

17 B. 466.

[466] ORIGINAL CIVIL.

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

1893

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FOOLIBAI (*Original Defendant*), Appellant v. RAMPRATAB
SAMRATRAI AND ANOTHER (*Original Plaintiffs*). Respondents.*

[10th March, 1893.]

Practice—Adding a defendant in a suit where leave to sue under cl. 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 Foolibai, alleging that she had a firm and carried on business at Sihore in the territory of Bhopal. Before the suit was filed, leave was duly obtained under cl. 12 of the Letters Patent, 1865. In her written statement Foolibai 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 named Goolibai, a minor, who was still living. The plaintiff then obtained a summons calling on the defendant Foolibai to show cause why the plaint and proceedings should not be amended by adding the name of Goolibai as a party-defendant. The summons was made absolute, and an order was made to add Goolibai as a defendant. The defendant Foolibai appealed, contending that the effect of adding a defendant would be to institute a new suit against Goolibai without obtaining the necessary leave under the Letters Patent. She relied on *Rampurtab v. Premsukh Chandamal* (1).

Held, dismissing the appeal, that the defendant Foolibai could not appeal against the order making Goolibai a party. It might be that Goolibai might object to the order either before or at the hearing, but she only could take the objection. The defendant Foolibai could not take it for her. The case of *Rampurtab v. Premsukh 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 cl. 12 of the Letters Patent to sue the defendant Foolibai, and so far as she was concerned there was no objection to the form of the suit. If her allegation was true, Goolibai and not Foolibai 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 Goolibai should be made a party defendant to the suit.

The suit was filed on the 12th February, 1892, against the appellant (defendant), Foolibai, alone. The plaint alleged that she had a firm at Sihore in the territory of Bhopal, where she formerly carried on business under the name of Chotamal Ballaram; that the plaintiffs had large dealings with the said [467] 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 cl. 12 of the Bombay Letters Patent, 1865.

On the 15th June, 1892, the defendant Foolibai 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

* Suit No. 76 of 1892.

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1893 *Samvat* 1943, leaving a daughter Goolibai, a minor, and that Goolibai was
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On receipt of the written statement the plaintiffs' attorney asked the defendant to consent to have Goolibai 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 Goolibai, 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 Goolibai 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 Foolibai.

Vicaji, 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—*Rampurtab v. Premsukh Chandamal* (1).

Macpherson, for respondents was not called upon.

JUDGMENT.

SARGENT, C. J.—We do not think that the decision in *Rampurtab v. Premsukh Chandamal* (1) applies to the present case. In that case the amendment which it was proposed to make in the [468] plaint altered the cause of action, and the Court held that under cl. 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 cl. 12 to sue Foolibai; 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 Goolibai, who is still alive. If that be true it is clear that Goolibai 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 Goolibai added as a defendant, so as, if possible, to obtain judgment in this suit against one or the other. It may be that Goolibai 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. Foolibai cannot take it for her. Mr. Justice Farran has ordered that Goolibai should be made a party, and Foolibai 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*.