

**THE LABOUR OFFICER for  
and on behalf of ABDUL KHAN**

v.

**VUNIMOLI SAWMILL LIMITED &  
DOMINION INSURANCE LIMITED**

[HIGH COURT, 1996 (Fatiaki J) 5 July]

Appellate Jurisdiction

*Practice: Civil- Magistrates' Courts third party proceedings- procedure governing- relationship between plaintiff and third party. Magistrates' Courts Rules (Cap. 14) Order III rule 8.*

A defendant in the Magistrates' Court issued a third party notice to which a defence was filed. The defendant failed to apply to the Court for directions. The Resident Magistrate gave judgment for the plaintiff without hearing the third party. The High Court set the judgment aside. It emphasised the need to comply with the provisions of Order 16 of the High Court Rules and pointed out that judgment for the plaintiff simpliciter did not render the third party liable.

Cases cited:

*Carpenter v. Ebbelwhite* [1939] 1 K.B. 347

*Eden v. Weardale Iron and Coal Company* (1887) 35 Ch.D. 287

*Edison & Swan United Electric Light Company v. Holland* (1889) 41 Ch.D. 28

Interlocutory application in the High Court.

*M.B. Patel* for Third Party

*V. Parshuram* for Respondent

**Fatiaki J:**

This is an application by the Third Party pursuant to Section 22(4) of the Workmen's Compensation Act (Cap.94) for an extension of the time within which an appeal may be lodged against an order of the Magistrates' Court awarding compensation under the Act.

The action has a rather chequered history which I do not propose to set out having regard to what transpired at the hearing of the application and the concession made by learned counsel for the respondent.

Suffice it to say that the action was begun in March 1994 by way of a claim under the Act instituted in the Labasa Magistrates' Court by a Labour Officer on behalf of an employee of the defendant company. (see : Section 2(4) of the Act.)

The insurance company was subsequently joined by the defendant company in

A May 1994 as a Third Party to the proceedings insofar as the defendant company claimed that there was in existence a policy of insurance which rendered the Third Party liable to indemnify the defendant company against any liability under the Act.

On 14th June 1994 the Third Party filed a Statement of Defence denying any liability under the policy on the ground of cancellation on account of non-payment of premiums and material non-disclosure.

B At this point I digress to observe that the Magistrates' Court Rules makes no specific provision for the service of Third party Notices and accordingly any such application must be guided by Order 16 of the High Court Rules (see : Order III r.8 of the Magistrates' Court Rules). In this regard I note that the relevant leave was sought and granted ex-parte on a wholly inadequate affidavit. (see : Order 16 r.2(2) High Court Rules)

C Further and although a Statement of Defence was filed by the Third Party, there was a complete failure to comply with the requirements of Order 16 r.4 which required the defendant company to issue a summons seeking the Court's directions as to the future conduct of the proceedings to be followed by the Third Party..

D In my view, this failure contributed significantly to the trial magistrate's erroneous order set out in the next paragraph, and demonstrates a clear misconception on his part as to the true nature of a Third Party proceeding.

E On 28th August 1994 the action was heard in the absence of any representative of the Third Party and on 21st September 1994 judgment was delivered in the Labasa Magistrates' Court in the following terms :

"In the circumstances I enter judgment in favour of the applicant against the third party insurance company in the sum of \$12,000."

F Quite plainly no judgment or order was made against the defendant company as the employer under the Workmens Compensation Act and therefore under its insurance policy with the Third Party there has been no judgment whereby to adopt the policy wording : "the Insured (i.e. the defendant company) shall be liable to pay compensation for injury (by accident) under the Workmen's Compensation Ordinance 1975".

G Accordingly, in my view a condition precedent to the Third Party's contractual liability to indemnify the defendant company under the policy has not been fulfilled, despite the apparent success of the Labour Officer's application for compensation under the Act.

In *Carpenter v. Ebbelwhite* (1939) 1 K.B. 347 Greer L.J. in upholding an order striking out a claim for a declaration against the defendant's insurers who were joined as a co-defendant, said at p.357 :

"It has never been determined that in an action by a plaintiff against

a defendant there can be a claim by the plaintiff for a declaration of liability against a third person for the relief claimed in the action where no dispute has as yet arisen between the plaintiff and that person ... It seems to me that no dispute can arise between the plaintiffs and the insurance company until after the disposal of the action of the plaintiffs against the defendant in favour of the plaintiff and the establishment of a right of indemnity by (the Respondent) against the insurance company.”

A

Somewhat similarly in this case the Third Party was brought into the proceedings by the defendant company not the applicant, and although it has filed a Statement of Defence, a cursory reading of it indicates beyond a doubt that it is strictly limited to defending the defendant's claim to a right to be indemnified under an insurance policy issued by the Third Party.

B

In none of papers before the trial magistrate was any claim made by the applicant against the Third Party nor, by any stretch of the imagination could there be said to have been an identity of interest between the defendant and the Third Party in defending the applicant's claim, indeed, the defendant company appears to have conceded liability under the Act.

C

Thereafter the Third Party sought a stay of execution pending an application to set aside judgment with unconditional leave to defend the proceedings (whatever that latter phrase may mean). The trial magistrate despite opposition, granted a temporary stay of execution on the 20th of October 1994 until 30th November 1994.

D

Six months later in June 1995 a *writ of fieri facias* was issued against the Third Party and this was sufficient to provoke the Third Party to apply to the Labasa Magistrates' Court for an extension of time to appeal. That application was refused in a written ruling delivered by the trial magistrate on 16th August 1995. Stay of execution was nevertheless continued until 20th October 1995, on which day, a further extension of the stay was refused.

E

Thereafter the Third Party sought and obtained a High Court Order in Suva suspending the *writ of fieri facias* on 16th February 1996 until further order, and pending the determination of an application to the High Court seeking unconditional leave to appeal against the trial magistrate's original judgment.

F

Subsequently and despite the application for extension of time to appeal being extant, counsel for the Third Party issued a further summons on the 3rd of April 1996 seeking an extension of time to appeal against the judgment and two further interlocutory orders made by the trial magistrate, the first, on 20th October 1994 refusing any further extension of the stay of execution, and then on 16th August 1995, an order refusing an extension of time to appeal. So much then for the background to the present application.

G

On 3rd April 1996 counsel appeared in Chambers and learned counsel for the Third Party took a preliminary point that the judgment of the trial magistrate

A was highly irregular insofar as it purports to give judgment against the Third Party in favour of the applicant when there was neither any privity between them either in contract or even in the substantive action insofar as the Third Party was joined by the defendant company.

B Learned counsel for the defendant company despite being taken by surprise, drew the Court's attention to several paragraphs of the trial magistrate's judgment immediately preceding the order complained about, where the learned trial magistrate dealt with and dismissed the Third Party's defence, and held, : "... that the third party insurance company is liable to compensate the workman for the injuries suffered by him."

C Counsel submitted that although the trial magistrate's phraseology may have been unfortunate in the circumstances, nevertheless, in the absence of any clear prejudice to the Third Party, the end result would have been the same.

I confess that I was initially unimpressed with this preliminary point however on further consideration I am constrained to agree with it.

The headnote to Eden v. Weardale Iron and Coal Company (1887) 35 Ch.D. 287 correctly describes the position of a Third Party in an action where it states :

D "Persons who are served by a defendant with a third party notice are not thereby made defendants ... nor do they become defendants by putting in a Statement of Defence."

E Finally, in Edison & Swan United Electric Light Company v. Holland (1889) 41 Ch.D. 28 where the plaintiff in a successful appeal sought costs and an injunction against a nominal third party and also to amend the action to make them defendants to the action, Cotton L.J. in refusing the application said at p.30 :

"That, however, would, I think, be wrong because the third parties are not in reality defendants.

F If a plaintiff has a direct claim against a third party his proper course, as soon as that is known, is to amend the Statement of Claim, and make the third party a defendant, and then the Court has all jurisdiction as against that defendant, which is gained by serving him with a writ and bringing him in as a party to the action ... It is, of course, not desirable that there should be unnecessary litigation. But I do not see that for that reason the Court could assume a power which, in my opinion, it has not got."

G In light of the foregoing I am constrained to agree with learned counsel for the Third Party's preliminary objection. The order of the trial magistrate must be and is hereby set aside and the case is remitted to the Magistrates' Court with an order that a new file be opened and the case retried before a different magistrate.

*(Application dismissed; matter remitted to the Magistrates' Court.)*