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Court : Chennai

Decided On : Jan-08-1999

Reported in : AIR1999Mad246

Judge : K.P. Sivasubramaniam, J.

Acts : [Code of Civil Procedure \(CPC\) , 1908](#) - Seciton 100 - Order 1, Rule 10(2) - Order 8A, Rules 5 and 6

Appeal No. : Second Appeal Nos. 737 of 1986 and 794 of 1993

Appellant : Bapu Pillai and anr.

Respondent : Supdt. Engineer, Madurai Electricity System, Tneb and ors.

Advocate for Def. : V. Rengapashyam, Adv. for Respondents 1 to 3 and ;C. Jose Ukkur, Adv. for Respondent 4

Advocate for Pet/Ap. : S. Kadarkarai, Adv.

Disposition : Appeal allowed

Judgement :

K.P. Sivasubramaniam, J.

1. Both the above Second Appeals arise out of the judgment of the learned District Judge of Madurai North at Dindigul, in A. S. No. 196 of 1984 confirming the judgment of the learned Subordinate Judge, Dindigul, in O.S. No. 25 of 1982. The plaintiffs in the suit are the appellants in Second Appeal No. 737 of 1986 and the fourth defendant in the suit is the appellant in S.A. No. 794 of 1993.

2. The suit was filed by the plaintiffs for recovery of Rs. 23,000/- towards damages and for costs from the defendants. According to the plaintiffs, the third plaintiff is the owner of the building Door No. 61, West Car Street, Dindigul Town and the first plaintiff was a tenant of the said premises. He was in occupation of the property. The second plaintiff is having his business in a petty shop in another portion of the building. On the north of the said building, defendants 1 to 3/Madurai Electricity System (T.N.E.B.) have erected a transformer of a capacity of 250 K. V. A. and due to the poor maintenance and negligence of the said defendants the transformer has not been properly maintained. There were several break down in the said transformer for the past two weeks. Even on 19-2-1982 at about 7.00 p.m. there was a fault in the said transformer and for a shortwhile the electricity was also shut down. But defendants 1 to 3 without attending to and rectifying the cause of such breakdown they had given the electricity supply. It is further stated that around 10.40 p.m. the said transformer burst out and a fire flame developed and also as a result of oil which emanated from the transformer, considerable damages were caused to the building. The goods in the shop of plaintiffs 1 and 2 were also damaged. Therefore, according to the plaintiffs, the accident took place due to the negligence of defendants 1 to 3. The accident had occurred only due to the negligence of defendants 1 to 3 and hence they were liable to pay damages. The plaintiffs had also given the details regarding the goods so damaged.

3. According to defendants 1 to 3, while admitting that the transformer had burst on 19-2-1982, they would say that it was due to its own inherent defect in its manufacture. The bursting of the transformer was only an unexpected event and unexplainable and the transformer was supplied by the fourth defendant with necessary condition to warranty and was erected in the station with all bona fide intention by defendants 1 to 3. The transformer was loaded and was working for a considerable time and subsequently burst out and due to bursting there appears to

have been some damages to the surrounding area. The allegation that the transformer had burst due to poor maintenance and negligence of defendants 1 to 3 was not correct. There was no reason or occasion for any negligence or poor maintenance of the transformer. It is further contended by defendants 1 to 3 that the entire damage to the building could not also be said to be only due to the bursting of the transformer. The quantum of damage as claimed by the plaintiff was also denied.

4. Subsequent to the filing of the suit it appears that at the instance of the defendants, the fourth defendant, the manufacturer of the transformer was impleaded as a party to the suit. According to the fourth defendant, the claim of the plaintiff was barred under Section 69 of the Indian Partnership Act and the fourth defendant was an unnecessary party. According to the fourth defendant the transformer was sold to Madurai Electricity System of the Tamil Nadu Electricity Board and the fourth defendant had given warranty for its performance for a period of one year and thus the guarantee given to the first defendant expired in or about 1971 and therefore the fourth defendant was not liable to pay any damages for the alleged negligence.

5. The fourth defendant further pleaded that even assuming without admitting that there was a subsisting guarantee, even then they were not liable to meet the claim of the plaintiffs. It was further pleaded that there was no proper maintenance and that it was only due to the negligence of defendants 1 to 3. It is also pleaded that the accident was an act of God and therefore, the fourth defendant cannot be held liable. The fourth defendant also pleaded that they were unnecessary party, having been brought on record without proper notice and that the suit was bad for misjoinder of parties and cause of action.

6. On the basis of the said pleadings and the evidence both oral and documentary, the trial Court held that the fourth defendant was a necessary party and that the entire accident was due to the inherent defect in the manufacture of the transformer by the fourth defendant and not due to poor maintenance or negligence on the part of the defendants. Therefore, the trial Court held that in view of the inherent defect in the manufacture of the transformer by the fourth

defendant, the fourth defendant was alone liable to pay the damages to the plaintiffs and with the result the suit was decreed. As against the said judgment the fourth defendant filed an appeal before the lower appellate Court and the plaintiffs also filed cross-objection questioning the findings of the trial Court in relieving the defendants 1 to 3 from the liability. Both the appeal as well as cross-objections were dismissed by the lower appellate Court and hence the present Second Appeals, one by the plaintiffs and other by the fourth defendant.

7. At an early stage of the hearing of these two Second Appeals I was given to understand that in the impleading of the fourth defendant, the procedure contemplated under Order VIII-A, C.P.C. had been complied with on the basis of which I had reserved judgment in the appeals. Subsequently, it has been clarified by both sides that the fourth defendant was impleaded only on a petition filed by defendants 1 to 3 under Order 1, Rule 10, C.P.C. and that the procedure under Order VIII-A has not been followed. In fact one of the substantial questions of law as raised by the fourth defendant/appellant in S. A. No. 794 of 1993 is as to whether a person bound under the guarantee can be impleaded otherwise than as prescribed under Order VIII-A, C.P.C. In this background the claim of the plaintiffs and the liability of the defendants have to be examined.

8. As far as the claim put forth by the plaintiffs is concerned, both the Courts have concurrently held that the damage caused to the plaintiffs had been established and that consequently the plaintiffs were entitled to be compensated. The entitlement of the plaintiffs to receive damages from the defendants being an issue of fact as concluded by both the Courts, has not been shown to be in any manner illegal or perverse. Hence the said findings in favour of the plaintiffs have to be upheld.

9. It is only the correctness or otherwise of the judgment and decree of the Courts below as regards the liability of the fourth defendant to pay damages to the plaintiffs which requires consideration. Admittedly the procedure under Order VIII-A, C.P.C. has not been complied with in the present case, but both the Courts below have held that the fourth defendant was liable to make good the loss suffered by the plaintiffs. It is submitted on behalf of defendants 1 to 3, T.N.E.B.,

that parties having agitated their rights and the claims in a full-fledged manner and the fourth defendant had also let in evidence after having fully exhausted the scope of their defence, it was not open to the fourth defendant to question the decree on technical grounds at the stage of the Second Appeal. I am unable to sustain the objection that the plea of the fourth defendant-appellant was belated. As pointed out earlier, the fourth defendant had pleaded in paragraph 5 of the written statement that they were unnecessary party and they had been brought on record without proper notice. It was also further pleaded that the suit was bad for mis-joinder of parties and causes of action. In the appeal before the lower appellate Court also the said objection has been raised by the fourth defendant in ground No. 22 of the grounds of appeal. Before this Court also at the instance of the fourth defendant/appellant a substantial question of law has been raised in the context of Order VIII-A, C.P.C.

10. It is generally accepted that the plaintiff is the master of his own action (*dominus litis*) and that he cannot be compelled to fight and against whom he does not claim any relief. He cannot be asked to expand the scope of the frame of the suit beyond his own choice and the disputes between the defendants and others cannot be brought into the scope of the claims made by plaintiffs. To this principle, Order VIII-A is incorporated as an exception. The intention behind the said provision is to avoid multiplicity of proceedings and the defendant being compelled to initiate another proceeding to enforce his right to be indemnified by another party. Therefore, the very purpose of the provision being one which is intended to be an exception to the general rule of *dominus litis*, the Code has prescribed an elaborate procedure and had specified certain issues to be determined under Order, VIII-A, C.P.C. The enquiry under Order VIII-A pertains to matters relevant only as between the defendants and another third party and not as between the plaintiff and the third party. A perusal of the said provision discloses that when a defendant claims to be entitled to contribution or for indemnity against a person not already a party to the suit, he has to issue a notice with the seal of the Court stating the nature and grounds of the claim along with a copy of the plaint. The notice shall be served on the third party and on receipt of the notice if the third party desires to dispute the plaintiffs' claim, he has to enter appearance and the Court may pass such decree as the nature of the case may require against the

third party. On the other hand if the third party enters appearance and the Court is satisfied that there was a question to be tried as regards the liability of the third party, the Court may pass any order as the nature of the case may require as provided under Rule 5 of the Order VIII-A. Rule 6 of Order VIII-A, C.P.C. requires that the Court upon hearing the applications mentioned in Rule 5 may give notice to the third party giving liberty to the third party to defend the suit or to appear at the trial and to take part in the proceedings.

11. Therefore, on a plain reading of the various requirements under Order VIII-A, C.P.C. it will be seen that such requirements cannot be substituted by the procedure under Order I, Rule 10(2), C.P.C.

12. The enquiry contemplated under Order I, Rule 10(2), C.P.C. is very narrow and is referable only to the cause of action as projected by the plaintiffs. The very answerability of the third party under Order VIII-A is made dependant on an elaborate enquiry into the objections of the third party under Rule 5 and subsequently by granting leave to defend or under Order VIII-A, Rule 6, C.P.C. All these requirements are not contemplated nor relevant under Order I, Rule 10(2), C.P.C. and therefore, it follows that the rights of the fourth defendant would be very much prejudiced as a result of the failure to comply with the said procedure. Therefore, the contention of the learned Counsel for the respondents/defendants 1 to 3 that the objection was merely technical and that no prejudice has been caused to the fourth defendant, cannot be accepted.

13. Reference was made to a judgment of the learned Judge of this Court reported in AIR 1955 Mad 927, Chockalingam v. Alagammai Achi. Reliance was placed on the said judgment in support of the contention of the respondents that the mere fact that a simple suit for recovery of money would get enlarged in its scope by the addition of third parties, cannot be a ground for refusal of an application under Order VIII-A, C.P.C. Reference was also made to another judgment reported in : AIR1961 Mad367 , R. and C. (PR.) Ltd. v. S.S. Navigation Co., in support of the contention that in order to bring a third party on record under Order VIII-A, it was not necessary that there should be a privity of contract between the plaintiff and the third party.

14. Both the above mentioned judgments relied on behalf of the respondents can have no relevance to the issues under consideration in the present case, having regard to the fact that in both the said rulings, the applicability of Order VIII-A was considered. The issue was not as to whether a third party can be impleaded in the context of a claim of indemnity by the original defendant without following the procedure under Order VIII-A, C.P.C.

15. In contrast, in the judgment of another learned single Judge reported in (1955) 68 Mad LW 371, In re, Thiruvannamalai Adhinam Sri Daivasigamani, the question arose as to whether the procedure followed to implead a third party by filing an application under Order I, Rule 10, C.P.C. was permissible. After considering the scope of various provisions under Order VIII-A, C.P.C., the learned Judge also rejected the request on behalf of the party who wanted the impleadment of the third party, to convert his application under Order I, Rule 10, C.P.C. into an application under Order VIII-A, C.P.C. The learned Judge held as follows :--

'This third party procedure cannot be invoked by this Revision Petitioner in support of his petition because his application was not based upon it, the order of the Court was not based upon it, the grounds of the Revision Petition are not based upon it. If the Revision Petitioner is to obtain the benefit of the third party procedure of which he and his Advocate seemed to have been ignorant in the lower Court, he must resort to the procedure prescribed under Order VIII-A, C.P.C., and not ask me to convert his application under Order I, Rule 10 into an application under Order VIII-A.'

16. Therefore, it follows that as a result of the failure to comply with the procedure under Order VIII-A, C.P.C. the relief granted by the Courts below as against the fourth defendant/appellant in S.A. No. 794 of 1993 cannot be sustained and that to the said extent the judgment and decree of the Courts below have to be set aside. It is open to the respondents/T.N.E.B. to sue the fourth defendant on the warranty, if so advised. The plaintiff is therefore, entitled to recover the amount fixed as compensation by the Courts below from defendants 1 to 3 instead of from the fourth defendant.

17. In the result, both the Second Appeals are allowed and the suit is decreed as prayed for as against defendants 1 to 3. There will be no order as to costs.

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