

IN THE HIGH COURT OF JUDICATURE AT MADRAS

(ORDINARY ORIGINAL CIVIL JURISDICTION)

FRIDAY, THE 13TH DAY OF APRIL 2018

THE HON'BLE MR. JUSTICE N.SATHISH KUMAR

A.No.2053 of 2017
in
C.S.No.50 of 2016

1. M/s. R K M Powergen Private Limited,
No.14/45, DR.Griappa Road, T.Nagar,
Chennai 600017.

2. The New India Assurance Company Limited,
Lage Corporate Cell,
Third Floor, Tarapore Towers,
Door No.826, Anna Salai,
Chennai 600002

...Plaintiffs

Vs

M/s.Globe Forwarding Agencies,
Door No.10-50-54/9, Haritha Arcade,
Third Floor, Opp Lions Clubs,
Ramnagar, Waltair Road,
Visakapatinam-2. And
Having its Registered Head office at:
No.700, Sharada Terrace Plot No.65,
Sector 11, CBD Belapur,
Navi Mumbai 400614
Also at
Flat No.87/88, BBC Villa, 8th Floor,
Door No.65,
Prakasam Salai, Broadway
Chennai 600001
Represented by its Authorised Officer
Mr.S.Srinivasan.

...Defendant

A.No.2053 of 2017:-

M/s.Globe Forwarding Agencies,
Door No.10-50-54/9, Haritha Arcade,
Third Floor, Opp Lions Clubs,
Ramnagar, Waltair Road,
Visakapatinam-2. And
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Navi Mumbai 400614
Also at

Flat No.87/88, BBC Villa, 8th Floor,
Door No.65,
Prakasam Salai, Broadway
Chennai 600001

...Applicant/Defendant

Vs

1. M/s. R K M Powergen Private Limited,
No.14/45, DR.Griappa Road, T.Nagar,
Chennai 600017.

...1st Respondent/1st Plaintiff

2. The New India Assurance Company Limited,
Lage Corporate Cell,
Third Floor, Tarapore Towers,
Door No.826, Anna Salai,
Chennai 600002

...2nd Respondents/2nd Plaintiff

3. Venkatesh Logistics Pvt.Ltd
Ideal Centre, 3rd Floor,
No.9, A.J.C.Bose Road,
Kokatta 700 071.

...3rd Respondent/Proposed Party

Application praying that this Hon'ble Court be pleased to pass an order issue a notice to the 3rd Respondent / Proposed party herein for cross decree/indemnity as contemplated under Order VIIIA Rule 8 of the Code of Civil Procedure, 1908 read with order VA of the Madras High Court Original Side Rules.

This Original application coming on this day before this court for hearing the court made the following order:

This application has been filed by the defendant to implead the third respondent/ proposed party as third defendant and also for cross decree under Order VIII A Rule 8 of Code of Civil Procedure.

2. The brief facts leading to the filing of this application is as follows :

In the month of April 2012, the defendants service was engaged by the plaintiff to take care of the customs clearances and to transport a consignment from Vishakapatnam to Karsia, Chattisgarh. Accordingly, the applicant approached the third respondent to transport the consignment from Vishakapatnam to Karsia, Chattisgarh. After the consignment reached Vishakapatnam, the defendant had issued two consignment notes dated 24.04.2012 and the same specifies that the disputes arising out of the consignment notes will be subject to the jurisdiction of Mumbai. The proposed party, who is the actual carrier, accepted the contract for safe carriage by road and issued two lorry receipts dated 24.04.2012. Accordingly, the subject cargo in the consignment was loaded in two trailer trucks from Vishakapatnam to Karsia, Chattisgarh.

3. The proposed party is the actual road carrier and the applicant was not involved in loading the cargo on the lorry of the proposed party. When the consignment reached the destination on 02.05.2012, the plaintiff contended that certain boxes were missing. In this regard, a police complaint also lodged by the proposed party in Rajgarh Police station on 03.05.2012. Thereafter, the plaintiff have unilaterally appointed a Surveyor and the Surveyor has provided a Survey Report dated 31.07.2013, without providing any reasons, attributed the cause of loss to theft by miscreants with the connivance of the driver of the third respondent/proposed party. Now the plaintiff has filed this suit against the applicant. It is the contention of the applicant that the proposed party alone is liable and no question of liability whatsoever of this defendant arise. Therefore, he has filed this application to implead the third respondent as third defendant and also for cross decree.

4. The brief contentions of the counter filed by the proposed party / third respondent is as follows :

The contention of the proposed party is that as per the terms of the consignment note cum delivery challan, all the disputes are subject to the Courts at Kolkatta and this Court does not have jurisdiction to entertain any dispute between the applicant and this respondent. The consignment was to be transported from Vishakapatnam to Karsia, Chattisgarh. The proposed party did not carry on any business within the jurisdiction of this Court and in the consignment note cum delivery challan, it is specifically stated that the dispute is subject to Kolkatta jurisdiction. It is his further contention that the claim of the applicant is also barred by limitation. Hence, prayed for dismissal of this application.

5. The learned counsel for the applicant submits that the lorry receipt issued by the proposed party and the endorsement clearly show that the consignment was lost only during transit by the proposed party. In this regard, legal notices have also been issued and the suit notice is also received by the proposed party and the assessment is also made in the presence of proposed party to assess the loss caused to the consignment. The plaintiff has filed a suit after obtaining the leave, though the consignment note issued by the applicant/defendant clearly specifies that the disputes arose out of the consignment will be subject to the jurisdiction of Mumbai. Whereas, the suit has been laid after obtaining leave. The jurisdiction aspect is mixing in question of law. The question of facts and law cannot be decided at this stage and this application has been filed after the defendants was put on notice by the plaintiff within the limited period and submitted that the proposed party has to be brought on record so that the defendant can seek cross decree against the third respondent, since they are actual carrier and they are liable to pay the suit claim and the damage occurred when the consignment was in their custody. In support of his

contentions, he has also relied upon the judgment reported in **1962 (1) MLJ 246 [P.S.Pattabiraman and others Vs. Ganapathy Kannappa Mudali and others]**.

6. The learned counsel for the proposed party/third respondent submitted that there is no privity of contract between the plaintiff and the third respondent, namely, the proposed party and the suit has been laid as against the applicant herein for recovery of money for the loss of cargo and the proposed party did not carry on any business within the jurisdiction of this Court and the consignment note issued by the proposed party was accepted by the applicant wherein both the parties specifically agreed to have the disputes resolved within the Kolkatta jurisdiction. Hence, it is the contention of the learned counsel that the proposed party cannot be made liable for damages and no cross decree can be passed. Further, it is the contention of the learned counsel that the suit is barred by limitation. The alleged cause of action arose only in the year 2012. But this application has been filed in the year 2017. In support of his contentions, he has also relied upon the judgment reported in **2008 [3] CTC 823 [Danmar Lines rep. By Local Agents Vs. Vetas RRB India Ltd]** and judgment reported in **2011 [5] LW 827 [Danmar Lines rep. By Local Agents Vs. Vetas RRB India Ltd.]**.

7. Now the points arises for consideration is
Whether the third respondent is to be impleaded in the suit for the purpose of cross decree.

8. The suit has been laid by the plaintiff for claiming recovery of a sum of Rs.84,13,773/- due to the loss of the consignment during transit. The applicant was originally entrusted to clear the consignment from

Vishakapatnam to Karsia, Chattisgarh. The applicant/defendant has issued two consignment notes bearing Nos.1697 and 1698 dated 24.04.2012 in two trailer trucks. While the consignment reached the destination on 02.05.2012, it was found that some of the boxes were found open and broken and the contents were damaged. Therefore, the plaintiff has laid the suit against the applicant/defendant for recovery of the amount as stated above. The defendant filed the written statement and also filed an application to implead the third party for cross decree under Order VIII A Code of Civil Procedure.

9. It is the main contention of the defendant that the proposed party is the actual carrier and accepted the contract for safe carriage by road and issued two lorry receipts dated 24.04.2012. The factum of issuing of lorry receipts dated 24.04.2012 by the proposed party is not in dispute. A copy of the lorry receipt filed in the typed set shows that the proposed party has issued the lorry receipts and the same specifies that the dispute shall be subject to the Kokatta jurisdiction. The endorsement on the backside of the lorry receipt shows that some of the consignments were found damaged at the time of delivery. These facts are not in dispute. It is the main contention of the applicant that since the proposed parties had issued lorry receipts and the damage to the consignment has occurred during transit and the third party is the actual carrier and they are necessary party and they are actually liable and the defendants seek a cross decree against them.

10. Though the proposed party has issued lorry receipts on 24.04.2012, the same specifies that all the disputes shall be subject to the jurisdiction of the Kokatta High Court and the parties to the contract has accepted the specific place of jurisdiction. The question remains whether any such party can file a suit outside the

jurisdiction agreed upon between them. In this regard, it is useful to refer the judgment reported in **2008 (3) CTC 823** in which the learned Single Judge, V.Ramasubramanian (as he then was) has held as follows :

"In the light of the aforesaid decisions, I am of the considered view that the defendant is bound by Clause 12 of the Sea Way Bill, relating to law and jurisdiction. As pointed out by Srinivasan, J., in Roy Chatterjee (Private) Ltd's case, Rule 2 of Order 8-A reats the claim made by the defenda t against the third party, as if it is a suit duly instituted in the ordinary way by the defendant. Therefore, the restrictions that would apply to the third party procedure. In other words, the right to sue, if circumscribed by an agreement valid in the eye of law, would not get enlarged merely because of the availability of an additionally remedy under Order 8-A C.P.C.

26. As a matter of fact, the very scheme of Order 8-A C.P.C., makes he following things very clear :

(a) The last portion of Rule-2 of Order 8-A says "as if he had been duly sued in the ordinary way by the defendant'. Therefore in a third party procedure, the defendant initiating the same is treated as the plaintiff and the third party is treated as the defendant. Hence, third party procedure does not supercede the contract between the defendant and the third party.

(b) Rule 4 of Order 8-A makes it clar that if the third party does not enter

appearance, a decree may be passed against such third party, depending upon any decree passed by consent or otherwise in favour of the plaintiff. However, the execution of the decree against the third party is made subject to the condition that it shall be made only with the leave of the Court after the satisfaction of the decree passed against the defendant in the first instance.

(c) Rule-5 of Order 8-A enables the third party to contest the claim for contribution or indemnity on merits. If it is so contested, the Court is given the liberty to try any question of liability of the third party to the defendant "at or after the trial of the suit". This means that the determination of the issues in the Suit as between the plaintiff and the defendant precedes the determination of the issues between the defendant and the third party.

27. Thus, it is clear that Order 8-A C.P.C. Provides only an additional remedy to a defendant who is entitled to contribution or indemnity from a third party. It is an enabling provision relating to procedure and hence it cannot override the contract between the parties. The contrary view taken by a learned Judge of the Kerala High Court in Kerala Transport Company case, AIR 1971 Ker. 230 does not, with respect, appear to reflect the correct view. The inspiration drawn by the Kerala High Court from Rule 9 of Order 8-A, to come to the conclusion that it did, may not be justified. The third party procedure itself is peculiar only to some of the States, in which the High Courts have issued

amendments in exercise of the power conferred under Section 122 of the Code of Civil Procedure. As stated earlier, Order 8-A C.P.C. Is an adaptation of the English law relating to third party procedure and the English decisions themselves have made it clear that the right to invoke the third party procedure would be subject to the contract between the defendant and the third party. Therefore, I hold that the applicant cannot invoke order 8-A C.P.C. As against the third respondent herein, with whom he had a contract in the form of a Sea Way Bill, Clause 12 of which, excluded the jurisdiction of all Courts other than those specified therein. The only remedy open to the applicant herein is to proceed against the third respondent in accordance with the terms of the Sea Way Bill and the applicant is at liberty to proceed so, independent of the present Suit.

11. It is further to be noted that the above judgment was confirmed by the Division Bench in the judgment reported in **2011(5) Law Weekly 827 [Danmar Lines rep. By Local Agents Vs. Vetas RRB India Ltd.]**.

12. In the judgment in reported in **1962(1) MLJ 246 [P.S.Pattabhiraman and others Vs. Ganapathy Kannappa Mudaly and Others]**, this Court, in para 8, has held as follows :

"But the more important question to be determined is whether the present case comes within Order 8-A, Civil Procedure Code. The claim of the petitioners against the third

parties is that they have fraudulently omitted to give credit to various sums paid by them before the assignment of the promissory note in favour of the respondent. Such, a claim would be in the nature of damages. I do not see how any question of contribution or indemnity can arise on the facts alleged. Mr. Rangaswami Iyengar, the learned counsel for the petitioners, referred, in this connection to the decision in *Eastern Shipping Co. v. Quah Bang Lee L.R.* (1924) A.C. 177 and contended that an indemnity need not necessarily be as a result of a contract, but can either be implied or arise by reason of other circumstances. In the case cited above, Lord Wrenbury stated at page 182 :

"A right to indemnity generally arises from contract express or implied, but it is not confined to cases of contract. A right to indemnity exists where the relation between the parties is such that, either in law or in equity there is an obligation upon the one party to indemnify the other. There are, for instance, cases in which the state of circumstances, is such that the law attaches a legal or equitable duty to indemnify arising from an assumed promise by a person to do that which, under the circumstances, he ought to do. The right to indemnify need not arise by contract; it may (to give other instances) arise by statute; it may arise upon the notion of a request made under circumstances from which the law implies that the common intention is that the party requested shall indemnified by the

party requesting him; it may arise (to use Lord Eldon's words in *Waring V. Ward* 7 Ves. 332, 336, a case of vendor and purchaser) in cases in which the Court will ' independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation of the vendor."

13. There is no dispute with regard to the above judgment. But in the present case, there is no privity of contract between the plaintiff and the proposed party and the fact remains that there is a specific contract between the applicant and the third party wherein they have agreed to have all the disputes resolved only at Kolkatta Jurisdiction. When there is a privity of contract and the jurisdiction is restricted to a particular place, the third party cannot be impleaded in the Court where it has no jurisdiction at all. It is well settled that any claim made against the third party should be treated as a suit duly instituted in the ordinary way by the defendant. Therefore, necessary condition would be that the contract between the parties with regard to the jurisdiction would be applicable. In case such suit being filed, the same procedure equally would be applicable in case of third party proceedings also. Therefore, when there is a specific contract between the parties submitting the jurisdiction to the other Courts, such third party cannot be brought on record by invoking Order 8A Code of Civil Procedure in a different Court where cause of action did not arise at all.

14. In view of the pronouncement in this regard made by the single Judge which has also been upheld by the Division Bench, I am of the view that when there is a specific contract between the parties, the third party cannot be

brought on record in this case. It is further to be noted that the claim made by the defendant against the third party is like a normal suit duly instituted in an ordinary way by the defendant. This includes, the suit to be laid within the period of limitation. The legal notice was issued on 10.01.2013 to the proposed party which was replied by the proposed party by repudiating the contention of the applicant. Even after such reply, no suit whatsoever filed by the applicant/defendant against the third party. Whereas, for the first time, he has filed this application only in the year 2017, after a period of three years. It is not the case of the applicant that he is not aware of the loss of the consignment. At the earlier point of time, he was put on notice and thereafter, suit has been filed by the plaintiff. Therefore, this Court is of the view that the claim against the proposed party is also barred by limitation. When the right itself is extinguished by operation of law, the same cannot be revived by invoking the procedure contemplated under Order 8-A Code of Civil Procedure. In view of the above discussion, I find that this application for impleading the proposed party lacks merits.

15. Accordingly, this application is dismissed. No cost.

Sd/.N.S.K.J

13.04.2018

//Certified to be a true copy//

Dated this the day of 2018.

KY/16.05.2018

COURT OFFICER

From 25.09.2008 the Registry is issuing certified copies of the Order/Judgment Decree in this format.