

## ORIGINAL CIVIL.

Before Mr. Justice Pratt.

JAMSHEDJI F. SHROFF, PLAINTIFF v. HUSSEINBHAI AHMEDBHAI,  
DEFENDANTS.\*

1919.

October 11.

*High Court—Jurisdiction—Receiver—Suit against Receiver without leave of Court—Application for leave after filing of suit—Amendment of title of plaint—Summons—Practice—Costs.*

A suit was filed by the plaintiff against the defendants who were the Receivers of an estate appointed by the High Court in a certain suit. The defendants were not described in the title to the plaint as Receivers of the estate, nor was the leave of the Court first obtained before the filing of the suit. The plaintiff subsequently applied for leave to continue the suit against the defendants as Receivers and to amend the title of the plaint and the proceedings accordingly.

*Held*, allowing the plaintiff's application, that the defect could be cured by leave subsequently granted, if there was no bar to the institution of the suit, that is to the jurisdiction of the Court to admit the plaint.

*Rustomjee Dhanjibhai Sethna v. Frederic Gaebele*<sup>(1)</sup>, followed.

*Chandulal v. Awad bin Umar Sultan*<sup>(2)</sup> and *Narayan Shankar v. Secretary of State*<sup>(3)</sup>, referred to.

PER CURIAM : The necessity for leave to sue the Receiver rests upon two considerations : (1) that such a suit is incompatible with the dignity and authority of the Court ; (2) that it might interfere with the duty of the Court to maintain the Receiver's possession. Neither of these considerations affects the jurisdiction of the Court. They are matters which the Court can deal with after the suit is filed ; and the Court could order the suit to be stayed until it was satisfied that there was no encroachment upon its authority, nor attempt to interfere with the Receiver's possession.

## CHAMBER SUMMONS.

The plaintiff Jamshedji Fardunji Shroff was an estate and coal broker carrying on business in Bombay in the name and style of Fardunji D. Shroff & Co.

\* O. C. J. Suit No. 987 of 1918.

<sup>(1)</sup> (1918) 48 Cal. 352.

<sup>(2)</sup> (1896) 21 Bom. 351.

<sup>(3)</sup> (1906) 30 Bom. 570.

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The defendants, Husseinbhai Ahmedbhai and Khanmahomed\* Cassambhai were the Receivers appointed by the High Court of the estate of Ahmedbhai Habibbhai deceased, in Suit No. 936 of 1914.

The plaintiff alleged in his plaint that he and his father since deceased had, at the request of the defendants, negotiated the sale of the Queen Mills which belonged to the estate of Ahmedbhai Habibbhai, and that he was accordingly entitled to receive Rs. 10,620 as brokerage from the defendants.

Though the defendants were, in the body of the plaint, referred to as being the Receivers of the estate of Ahmedbhai Habibbhai, the title of the plaint did not show that they were sued as Receivers.

The plaintiff had not obtained leave of the Court before the filing of the suit on 16th July 1918. Subsequently, the plaintiff took out a Chamber Summons for leave to continue the suit against the defendants as Receivers and to amend the title of the plaint.

The following affidavit, dated 19th September 1919, was made by the plaintiff in support of his application:—

I, Jamshedji Fardunji Shroff of Bombay, Parsi inhabitant, a coal broker, the sole proprietor of the plaintiff firm above named, residing at Marine Lines within the Fort of Bombay, make oath and say as follows:—

1. That the above suit is filed by me against the defendants abovenamed for brokerage due and payable by them in respect of sale of certain immovable property sold by them to one Mathuradas Gokuldas, brought about by the plaintiff.

2. That the defendants are the Receivers of the estate of the late Mr. Ahmedbhai Habibbhai appointed by this Hon'ble Court in Suit No. 936 of 1914 and the said immovable property belonged to the estate of the said deceased Ahmedbhai Habibbhai.

3. That owing to oversight the defendants have not been described in the title to the plaint as Receivers of the estate of the late Ahmedbhai Habibbhai

and that leave to sue them as such Receivers had not been obtained at the time of the filing of the suit.

4. Under the circumstances I pray that leave may be granted to me to continue the present suit against the defendants as Receivers of the estate of the said Ahmedbhai Habibbhai deceased and to allow me to amend the title of the plaint and proceedings accordingly.

The defendants contended that the plaintiff's application was belated, being made nearly a year and two months after the filing of the suit, and that the only course open to the plaintiff was to withdraw his suit on payment of defendants' costs and to file a fresh suit if so advised. The defendants further submitted that leave cannot be granted after the institution of the suit.

PRATT, J. :—The summons was issued on an application by the plaintiff for leave to continue the suit against the defendants who are Receivers of the estate of Ahmedbhai Habibbhai. The plaintiff claims to have been employed as a broker by the Receivers and sues for his brokerage. It is clear, therefore, that there is a question to be tried and the case is one in which the Court would grant leave as a matter of course: *Lane v. Capsey*<sup>(1)</sup> and *Braja Bhusan Trigunait v. Sris Chandra Tewari*<sup>(2)</sup>.

The only difficulty arises from the fact that *per incuriam* the suit was filed without the previous sanction of the Court. It was held in *Pramanatha Nath Gangooly v. Khetra Nath Banerjee*<sup>(3)</sup> that leave of the Court is a condition precedent to the right to sue and that that omission cannot be rectified by subsequent application. The judgment in that case is not supported by any reasons and was not followed in *Rustomjee Dhanjibhai Sethna v. Frederic Gaebeler*<sup>(4)</sup>. The various statutory provisions which require the

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(1) [1891] 3 Ch. 411.

(3) (1904) 32 Cal. 270.

(2) (1918) 4 P. L. J. 20.

(4) (1918) 46 Cal. 352.

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consent of the Court or some other authority as a condition on which a suit may be maintained are collected in the case of *Chandulal v. Awad bin Umar Sultan*<sup>(1)</sup>. The consideration of those and subsequent authorities shows that the words in the Statute have to be examined in each case in order to ascertain whether the provision is a bar to the Court dealing with the action, or is a bar to the original institution of the suit. In the former case the suit may continue on leave subsequently granted: for instance, the leave of the Collector in a suit to which sections 4 and 6 of the Pensions Act XXIII of 1871 are applicable: *Nawab Muhammad Azmat Ali Khan v. Mussumat Lalli Begum*<sup>(2)</sup>; or leave under Order I, Rule 8 (1), Civil Procedure Code: *Fernandez v. Rodrigues*<sup>(3)</sup>; or leave under section 20, Civil Procedure Code: *Narayan Shankar v. Secretary of State*<sup>(4)</sup>. But in the latter case, that is, when the bar is to the original institution of the suit, leave subsequently granted is of no avail: for instance, the consent of the Advocate General under section 92, Civil Procedure Code: *Tricumdas Mulji v. Khimji Vullabhdass*<sup>(5)</sup>; or the leave of the Court under section 17 of the Presidency Towns Insolvency Act: *In re Dwarkdas Tejbhandas*<sup>(6)</sup>.

In the case of a suit against a Receiver there is no statutory provision requiring the leave of the Court. But the same principle would apply, and the defect can be cured by leave subsequently granted if there is no bar to the institution of the suit, that is to the jurisdiction of the Court to admit the plaint.

The necessity for leave to sue the Receiver rests upon two considerations: (1) that such a suit is incompatible with the dignity and authority of the Court;

(1) (1896) 21 Bom. 351.

(4) (1906) 30 Bom. 570.

(2) (1881) L. R. 9 I. A. 8.

(5) (1892) 16 Bom. 626.

(3) (1897) 21 Bom. 784, F.B.

(6) (1915) 17 Bom. L. R. 925.

(2) that it might interfere with the duty of the Court to maintain the Receiver's possession. Neither of these considerations affects the jurisdiction of the Court. They are matters which the Court can deal with after the suit is filed; and the Court could order the suit to be stayed until it was satisfied that there was no encroachment upon its authority, nor attempt to interfere with the Receiver's possession.

Therefore it seems clear that leave may be granted after the filing of the suit, and Mr. Desai with his customary fairness does not dispute this proposition.

Accordingly, I make the summons absolute but direct that plaintiff pay the costs of the summons. Counsel certified.

Solicitors for the plaintiff: Messrs. *Unwalla Pherojshaw & Pappa*.

Solicitors for defendants Nos. 1 and 2: Messrs. *Payne & Co.*

*Summons made absolute.*

G. G. N.

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*Before Mr. Justice Heaton and Mr. Justice Marten.*

**HARNANDRAI FULCHAND, APPELLANTS AND PLAINTIFFS v. PRAGDAS BUDHSEN, RESPONDENTS AND DEFENDANTS.**<sup>a</sup>

*Contract—Sale and purchase of goods to be manufactured by a Mill—Vendor agreeing to give delivery as and when the goods are received from the Mill—Contract conditional and not absolute—Vendor not bound to deliver goods on failure of the Mill to supply goods—No implied warranty that the Mill would manufacture and supply goods—Implied condition that the Mill would supply goods—Condition failing both parties released from contract—Buyer not entitled to damages.*

<sup>a</sup> Appeal No. 52 of 1919; Suit No. 273 of 1919.

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