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is a party to a gaming transaction, unless of course it is in his interest to do so.

I agree, therefore, in allowing the appeal and dismissing the plaintiffs' suit with costs throughout.

Appeal allowed.

Solicitors for appellants: Messrs. *Tyabji Dayabhai & Co.*

Solicitors for respondent: Messrs. *Captain & Vaidya.*

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ORIGINAL CIVIL.

Before Sir Norman Macleod, Kt., Chief Justice, and Mr. Justice Farcett.

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August 9.

CHARANDAS CHATURBHUIJ (DEFENDANT), APPELLANT v. CHHAGANLAL PITAMBARDAS (PLAINTIFF), RESPONDENT AND ALIBHOY KIIUSAL (THIRD PARTY), RESPONDENT *.

Letters Patent, 1865, clause 15—High Court Rules 130 and 131—Third Party notice—Summons for directions to third party issued at the instance of defendant—Order refusing directions—Judgment—Appeal—Practice—Procedure.

An order refusing directions under Rules 130 and 131 of the High Court Rules is not a "judgment" within the meaning of clause 15 of the Letters Patent, and no appeal lies against that order.

The Justices of the Peace for Calcutta v. The Oriental Gas Co. (1), followed.

APPEAL from an order of Pratt J. refusing directions on Chamber Summons taken out by defendant under third party proceedings.

By a contract of the 7th July 1918, the defendant agreed to purchase from the plaintiffs 100 bales

* O. C. J. Appeal No. 26 of 1920; Suit No. 1727 of 1919.

(1) (1872) 8 Beng. L. R. 433.

of cotton. The contract was for delivery to be taken between the 1st and 25th September 1918 according to the Rules and Regulations of the Bombay Cotton Trade Association. The plaintiffs sent the defendant a delivery order for the 100 bales which the defendant passed on to his purchaser Alibhai. Alibhai did not take delivery under the delivery order and demanded arbitration as to quality under Rule 12 of the Association and then a further arbitration under Rule 13. Both awards went against Alibhai. Yet neither the defendant nor Alibhai took delivery and the plaintiffs filed this suit to recover damages from the defendant for breach of contract.

The defendant in his written statement contended in the first place that as plaintiffs had treated Alibhai as the person responsible, he the defendant was exonerated; and in the second place that if he was liable he had a right to contribution or indemnity against Alibhai.

On the second contention of the defendant a third party notice was issued to Alibhai.

The third party filed his appearance and the defendant took out a summons for directions. The plaintiffs and the third party contended that the case was not one in which directions should be given under Rule 130 of the High Court Rules, inasmuch as the third party was not a joint promisor in the contract of sale by plaintiffs to defendant, nor had he agreed to indemnify the defendant in case he failed to take the delivery of the bales.

The defendant urged that by the Rules of the Bombay Cotton Trade Association the terms of the plaintiff's contract with the defendant had been imported into the defendant's contract with Alibhai.

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Pratt J. before whom the summons was argued held that there was nothing in the rules of the Association to support the contention that the defendant had any right either of contribution or indemnity against the third party and the defendant's claim, if any, was for damages against Alibhai, but under *Birmingham and District Land Company v. London and Western Railway Company*⁽¹⁾ and the case of *Nippon Menkwa v. Gurmukrai*⁽²⁾ that was not sufficient.

The case not being one for directions, his Lordship dismissed the summons and directed the defendant to pay the costs of the plaintiffs and the third party.

Defendant appealed.

Coltman and *Mirza*, for the appellant.

Jinnah, for the 1st respondent.

Munshi, for the second respondent (third party).

MACLEOD, C. J. :—The plaintiff filed this suit against the defendants for damages for breach of contract because the defendants failed to take delivery of 100 bales of cotton which they had contracted to buy for the September delivery 1918. On the 8th January 1920 leave was given to the defendants to issue a third party notice against one Alibhoy Khushal. The defendants claimed to be indemnified by Alibhoy Khushal in respect of the breach of the contract with the plaintiff, because Alibhoy surveyed the said bales and failed to take delivery of the same from the plaintiff under the delivery order which had been sent to him. The third party entered an appearance on the 8th of March. The defendant then took out a summons for directions. The third party proceedings have been

⁽¹⁾ (1886) 34 Ch. D. 261.

⁽²⁾ (1908) 10 Bom. L. R. 1024.

introduced into this Court by rules, while the Code of Civil Procedure makes no mention at all of such procedure.

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Rule 130 is as follows :—

“ If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or Judge for directions, and the Court or Judge, 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 or Judge 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.”

Again under Rule 131 :—

“ The Court or a Judge upon the hearing of the application mentioned in Rule 130 may, if it shall appear desirable to do so, give the third party liberty to defend the suit, upon such terms as may be just, or to appear at the trial and take such part therein as may be just, and generally may order such proceedings to be taken, documents to be delivered, or amendments to be made, and give such directions as to the Court or Judge shall appear proper for having the question most conveniently determined, and as to the mode and extent in or to which the third party shall be bound or made liable by the decree in the suit.”

The first direction that was sought in the summons was that the third party Alibhoy Khushal should be made a party defendant to the suit and the second that he should be ordered to file his written statement within a fortnight or such other time as this Honourable Court might deem fit, and that he should also be ordered to file his affidavit of documents. These directions ought to have been asked for, if at all, under the Code, on the ground that Alibhoy was a necessary party in the trial of the action between the plaintiff and the original defendant. As this was a summons for directions issued after the third party had appeared on the third party notice, the only directions that could be

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asked for were those directions which can be given by the Court under Rules 130 and 131.

The directions under these Rules which were asked for were as follows:—"That the said Third Party Alibhoy Khushal be at liberty to appear at the trial of this suit and the questions in issue between the defendant and the third party be tried simultaneously with the questions in issue between the plaintiffs and the defendant".

The learned Judge in dealing with the summons said that he was not concerned with the defendant's contention, that as plaintiff had treated Alibhoy as the person responsible for taking delivery he the defendant was exonerated and he considered the question, whether the defendant if liable had a right to indemnity or contribution against Alibhoy.

In considering the facts of the case, the learned Judge came to the conclusion that there was nothing in the Rules of the Bombay Cotton Trade Association to support the contention that the defendants had any right to contribution or indemnity against the third party, and therefore declined to give directions.

It is contended that no appeal lies against an order refusing directions, on the ground that it is not a "judgment" within the meaning of clause 15 of the Letters Patent. The meaning of the term "judgment" has often been considered in this Court, and the following definition in *The Justices of the Peace for Calcutta v. The Oriental Gas Company*⁽¹⁾ has been consistently approved of by all the High Courts. Couch C. J., in the course of his judgment, said:—

"We think that 'judgment' in clause 15 means a decision which affects the merits of the question between the parties by determining some right or

(1) (1872) 8 Beng. L. R. 433 at p. 452.

liability. It may be either final, or preliminary, or interlocutory, the difference between them being that a final judgment determines the whole cause or suit, and a preliminary or interlocutory judgment determines only a part of it, leaving other matters to be determined."

I find that the Judge did not consider on the facts placed before him that the questions in issue between the defendant and the third party should be tried in the suit which had been filed by the plaintiff against the defendant. Nothing has been decided which affected the merits of those questions between the defendant and the third party, by determining any right or liability between them. This is purely a question of procedure, furthermore a procedure which is peculiar to this High Court under its own rules. There may be cases where the procedure may be of advantage to the parties, and may save expense, but as far as my experience goes, much time is wasted and more money is spent than is saved in discussing whether the procedure should be applied or not. However, we are of opinion that the order refusing directions under Rules 130 and 131 is not a judgment within the meaning of clause 15 of the Letters Patent, and, therefore, there is no appeal. The appeal is dismissed with costs.

Solicitors for appellant : Messrs. *Dastur & Co.*

Solicitors for respondent : Messrs. *Matubhai, Jamietram & Madon.*

Solicitor for third party : Mr. *M. B. Chothia.*

Appeal dismissed.

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