely adjudicating upon the question of title to the property in the suit. No doubt, the plaintiff is not interested in the question of damages or the extent of the liability of Rajarama Sastri to the first defendant but all the questions between the first defendant and Rajarama Sastri need not be identical with the questions to be tried between the plaintiff and the first defendant. It is enough if there is a

(1) (1885) 29 Ch. D. 344, 346.

common question to be tried. At the same time it is the duty of the Court to see that by the addition of the third party the plaintiff is not embarrassed in the trial of questions with which he would have no concern. If the adjudication of the question between the defendant and the third party would embarrass the plaintiff in his trial, the Court generally exercises its discretion by ordering the trial of those issues subsequent to the trial of the action. If therefore Rajarama Sastri would, according to the dictum of JESSEL M.R. in *Swansea Shipping Co.* v. *Duncan*(1), be a proper party to be cited to take part in the litigation between the plaintiff and the first defendant, and if the question of liability of Rajarama Sastri to the first defendant on the covenant for indemnity can be postponed till the trial of the action, I do not see any objection to allowing the third party notice so far as he is concerned.

I therefore direct that Rajarama Sastri be added as a third party to the action and the first defendant is given leave to serve a statement of his claim in two weeks from to-day on Rajarama Sastri who will have leave to file an answer thereto in two weeks from the date of service of the said statement. The issues relating to the liability of Rajarama Sastri to the first defendant should be adjudicated upon only after the trial of the action and, so far as the conduct of the defences in regard to the trial of the issues raised by the plaintiff in the action is concerned, it should, as between the first defendant and Rajarama Sastri, be in the hands of the first defendant; but the first defendant will not be at liberty to enter into any compromise with the plaintiff without the consent of Rajarama Sastri. If Rajarama Sastri has reason to believe

(1) (1876) 1 Q.B.D. 644.

that the first defendant is conducting his defence in a manner adverse to his interest or is otherwise not properly conducting the defence, liberty is reserved to Rajarama Sastri to move the Court for directions to enable him to contest the plaintiff's claim without reference to the first defendant.

Solicitor for first respondent: *N. T. Shamanna.*

G.R.

INCOME-TAX REFERENCE.

Before Sir Lionel Leach, Chief Justice, Mr. Justice Madhavan Nair and Mr. Justice Varadachariar.

1938, November 14.

COMMISSIONER OF INCOME-TAX, MADRAS, PETITIONER,

v.

P. R. A. L. M. MUTHUKARUPPAN CHETTIAR, RESPONDENT.*

Indian Income-tax Act (XI of 1922), *sec.* 26 (2)—" *Assessment* " *in—Meaning of—Process of determining amount of profit or loss on which tax is to be levied, if included in—Foreign business—Applicability of sec.* 26 (2) *to.*

The word " assessment " is used in two senses in the Indian Income-tax Act of 1922—the process of determining the amount of profit or loss and the process of levying tax—but, if there is nothing repugnant in the context, the word refers to the process of determining the amount of profit or loss. As under sub-section 2 of section 26 of the Act the assessment is to be made on the person succeeding as if he had been carrying on the business throughout the year of account and as if he had made the whole of the profits for that year, the sub-section must be held to include the process of computing the amount on which tax is to be paid. The sub-section not

* Original Petition No. 254 of 1937.