ORIGINAL CIVIL.

Before Mr. Justice Davar.

SHIVLAL NANAKRAM AND ANOTHER (PLAINTIFFS) *v.* THE FIRM OF SHRIKISSONDAS BALKISSONDAS (DEFENDANTS), AND MITCHELL & Co., THIRD PARTY.* 1907 *March* 4.

Practice—Third party notice—High Court Rules, Chapter VIII—Summons for directions—Claim of Indemnity—Embarrassing pleading—Refusal to give directions, effect of.

In deciding whether the Court should give directions on a summons for directions, the Court has to see that nothing is done which would put the plaintiffs to additional expense or difficulty, and also to see that they are not embarrassed by the introduction of third parties in their suit.

In giving leave to serve notice of claim for contribution or indemnity on a third party the Court will not consider whether the claim is a valid one but only whether the claim is *bona fide* and whether, if established, it will result in contribution or indemnity.

Carshore v. *North Eastern Railway Company* (1) followed.

The effect of a refusal by the Judge to give directions is to dismiss the third party from the action.

Baxter v. *France* (*No.* 2) (2) referred to.

Third party procedure.

Proceedings in Chambers.

The plaintiffs, who were merchants carrying on business at Khandwa in the Central Provinces, sued the defendants, who were merchants and commission agents to recover a sum of Rs. 11,738-12-6 as being the sum due to the plaintiffs in respect of the agency business subsisting between them and the defendants. The defendants disputed the plaintiffs' claim and contended that they were entitled to credit of two sums of Rs. 5,000 each being the amounts paid by them against two Hundis of Rs. 5,000, each of which purported to be drawn by the plaintiffs and paid by the defendants on their account.

One of these Hundis was sent by Messrs. Kesowsha Kalorsha of Khandwa to Messrs. Mitchell & Co. who presented it for payment to the defendants who paid the same.

* O. C. J. Suit No. 540 of 1906.

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

(2) [1895] 1 Q. B. 591.

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The plaintiffs contended that the Hundi was a forgery and that they were not liable to be debited with the amount of it.

The defendants obtained leave on an *ex parte* application to serve a third party notice on Messrs. Mitchell & Co. Messrs. Mitchell & Co. filed their appearance and through their solicitors called upon the defendants to apply for directions.

The defendants thereupon obtained from the Prothonotary a summons for directions.

On the argument of the summons before Mr. Justice Davar the Court held that directions should be given on the summons since the plaintiffs would not really be embarrassed or be really put to additional expense or difficulty, and the refusal to give directions would certainly entail hardship on the defendants and multiply litigation.

Scott (Advocate General) for the third parties.

Setalvad for the plaintiffs.

Lowndes for the defendants.

DAVAR, J.—The plaintiffs are merchants and as such carry on business at Khandwa in the Central Provinces. The defendants are merchants and commission agents and have a firm in Bombay. The plaintiffs sue to recover from the defendants' Bombay firm a sum of Rs. 11,738-12-6 alleging that the defendants' Bombay firm acted as their commission agents for, amongst other things, selling cotton consigned by them from Khandwa and stating that the sum claimed in the suit is due by the defendants to the plaintiffs in respect of the agency account subsisting between the parties. The defendants dispute the plaintiffs' claim and they contend that they are entitled to credit in the account of two sums of Rs. 5,000 each—these being the amounts paid by them against two Hundis for Rs. 5,000, each of which purported to be drawn by the plaintiffs, and paid by the defendants on their account, under their orders and directions. One of such Hundis purported to be drawn by the plaintiffs on the defendants. That Hundi was sent by Messrs. Kesowsha Kalorsha of Khandwa to Messrs. Mitchell & Co. at Bombay. The Hundi was presented for payment by Messrs.

Mitchell & Co. to the defendants who paid the same. The plaintiffs contend that both these Hundis were forgeries—that they never drew such Hundis—and they are not liable to be debited with the amounts of these Hundis. For the purposes of the present proceedings it is only necessary to refer to one of such Hundis—the one presented by Messrs. Mitchell & Co. This original Hundi is alleged to be lost.

The defendants obtained leave on an *ex parte* application to serve a third party notice on Mitchell & Co. and the notice which is dated the 14th of November 1906 was served on the 19th of November 1906. Mitchell & Co. filed appearance on the 22nd of November 1906, and on the 4th of December their solicitors wrote to the defendants calling upon them to apply for directions. Copy of their letter is annexed to the affidavit of Jugjivan Morarji affirmed on the 5th of December last. The defendants thereupon obtained from the Prothonotary the present summons for directions. The summons was argued before me on Saturday the 23rd of February 1907. The Advocate General on behalf of Mitchell & Co. argued that I ought to refuse to give directions and that this was not a case in which bringing in his clients as third parties would be necessary or desirable. Mr. Setalvad for the plaintiffs also objected to this procedure and said it would complicate his suit and embarrass the plaintiffs. Mr. Lowndes for the defendants pressed me to give directions so that the firm of Mitchell & Co. would be bound by the finding in this suit as to whether the Hundi in question was drawn by the plaintiffs or was a forgery.

The Advocate General contended that this Hundi was not a Sha Jog Hundi, that his clients were not liable to indemnify the defendants, and that the defendants by their acts and conduct were estopped from making any claim against his clients.

The Advocate General also pointed out to me that the defendants had filed a suit against his clients, No. 127 of 1907, in which this Hundi was referred to and contended that the question of his client's liability could be with greater convenience gone into in that suit. I confess I was impressed at one time with the arguments of the Advocate General and was disposed to

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refuse to give directions on this summons. I, however, took time to consider my judgment and have now studied the papers in this case and the plaint in No. 127 of 1907. In deciding whether I should give directions on this summons, I have first to see that nothing is done which would put the plaintiffs to additional expense or difficulty, and also to see that they are not embarrassed by the introduction of third parties in their suit. This is laid down in *Carshore* v. *North Eastern Railway Company* (1). This case is also useful as showing under what circumstances leave to a defendant to serve third party notice *should* be granted. The circumstances in that case were not dissimilar to the circumstances in this case, and in answer to the plaintiffs' plea that he would be embarrassed by the introduction of a third party, Lord Justice Cotton, after laying down the principle that the plaintiff ought not to be embarrassed, observes as follows:—"The plaintiff has nothing to do with the question of indemnity .....But the question of forgery arises as well between the plaintiff and the defendants, as between the third party and the defendants, and it may well be left to the Judge to see that the question is properly tried." Lord Justice Fry in his judgment observes:—"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. Here all are interested in the question whether the transfer was a forgery, and I think it is best to try it once in the presence of all the parties." The appeal from the order giving leave was dismissed.

Messrs. Mitchell & Co. did not choose to apply that the leave to serve them with third party notice should be revoked or cancelled. They however by their solicitor's letter of the 4th of December 1906 called upon the defendants to apply for directions and gave notice that they would not be bound by any decree or order passed in the suit unless and until directions were given and they were given liberty to defend this suit and appear at the trial. The procedure followed seems to be perfectly correct as appears from *Schneider* v. *Batt* (2) where it was held that the action came to an end as regarded the third parties when the

(1) (1885) 29 Ch. D. 344. (2) (1881) 8 Q. B. D. 701.

Court refused to give directions. This view is emphasised in *Baxter* v. *France* (No. 2) [1], wherein Lord Esher, Master of the Rolls, says that by refusing to give directions the Judge strikes the third party, as such, out of the action and Lord Justice Lopes observes that the refusal to give directions is to dismiss the third party from the action.

In the case of *Carshove* v. *North Eastern Railway Company* [2], referred to by me above, it was further held that in giving leave to serve notice of claim for contribution or indemnity on a third party the Court will not consider whether the claim is a *valid* one but only whether the claim is *bona fide* and whether *if established* it will result in contribution or indemnity.

Third party procedure has been only recently introduced in our Courts and so far as I am aware very rarely adopted by defendants in actions filed in these Courts. I therefore took time to consider my judgment, and had to look into English cases for guidance in this matter.

The question before me is—ought I to refuse to give directions and thereby discharge the third party from this action, and thus practically revoke my order of the 10th of November 1906 giving defendants leave to serve third party notice or should I give directions and thereby introduce Messrs. Mitchell & Co. into this action.

The facts appear to be very simple. Messrs. Mitchell & Co. receive a Hundi drawn upon the defendants in Bombay from one of their constituents for collection. They present it to the defendants—defendants pay the amount to Mitchell & Co. The defendants say they believe the Hundi was a genuine Hundi drawn by the plaintiffs who were their constituents. The plaintiffs deny that they ever drew such a Hundi and charge that if such Hundi was drawn in their name it must have been a forgery. The defendants contend—whether rightly or wrongly it is not for me at present to say—that in the event of the Hundi turning out to be a forgery they are entitled to claim the amount paid by them to Mitchell & Co. back from them. Messrs. Mitchell & Co. on various grounds contend that they

(1) [1895] 1 Q. B. 591. (2) (1885) 29 Ch. D. 344.

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are not liable to refund the amount and that the defendants are estopped from making the claim.

It seems to me fairly clear that the defendants are making the claim against Mitchell & Co. *bona fide*. It may be that they may fail to establish the claim or that their claim may be held not to be valid. The main and substantial question in the suit as between the plaintiffs and the defendants is whether the two Hundis were or were not forgeries. One of the questions between the defendants and the third parties also is whether the Hundi which they collected and which is one of the two Hundis mentioned above was or was not a forgery. If Messrs. Mitchell & Co. had offered to fight the defendants on the assumption that it was a forgery and were content to rest their case for non-liability on other grounds or if they had offered to be bound by the decision in this suit on the point of forgery, I would not have hesitated to discharge them from the suit and would have refused to give directions. This however they have refused to do and I can quite understand their reasons for doing so. They are interested in proving that the Hundi was a genuine Hundi and they are entitled to be present in any inquiry which may be held on the question of the genuineness of the Hundi if the result is to bind them. It is to their interest to see that the question is properly fought out and in that fight they are entitled to take part.

I have perused the plaint in Suit No. 127 of 1907 with a view to see if it would be more convenient to leave the defendants and Messrs. Mitchell & Co. to fight this question in that suit. The plaintiffs are not parties to that suit. The suit mainly refers to another Hundi and paragraph 7 in the plaint appears to be inserted therein merely by way of extra caution. The introduction of an inquiry with regard to this Hundi in that suit would, I think, complicate matters very much indeed.

On a careful consideration of the authorities and of the facts disclosed in the affidavits on this summons I have come to the conclusion that I ought not to refuse to give directions on these summons. I do not think the plaintiffs will be really embarrassed or be really put to additional expense or difficulty and my

refusal to give directions would certainly entail hardship on the defendants and multiply litigation.

The third party notice dated the 14th of November 1906, admittedly contains inaccurate and incorrect statements. The defendants say this was due to a mistake in the office of the Prothonotary. It was clearly the duty of the solicitors of the defendants to see that the notice was correctly drawn and it is useless attempting to put the blame on the office of the Prothonotary.

I give leave to the defendants either to amend the notice or to issue a fresh notice stating correctly what their claim is against the third parties. The amended or fresh notice to be served on the third parties within seven days from to-day. The defendants to bear and pay their own costs of such amendment or fresh notice.

On the summons I give the following directions :—

The third party Messrs. Mitchell & Co. are at liberty to put in a written statement within a fortnight of the service of amended or fresh notice upon them.

The third party Messrs. Mitchell & Co. are at liberty to appear at the hearing of the suit and defend the suit in respect of the issues which relate to the questions as to whether the two Hundis mentioned in the defendants' written statement were genuine or forged.

I advisedly say two Hundis as the inquiry will necessarily be such that it would be extremely inconvenient to restrict the third party to the one particular Hundi in which the third party is interested.

The third party may take such further part at the hearing of the suit as the learned Judge who hears the case may allow.

The third party will be bound by the finding in this case of the issue or issues as to the genuineness or forgery of the Hundi in question.

All other questions between the defendants and the third party to be tried after the trial of the suit between the plaintiffs and the defendants.

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The third party to put in affidavit of documents within a fortnight from service of amended or fresh notice.

Hearing of the suit to come on in its ordinary course.

Costs of the plaintiffs and defendants to be costs in the cause.

Costs of the third party reserved to be dealt by the Judge hearing the suit.

Counsel certified.

Attorneys for third parties: *Messrs. Pestonji, Rustom & Kola.*

Attorneys for the plaintiffs: *Messrs. Dikshit, Dhanjisha & Co.*

Attorneys for defendants: *Messrs. Tyabji, Dayabhai & Co.*

B. N. L.

ORIGINAL CIVIL.

Before Mr. Justice Davar.

DINSHAW SORABJI MODY AND ANOTHER, PLAINTIFFS, *v.* DINSHAW SORABJI MODY AND OTHERS, DEFENDANTS.*

1907. *April* 15.

Civil Procedure Code (Act XIV of 1882), section 527, case stated under—Indian Succession Act (X of 1865), section 78—Will—Appointment by general bequest—Power created subsequently to the will.

A general power of appointment may be well exercised by a will executed previously to the creation of the power and that too by a mere residuary gift.

THIS suit was filed in pursuance of an agreement between the parties under section 527 of the Civil Procedure Code for taking the opinion of the Court on the question of law set forth in paragraph 12 of the said agreement. The material facts are set forth fully in the case stated for the opinion of the Court which was as follows:—

1. One Nusserwanji Jehangirji Wadia, late of Bombay, Parsi, died on or about 5th day of May 1897, having previously thereto made his last will and testament dated the 8th day of June 1885, and thereby appointed his wife Pirojbai (since deceased) the sole executrix thereof. After giving diverse legacies the said testator by the 17th clause of his said will gave his residuary estate in the event of his death without having issue to his said executrix upon the trusts following:—"And I declare that in case I shall die without leaving

* Original Suit No. 263 of 1907.