

ORIGINAL CIVIL.

Before Sir Charles Sargent, Kt., Chief Justice, and Mr. Justice Bayley.

1893.
March 10.

FOOLIBAI (ORIGINAL DEFENDANT), APPELLANT, v. RAMPRATA'S
SAMRATRAI AND ANOTHER (ORIGINAL PLAINTIFFS), RESPONDENTS.*

Practice—Adding a defendant in a suit where leave to sue under Clause 12 of the Letters Patent, 1865, was necessary—Alternative liability—Order to add new defendant—Appeal against such order by original defendant.

The plaintiff filed this suit against the defendant Foolibái, alleging that she had a firm and carried on business at Sihore in the territory of Bhopál. Before the suit was filed, leave was duly obtained under clause 12 of the Letters Patent, 1865. In her written statement Foolibái denied that she was the owner of the Sihore firm, or that she was responsible for any of its dealings with the plaintiffs. She alleged that the Sihore firm had belonged to her son Poonamehand, who died in *Samvat* 1943, leaving a daughter named Goolibái, a minor, who was still living. The plaintiff then obtained a summons calling on the defendant Foolibái to show cause why the plaint and proceedings should not be amended by adding the name of Goolibái as a party-defendant. The summons was made absolute, and an order was made to add Goolibái as a defendant. The defendant Foolibái appealed, contending that the effect of adding a defendant would be to institute a new suit against Goolibái without obtaining the necessary leave under the Letters Patent. She relied on *Rámpuráb v. Prensukh Chandamal*(1).

Held, dismissing the appeal, that the defendant Foolibái could not appeal against the order making Goolibái a party. It might be that Goolibái might object to the order either before or at the hearing, but she only could take the objection. The defendant Foolibái could not take it for her. The case of *Rámpuráb v. Prensukh Chandamal*(1) did not apply. In that case the proposed amendment altered the cause of action. Here it was left unaffected. On the cause of action as set forth in the plaint, leave had been given under clause 12 of the Letters Patent to sue the defendant Foolibái, and so far as she was concerned there was no objection to the form of the suit. If her allegation was true, Goolibái and not Foolibái was liable. That question would be decided at the trial.

APPEAL from an order made by the Judge in Chambers, dated 13th August, 1892, directing that one Goolibái should be made a party defendant to the suit.

The suit was filed on the 12th February, 1892, against the appellant (defendant), Foolibái, alone. The plaint alleged that she had a firm at Sihore in the territory of Bhopál, where she formerly carried on business under the name of Chotámál Balláram; that the plaintiffs had large dealings with the said

* Suit No. 76 of 1892.

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firm; and that in respect of such dealings a sum of Rs. 53,833 was due by the defendant to the plaintiffs. The plaintiffs prayed for judgment for that sum, or, if necessary, for an account, &c.

Before filing the suit leave was duly obtained under clause 12 of the Bombay Letters Patent, 1865.

On the 15th June, 1892, the defendant Foolibái filed her written statement. She denied that she was the owner of the Sihore firm, or that she was responsible for any of its dealings with the plaintiffs. She alleged that the Sihore firm had belonged to her son, Poonamchand, who died in *Samvat* 1943, leaving a daughter Goolibái, a minor, and that Goolibái was still alive.

On receipt of the written statement the plaintiffs' attorney asked the defendant to consent to have Goolibái added as a defendant. On her refusal the plaintiffs on the 25th June, 1892, took out a Judge's summons calling on her to show cause why the plaintiffs should not have liberty to amend the plaint by adding the name of Goolibái, a minor, as a party-defendant and by making such other amendments as might be necessary to be made in the plaint. On the 13th August, 1892, the summons was made absolute, and an order was made to add Goolibái as a defendant and to amend the plaint and proceedings as might be necessary. From this order the present appeal was brought by the defendant Foolibái.

Vicáji for the appellant (defendant) :—The suit has been filed against us, and for this suit leave has no doubt been obtained. But now the plaintiffs seek to add a new defendant, the effect of which would be to institute a new suit against this new defendant without obtaining leave under the Letters Patent. They cannot do this, and they cannot obtain leave now. It is when the suit is filed that leave must be obtained. It cannot be obtained afterwards—*Rámpurtáb v. Premsukh Chandamál*⁽¹⁾.

Macpherson for respondents was not called upon.

SARGENT, C. J. :—We do not think that the decision in *Rámpurtáb v. Premsukh Chandamál*⁽¹⁾ applies to the present case. In that case the amendment which it was proposed to make in the

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plaint altered the cause of action, and the Court held that under clause 12 of the Letters Patent, 1865, the amendment could not be made after the suit had been instituted. Here, however, the cause of action is left unaffected. On the cause of action set forth in the plaint leave has been given under clause 12 to sue Foolibái; and so far as she is concerned there is no objection to the form of the suit, and it will go on to a hearing. In her written statement she, however, says that she is not the proper defendant, that the firm with which the plaintiffs had dealing was not hers, but her son's, and that her son is dead and has left a daughter Goolibái, who is still alive. If that be true it is clear that Goolibái is the person liable. Whether it is true or false, will be a question for determination at the trial of the case. The plaintiffs naturally wish to have Goolibái added as a defendant, so as, if possible, to obtain judgment in this suit against one or the other. It may be that Goolibái can apply to have her name taken off the record on the ground that the suit has been instituted against her without the necessary leave, or she may possibly take this objection at the hearing. We need not give any opinion on that question. Such an objection, however, can only be taken by her. Foolibái cannot take it for her. Mr. Justice Farran has ordered that Goolibái should be made a party, and Foolibái appeals against that order. We do not think she is the person to appeal, and we dismiss the appeal with costs.

Attorney for the appellant:—Mr. *D. S. Garud*.

Attorneys for the respondents:—Messrs. *Payne, Gilbert and Sayani*.