1964 *Present :* **Sri Skanda Rajah, J., and Alles, J.**

THE CHARTERED BANK, Appellant, *and* L. N. DE SILVA and others, Respondents

S. C. 19 (Inty.)/1961—D. C. Colombo, 46569/M

Addition of parties—Scope of s. 18 (1) of Civil Procedure Code—Witness—Right to object to being added as a party—Contract of suretyship—Action instituted by guarantor against principal debtor—Non-liability of creditor to be added as a party.

A person who is no more than an important witness in a case is not liable to be added as a party to the case in terms of section 18 (1) of the Civil Procedure Code on the pretext that his presence is necessary " in order to enable the court effectually and completely to adjudicate upon all the questions involved in the action ".

In a contract of suretyship, the principal debtors were the 1st and 2nd defendants, the creditor was a Bank, and the guarantor was the plaintiff. The Bank demanded payment of a sum of Rs. 28,520·02 from the plaintiff, who complied and sued the defendants for the recovery of the sum. The defendants pleaded that the Bank had, in breach of certain terms, wrongly called upon the plaintiff to pay, and that, therefore, the plaintiff was not entitled to recover the sum from the defendants. On the trial date, the plaintiff and the defendants moved to add the Bank as a party to the action under section 18 (1) of the Civil Procedure Code " for the complete and effectual adjudication of all matters in this case ". Although the Bank filed objections, the application of the parties was allowed.

Held, that the Bank was not liable to be added as a party. The cause of action against the defendants was quite different from the cause of action against the Bank. The Bank was undoubtedly a material witness, but the process of the Court was available to the parties to compel the Bank to produce the necessary documents.

APPEAL from an order of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *L. C. Seneviratne* and *D. S. Wijewardene*, for Added-party Appellant.

H. V. Perera, Q.C., with *C. G. Weeramantry* and *V. Martyn*, for Plaintiff-Respondent.

M. Tiruchelvam, Q.C., with *C. D. S. Siriwardene* and *Mark Fernando*, for 1st and 2nd Defendants-Respondents.

Cur. adv. vult.

October 6, 1964. SRI SKANDA RAJAH, J.—

At the conclusion of the argument we allowed the appeal with costs in both Courts and reserved the reasons for a later date. They are set down now.

The facts leading up to this appeal are briefly :—

The two defendants contracted with the Ceylon Government Railway to supply railway sleepers to be imported from Bangkok. For that purpose they caused the Chartered Bank (hereinafter referred to as the Bank) to open a letter of credit in favour of the shippers in Bangkok for a sum of Rs. 68,520·02 with the plaintiff as guarantor. The Bank paid this amount to the shippers and called upon the defendants to pay it. The defendants paid the Bank Rs. 40,000 but failed to pay the balance. Thereupon, the Bank demanded payment of the balance from the plaintiff, who complied and filed this suit against the defendants for the recovery of the Rs. 28,520·02. The defendants filed answer denying liability alleging that they were not under obligation to make good to the Bank the payment made by it to the shippers because the payment was in breach of certain terms. Therefore, the plaintiff was under no obligation to pay the Bank. Therefore, the plaintiff cannot recover it from the defendants. The case was fixed for trial on 29.1.1961 and the parties got ready for it. The defendants filed their list of witnesses and documents in which the Bank was mentioned as witness and also the necessary documents which were in its possession. The plaintiff did likewise. That is to say, the parties realised that the Bank was an important witness because the documents in its possession were vital for the determination of the issues. On the trial date " counsel for both parties agreed that the Bank should be made a party to this action in terms of section 18 (1) (of the Civil Procedure Code) for the complete and effectual adjudication of all matters in dispute in this case ". Thereupon, in total disregard of the appropriate procedure, the Bank was added as the third defendant and summons ordered. The Bank filed objections and they were inquired into. At the inquiry objection regarding procedure was waived. Therefore, that matter does not merit our attention now. After hearing argument into the other objections order was made dismissing them. That order is the subject of this appeal.

The provision regarding the joinder of defendants in the plaint is found in section 14 of the Civil Procedure Code, the relevant portion of which reads :—

> " All persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative, in respect of the same cause of action. "

The corresponding provision in India is in Order I Rule 3 in the first schedule of the Code of Civil Procedure.

The relevant portion of section 18 (1) of the Civil Procedure Code runs thus :

> " the Court may order that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court to effectually and completely to adjudicate upon and settle all the questions involved in the action, be added. "

The corresponding provision in India is part of Order I Rule 10 (2) and that in England is :

> " the Court may order any person whose presence before the Court is necessary to ensure that all matters in dispute in the cause or matter may be effectually and completely determined and adjudicated upon be added as a party. "

Section 18 (1) of our Code, like Order I Rule 10 (2) of the Indian Code, makes a distinction between two classes of persons, viz., persons who ought to have been joined, i.e., necessary parties, and persons whose presence is necessary to enable the Court to completely and effectually to adjudicate upon and settle all the questions involved in the suit, i.e., proper parties. The plaintiff and defendants sought to bring the Bank under the second category.

The plaintiff's cause of action against the defendants arises on a contract of suretyship. His cause of action, if any, against the Bank arises on quasi-contract known as *condictio indebiti*, which is an action for the recovery of money which was not due but which was voluntarily paid under mistake. They are different causes of action. The respondents conceded that the plaintiff could not have filed action joining the defendants and the Bank under section 14. If he could not do so he cannot be permitted to achieve it indirectly by seeking the Court's intervention under section 18 (1).

If the plaintiff instituted the suit joining the defendants and the Bank uniting the two causes of action it would have been open to the defendants and for the Bank to raise the plea of misjoinder of parties and causes of action. Then the plaintiff would have had to amend his plaint and elect as to the party against whom he would proceed; otherwise his action will be dismissed : *Kanagasabapathy v. Kanagasabai et al.*[1] ; *Sivakaminathan v. Anthony et al.*[2] ; *Grace Fernando et al. v. Fernando*[3].

To add the Bank under the provisions of section 18 (1) would result in misjoinder of parties and causes action. If joinder of defendants is impossible under section 14 it does not become possible under section 18 (1).

It is relevant to mention that in *Chidambaram Chettiar v. Subramaniam Chettiar and others*[4] it was held that if joinder of plaintiffs is impossible under Order I Rule 1 (which corresponds to the first part of our section 11 regarding joinder of plaintiffs) it does not become possible under Order I Rule 10 (our section 18 (1)).

In our view sections 14 and 18 (1) should be read together.

When an application is made under section 18 (1) to add a party what the Court ought to see is whether there is anything which cannot be determined owing to his absence or whether he will be prejudiced by his not being joined as a party (vide *Vattam Ramakrishnayya v. Vattini Satyanarayana and others*[5]).

[1] *(1923) 25 N. L. R. 173.*
[2] *(1935) 3 C. L. W. 51.*
[3] *(1937) 9 C. L. W. 99.*
[4] *A. I. R. 1927 Madras 834.*
[5] *A. I. R. 1929 Madras 291.*

In the present case there is nothing that cannot be determined in regard to the contest between the plaintiff and the defendants owing to the absence of the Bank as a party defendant. The process of the Court is available to the plaintiff and the defendants to compel the Bank to produce the necessary documents.

The respondents strenuously argued that in order to avoid multiplicity of actions the Court properly exercised its discretion in adding the Bank as party defendant. Certain English and Indian cases in which persons who sought intervention were added were cited in support.

In *Vydianadayyan v. Silaramayyan*[1] the ground for intervention was that the debt sued was due to the joint family of which the intervenient and the plaintiff were members and not merely the plaintiff. The intervenient had already filed an earlier suit against the same defendant on the basis that the debt was due to the joint family and it was pending when the plaintiff sued the defendant on the basis that it was a personal debt due to him.

In 5 Madras 52 (*supra*) the learned Judges said, " Is it meant by these words that a person not originally impleaded is to be made a party only if the questions raised in the suit cannot otherwise be completely and effectively determined between the parties to the suit ? or is it meant completely and effectively determined so that they shall not be again raised in that or in any other suit between the parties to the suit or any of them and third parties ? To accept the more restricted interpretation involves the addition of words which we do not find in the section, namely, ' between the parties to the suit '." This was referred to in the two cases which now follow.

In *The Secretary of State v. Murugesa Mudaliyar*[2], the Government of Madras sought intervention. It was a case in which the plaintiff sued the District Board and its President for a declaration that he was duly elected member by a resolution of the Board. Intervention was allowed on the ground that the Government was a proper party to the suit inasmuch as it was given power over the Board and to suspend execution of any resolution.

Parasuram Mangacharyulu v. Parasuram Krishnamacharyulu[3] : This was a suit for declaration of title to certain rights and the intervenient claimed joint interest in those rights with one of the plaintiffs and denied the title of the other plaintiff. The genealogical table reproduced in the judgment shows this clearly.

In the last two cases reference was made to *Montgomery v. Foy*[4], which was an action by a ship-owner for a declaration that he was entitled to freight against a consignee of the goods who had no property in the cargo and it was held that the shippers of the cargo who applied to be added as defendants were proper parties and that they should be added in order that they might counter-claim against the plaintiffs damages for short delivery and injury to cargo. Lord Esher, M.R.,

[1] *5 Madras 52.*
[2] *A. I. R. 1940 Madras 225.*
[3] *A. I. R. 1929 Madras 443.*
[4] *(1895) 2 Q. B. 321.*

said in *Montgomery*, " Then comes the question whether, for the purpose of preventing the useless and expensive formality of having two separate actions, the Court may not add the owners of the cargo as defendants in the original action and so settle the whole matter in one action and in one trial". He explained that it was one of the great objects of the Judicature Acts that where there is one subject-matter out of which several disputes arise all parties should be brought before the Court and all disputes should be determined in one and the same action.

The contrary view had been taken earlier by Coleridge, C.J., in *Norris v. Beazley*[1]. Lord Esher said in *Montgomery* (*supra*), " With regard to the case of *Norris v. Beazley*, it is to be observed that it was decided at an early stage of the decisions with regard to the meaning of the Judicature Acts, and though I do not say that the actual decision was wrong, I do not think that all the statements made in the judgments could now be supported".

As pointed out by Devlin, J., in *Amon v. Raphael Tuck & Sons Ltd.*[2], " In this case (*Montgomery*) the plaintiff was, in substance, suing the intervener because he was the person, as Lord Esher, M.R., said who made the contract of affreightment and out of whose pocket the freight came".

We would observe that there is often danger in acting on the principle stated in a decision without reference to the facts in respect of which it came to be so formulated.

In *Amon* (*supra*) at 279 Devlin, J., said " It is not, I think, disputed that ' the cause or matter ' (in the relevant English rule) is the action as it stands between the existing parties. If it were otherwise, then anybody who showed a cause of action against either a plaintiff or defendant could, of course, say that the question involved in his cause of action could not be settled unless he was made a party. "

In *Amon* (*supra*) Devlin, J., after exhaustively reviewing the authorities beginning from *Norris* (*supra*), held himself bound to decide against the view expressed by Esher, M.R., in *Montgomery* (*supra*). The view expressed by Devlin J., has found acceptance in *Miguel Sanchez and Compania S. L. v. Result et al.*[3] and *Fire, Auto and Marine Insurance Co., Ltd. v. Greene*[4].

The more restricted interpretation referred to in the last mentioned case has found favour in recent decisions. The Indian cases following 5 Madras 52 and *Montgomery* (*supra*) can no longer be regarded as expressing the correct interpretation of the provision under consideration.

In all these cases the intervention was sought by a third person. But in the present case both parties to the suit seek to add a party, who resists the application.

In *Kumarihamy v. Dissanayake et al.*[5], an important witness, as in this case, was held to have been wrongly added.

[1] *(1877) 35 L. T. 846.*
[2] *(1956) 1 A. E. R. 273 at 278.*
[3] *(1958) P. 174.*
[4] *(1964) 2 A. E. R. 761.*
[5] *(1936) 37 N. L. R. 345.*

We cannot help observing that this interlocutory appeal from an order adding a party has taken three years and eight months for disposal, with the inevitable consequence of delaying the final disposal of the suit itself.

ALLES, J.—

I have had the advantage of reading the judgment proposed by my brother Sri Skanda Rajah, J. and would like to add my own observations on the question of law that arises for decision in this appeal.

The plaintiff sued the defendants for the recovery of a sum of Rs. 28,520·02 which the former paid to the added party, the Chartered Bank, on behalf of the defendants as guarantor. On the trial date the plaintiff and the defendants moved to add the Bank as a party to the action under s. 18 (1) of the Civil Procedure Code " for the complete and effectual adjudication of all matters in dispute in the case ". Despite the objections of the Bank, the application of the parties was allowed and the present appeal is from that order. My brother has dealt with the merits of the application to which I have nothing useful to add.

Mr. H. V. Perera, Q.C., who appeared on behalf of the plaintiff relied on the Indian case of *Parasuram Mangacharyulu and others v. Parasuram Balarama Krishnamacharyulu* [1] in support of the proposition that a person may be added as a party to a suit when his presence before the Court is necessary to enable the Court effectually and completely to adjudicate and settle *all the questions involved in the suit and not merely the questions between the parties to the suit.* His submission was that the addition of the Bank as a party to the suit was necessary in this case so that all questions involved in the suit should be adjudicated upon. My brother has demonstrated quite clearly that for the purpose of adjudicating on the matters in issue in the present case it was unnecessary to add the Bank as a party. In the Madras case the learned Judge purported to follow the dictum of Lord Esher in *Montgomery v. Foy, Morgan & Co.*[2] which was a case of a contract of affreightment where the Judge made the general observation " that for the purpose of preventing the useless and expensive formality of having two separate actions, the Court may add the owners of the cargo as the defendants in the original action to settle the matter in one action and at one trial ". The view expressed by Lord Esher has been considered by Devlin, J. in the leading case of *Amon v. Raphael Tuck & Sons*[3]. After dealing with the facts of *Montgomery's case* Devlin J. said that in that case the plaintiff was in substance suing the intervener because he was the person who made the contract of affreightment and out of whose pocket the freight came and therefore the intervener was properly added as a party. In *Amon's case* Devlin J. laid down the principle that the test whether the Court had jurisdiction to add a party

[1] *(1940) A. I. R. Madras 225.*
[2] *(1895) 2 Q. B. 321.*
[3] *(1956) 1 A. E. R. 273.*

depended on whether the order for which the plaintiff was asking in the action might directly affect the added party by curtailing the enjoyment of his *legal rights.* " The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is made a party ".

The principle laid down by Devlin J. has been followed in two later cases—*Miguel Sanchez & Compania S. L. v. Result et al.*[1], and *Fire, Auto & Marine Insurance Co. Ltd. v. Greene* [2].

In the former case the third parties agreed to buy from the plaintiffs 6000/7000 cases of oranges and chartered two ships for the carriage of the oranges to the United Kingdom. The plaintiffs shipped only 1000 cases of oranges and on the arrival of one of the ships, the *Result,* the defendants (the owners of the *Result*) without the production of the bill of lading or the authority of the plaintiffs and in return for and in consideration of an indemnity whereby the third parties agreed to indemnify the defendants against all consequences of delivery, delivered the 1000 cases of oranges to the third parties, who claimed that the property therein had passed to them. The plaintiffs commenced an action *in rem* against the owners of the *Result* claiming damages for breach of contract of carriage under the bill of lading in that the defendants delivered the 1,000 cases of oranges, the property in which had remained in the plaintiffs, without the production of the bill of lading or the authority of the plaintiffs, and alternatively, damages for conversion. The third parties applied for an order to be joined as co-defendants in the action so that they could counter-claim against the plaintiffs claiming damages for breach of contract of sale. This was allowed and the plaintiffs appealed from that order. It was held that with regard to the third parties' counter-claim in respect of the 6000 cases of oranges which were not shipped, the legal rights sought to be asserted by this counter-claim were unaffected by the plaintiffs' claim in the " cause or matter ". It was further held that the only reason which made it necessary to add the name of a party to an action is so that the party may be bound by the result of the trial and the question to be settled must be a question which cannot be effectually and completely settled unless the party is so joined. Inasmuch as the plaintiffs were pursuing a remedy *in rem* against the ship, which, *prima facie,* they were entitled to pursue, it could not be said that the action was not properly constituted and therefore the third parties were not parties who should have been joined in the action in the first instance.

In *Fire, Auto and Marine Insurance Co. Ltd. v. Greene,* the Judge in refusing the third party to be added held that the third party " must at least be able to show that some legal right enforceable by him against one of the parties to the action or some legal duty enforceable against him by one of the parties to the action will be affected by the result of the action ".

[1] *(1958) Probate 174.* [2] *(1964) 2 A. E. R. 761.*

I therefore agree that the principle laid down in *Amon's case* and followed in the later decisions should be preferred to the broad generalisation of Lord Esher in *Montgomery's case.* Otherwise as Devlin J. remarked in *Amon's case* " anybody who showed a cause of action against either a plaintiff or defendant could, of course, say that the question involved in his cause of action could not be settled unless he was a party ".

Applying therefore the principles laid down by Devlin J. and followed in the later English cases to the facts of the present case what are the legal rights of the Bank which can be affected by the result of the action between the plaintiff and the defendants ? The plaintiff is suing the defendants on a contract of suretyship for monies which the plaintiff paid to the Bank on behalf of the defendants. The Bank is not interested in the result of the action as all the monies advanced by them on behalf of the defendants have been recovered. The result of the action between the plaintiff and the defendants cannot in any way affect the legal rights of the Bank.

The Bank would undoubtedly be a material witness in the suit between the parties and as my brother has remarked " the process of the Court is available to the parties to compel the Bank to produce the necessary documents ". In disallowing an application to add a party under Section 18 (1) of the Civil Procedure Code, Dalton S.P.J. in *Kumarihamy v. Dissanayake* [1] said " the presence of Dissanayake (the added party) as a party was quite unnecessary for the purpose of enabling the Court effectually and completely to adjudicate upon and settle all the questions involved in the action. He was clearly an important witness ". The same considerations apply in the present case.

Appeal allowed.