

(1939) 10 BOM CK 0023

In the Bombay High Court

Case No : Letters Patent Appeal No. 11 of 1938

Abdul Latif Gulam Nabi Patil

APPELLANT

Vs

The Jawhar State

RESPONDENT

Date of Decision : 04-10-1939

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 3 Rule 2, 85

Citation : AIR 1940 Bom 172 : (1940) 42 BOMLR 262

Hon'ble Judges : Wassoodew, J; Indarnarayan, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Wassoodew, J.—This is a Letters Patent Appeal from a decision of Mr. Justice Sen in second appeal No. 133 of 1935. The material facts can be shortly stated. The suit was instituted on behalf of the Jawhar State to recover a sum of Rs. 1,950 as the balance due for the price of certain jungle sold by the State to the defendant. The plaint was presented¹ in Court signed by a Daftardar of the State. The defendant contended that the Daftardar had no authority to sue on behalf of the State and that contention was upheld by the trial Court which dismissed the suit on October 5, 1933. It seems that subsequent to that date at the request of the person appointed to carry on the administration of the State, which was communicated to the Governor-General in Council through the Political Agent and Resident at Baroda, the Central Government in the exercise of their power u/s 85 of the CPC appointed the Administrator of the Jawhar State to prosecute or defend on behalf of the State the civil suit filed against the defendant. That authority is dated January 29, 1934. In the meantime upon the dismissal of the suit the Daftardar had presented an appeal to the District Judge on November 14, 1933, and while that appeal was pending the authority from the Central Government was produced before the Appeal Court on February 17, 1934, and the Court was asked to treat the proceedings taken prior thereto as having been validated by the subsequent authority. The Appeal Court thought

that the authority obtained after the dismissal could, not have that effect as the claim was already barred by then. It accordingly dismissed the appeal. In second appeal Mr. Justice Sen, relying upon *Maharaja of Rewah v. Swami Saran* ILR (1903) All. 635, thought that the production of the sanction or certificate of appointment validated the previous proceedings, inasmuch as in his view the claim when the authority was presented in Court had not been barred by time. With regard to the further question whether the Daftardar was properly appointed to institute the proceedings, Sen J. held that as the appointment made by the Government of India, though subsequent to the date of the suit, validated the prior proceedings, the appointment by the Administrator of the Daftardar to file the suit on behalf of the State would also be validated although it was made prior to the Administrator's own appointment. He further held that Sub-section (3) of Section 85 of the CPC did not require the authority or appointment to be made in writing, and could be implied or presumed from the Administrator's allowing the litigation on behalf of the State to be continued by the Daftardar. The appeal was accordingly allowed and the plaintiff given a decree for the claim made.

2. The question that has been presented to us in this appeal is whether a suit instituted on behalf of a Ruling Prince or an Indian State by a person who is not an authorised agent under Order III, Rule 2, and without the authority required by Section 85 of the Civil Procedure Code, is a defective suit and must be dismissed, and whether a subsequent authority obtained u/s 85 for the first time after the presentation of the appeal upon dismissal of the suit could cure that defect. Section 85 provides as follows :-

(1) Persons specially appointed by order of the Government at the request of any Sovereign Prince or Ruling Chief, whether in subordinate alliance with the British Government or otherwise, and whether residing within or without British India, or at the request of any person competent, in the opinion of the Government, to act on behalf of such Prince or Chief, to prosecute or defend any suit on his behalf, shall be deemed to be the recognized agents by whom appearances, acts and applications under this Code may be made or done on behalf of such Prince or Chief,

(2) An appointment under this Section may be made for the purpose of a specified suit or of several specified suits, or for the purpose of all such suits as it may from time to time be necessary to prosecute or defend on behalf of the Prince or Chief.

(3) A person appointed under this Section may authorize or appoint persons to make appearances and applications and do acts in any such suit or suits as if he were himself a party thereto.

3. Obviously the provisions of that Section enable a, Sovereign Prince or Ruling Chief to institute a suit in British Indian Courts through his own agent, and that agent in order to enable him to make or do appearances, acts and applications

must be specially appointed so that he could be regarded as a recognized agent for the purpose of the Code. There can be no question that there is an alternative remedy open to the Sovereign Prince or the Ruling Chief to institute a suit in his own name or follow the procedure prescribed in Order III, Rule 2, of the Civil Procedure Code, which according to the rules specially framed by this High Court would require a general power of attorney in the agent to institute a suit on behalf of the Prince. It has been admitted before us, and it is a finding of Mr. Justice Sen, that there was no recognized agent who could sue on behalf of the Sovereign Prince or Ruling Chief until the special appointment was made by the order of January 29, 1934. A suggestion was made in the trial Court and also in the Court of first appeal that inasmuch as the Administrator had authorised the Daftardar to file the suit, the special appointment contemplated by Section 85 could be dispensed with. That suggestion was clearly not well founded. Upon the record therefore it might safely be assumed that there was no special appointment of a recognised agent for the purpose of the suit until after the appeal was filed from the order of dismissal by the trial Court.

4. While it is said for the defendant-appellant that the defect is vital and goes to the root of the claim, it is suggested on behalf of the plaintiff-respondent, the Jawhar State, that it is an irregularity which could either be condoned or cured by a proper amendment of the plaint even at this stage. The provisions of Section 85 like those of Sections 86 and 87 are specially enacted for a privileged class of persons such as a Sovereign Prince or a Ruling Chief who are parties to suits or legal proceedings. That special provision is beyond question supplementary to the ordinary rule. Therefore when there is a special rule conferring privileges on a special class of litigants, that rule must be strictly observed. (See Maxwell on the Interpretation of Statutes, 7th edn., p. 257.) In *Venkatrav Raje Ghorpade v. Madhavrav Ramchandra* ILR (1886) 11 Bom. 53 a suit was brought by the Political Agent, as administrator of the estate of the Chief of Mudhol in ejectment, and the objection taken, that he was not a recognised agent within the meaning of Section 37 and that he was not nominated by Government u/s 432 (which corresponds to Section 85) of the old CPC at the request of the Chief, was upheld by the Court on the ground that the Political Agent did not properly represent the Chief. No question arose in that case of removing the defect by subsequent authorisation nor can it be presumed that the Court would have allowed that to be done if an application were made in that behalf. That decision would, in my opinion, be a clear authority in support of the appellant.

5. In dealing with similar provisions in Sections 86 and 87 of the Civil Procedure Code, our Courts have observed that the consent of the Government of India to institute an action or a proceeding against the Sovereign Prince or a Ruling Chief must be obtained before the institution of the suit, and that the consent given after the institution of the suit is not sufficient consent u/s 86. Those provisions, it may be remembered, provide for analogous circumstances. Consequently, on the principle of interpretation of statutes in *pan materia*, where as here words in

the different Sections of the same statute, enacted for a similar purpose, are susceptible of a possibly different construction, one which is approved by considerations derived from the policy of the law has to be adopted. The rule of strict construction was applied in dealing with the provisions of Section 433 (corresponding to Section 86) by Mr. Justice Strachey in *Chandulal v. Awad bin, Umax Sultan* ILR (1896) 21 Bom. 351, where the consent was given by the Governor-General in Council after the commencement of the suit against a Ruling Prince. It was said that the proper course for the Court to adopt, if the consent had not been obtained before the commencement of the suit, was to dismiss the suit or allow the plaintiff to withdraw it with liberty to bring a fresh suit u/s 373 of the CPC (Act XIV of 1882). In that case the question also arose whether the defendant might not by his conduct waive the defect in the consent and the Court thought that he could. That view was not accepted in another case by the Judicial Committee of the Privy Council in *Gaekwar Baroda State Railway Vs. Hafiz Habib-Ul Haq, , P.C.*, where it was stated that the provisions of Sections 86 and 87 could not be waived, for the provisions "were imperative and having regard to the public purpose which they serve they cannot be waived in the manner suggested by the High Court." The provisions of Section 85, as I have stated, serve equally a public purpose and in my opinion must be rigidly followed.

6. But Mr. Justice Sen felt constrained to adopt the view expressed in *Maharaja of Rewah v. Swam Saran*. In that case the Court allowed, on a certificate of authority produced in the course of the trial of the suit instituted on behalf of a Prince, Maharaja of Rewah, the suit to be continued after the plaint was amended and again filed duly verified and signed by the person authorised subsequent to the institution of the suit. It has to be noticed that at the time when the amendment was made and the authority procured, the claim was in time. In this case too the claim was in time when the authority was produced in Court, for we have accepted the view of Sen J. on the question of limitation. Moreover there is no objection taken to that finding. But what distinguishes Maharaja of Rewah's case from the facts of this case is -and it is an important distinction to be remembered-that it had not reached the stage of judgment. Mr. Justice Sen did not think that distinction was important or could affect the decision on the question in issue. With respect it is difficult to agree with him on that point. The view of the Privy Council has now been expressed upon the scope and effect of the special and analogous provisions contained in Section 86 of the Civil Procedure Code. But apart from authority, it seems to me that the defendant upon a defect of this type in the presentation of the plaint was entitled to properly contend that the person representing the Chief had no right to sue him. That plea was sufficient to overthrow the suit for it affected the merits of the case. In other words the plea would be tantamount to saying, as observed by Mr. Justice West in *Venkatrav Raje Ghorpade v. Madhmrav Ramchmdra*, that there are no merits in the claim made against him. Mr. Justice West remarked there as follows (p. 56) :-

As to jurisdiction, the Court, to which a plaint was presented by a person capax

sui, certainly had jurisdiction, in the first instance, to receive it. Whether it set forth a cause of action, or presented some defect which would prevent the suit from being maintained, was a question, to be answered in the exercise of its jurisdiction. But the second question, of whether the Political Agent could maintain the suit, was one affecting the merits of the case as between him as plaintiff and the defendants. If he was not properly representing the Chief, he had no "merits", no right as against the defendants at all.

7. That I think with extreme respect is a correct view to take of the provisions of Section 85 of the Civil Procedure Code. It will therefore not lie in the mouth of the unsuccessful party in the course of appeal to say that he will cure the defect, supply the lacuna and remove the demerits of his case. That could not be done except under special circumstances as provided in Order XLI, Rule 27.

8. It has been argued that such a rigid observation of the rules; of procedure would work hardship and even irremediable harm. But that argument could be applied with equal cogency to the other provisions of the Code. In dealing with the provisions of Section 80 of the Code as to notice of suit against Government or a Government servant, and the decisions of Indian Courts which had adopted the rule *ab incmvenienti* their Lordships of the Judicial Committee observed in *Bhagchand Dagadusa v. Secretary of State for India* (1927) L.R. 54 IndAp 338 : 29 Bom. L.R. 1227 as follows (p. 357) :-

The argument that a statutory provision as to procedure is subject to some exception of cases, where hardship or even irremediable harm might be caused, if it were strictly applied, might be used with equal cogency in connection with a code fixing the admissibility of evidence or with a limitation Section, recognizing rights but barring remedies. For this, however, there is no authority. The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. Sect. 80 is express, explicit and mandatory, and it admits of no implications or exceptions.

9. On the question under consideration several authorities have been cited which it is said suggest that the defect complained of is merely procedural and that the irregularity might be cured. The first case in point referred to was *Uttamram Vithaldas v. Thakordas Parshottamdas* ILR (1921) 46 Bom. 150 : 23 Bom. L.R. 911. There during the plaintiff's absence a servant of the plaintiff signed the plaint and presented it in Court; so also the vakilpatra of the vakil. While holding that the plaint was not duly presented and not duly signed, as it was not established that, the signatory was the plaintiff's recognised agent, the Court observed as follows (P. 152) :-

But we think that if the plaintiff had applied to be allowed to sign the plaint and present it on that day, he should have been allowed to do so.

10. Now that case and other cases cited such as *Basdeo v. John Smidt* ILR (1899) All. 55. In the matter of the petition of *Bisheshar Nath* ILR (1917) All. 147; and *Bombay Baroda and Central India Ry. Co. Ltd. Vs. Siyaji Mills Co., Ltd.* ,

were cases of irregularity in signing and presenting the plaint, and it was held that those defects could not go to the root of the case. A very elaborate discussion on the point is contained in *Basdeo v. John Smidt*, where Sir Arthur Strachey C.J. maintained that an irregularity in the signature of the plaintiff or of a person duly authorised by him in that behalf as required by Section 51 (old Code of 1882) would not necessarily make the plaint absolutely void, and that it could be cured by amendment at any stage of the suit. It is easily intelligible that a signature and verification is a rule of procedure and any defect in signature would not affect the merits of the case. There is considerable body of authority supporting that view for it is one of the defects pointed out in Order III which involve the consequence of rejection of the plaint in the absence of amendment. But it seems to me that it would be wrong to draw a parallel between a case of defect in signature and a case of defect in authority u/s 85. The latter would disable the Ruling Chief under the special provisions enacted for his benefit from instituting a suit. In that view I think if the suit were dismissed, and dismissed on the merits, it could not be cured by a subsequent appointment as has been done in this case. The procedure outlined in *Chartdulal v. Awad bin Umar Sultan* must be followed in such a case.

11. There is another defect which is obvious in these proceedings, and that is by reason of the provisions of Section 85, Clause (3), of the Civil Procedure Code. Those provisions are equally imperative. They require the person specially appointed u/s 85, Clause (1), to authorise or appoint a person to make appearances and applications and do acts in the suit as if he were himself a party thereto. This is an exception to the rule of delegation of authority conferred upon an agent, and the provisions must, in my opinion, be strictly observed. The Daftardar had not signed the plaint as a specially appointed agent and there is no evidence that after January, 1934, the Karbhari, who was then specially appointed, had authorised the Daftardar to rectify the irregularity. Even if he had, that has not been done, and the defect still remains uncured. Mr. Rele for the respondent suggests that at least in this appeal having regard to the wide powers of the Court under Order VI, Rule 17, [see *Ramdhan Puri v. Lachmi Narain* (1936) 39 Bom. L.R. 363, P.C.] the plaint could be amended by proper authority and signed either by the specially appointed person, the Karbhari or the Administrator or by the Daftardar, as the case may be. That we think ought not to be allowed to be done. Consequently we allow this appeal, set aside the decree in second appeal, and restore the decree of the trial Court with costs in this Court as well as in the first appellate Court.

Indranarayan, J.—I agree. I would add that an examination of the terms of Section 85 of the CPC shows that the Legislature has deliberately provided in this Section for "recognised agents" of a special class different from those mentioned in Order III, Rule 2, to provide facilities to Sovereign Princes and Ruling Chiefs for filing or defending suits in British Indian Courts. Section 85 is hence an enabling Section and the provisions thereof must therefore, in my opinion, be strictly adhered to. The Section provides the fountain source for the

authority of the person " specially appointed" to be able to file or defend actions in British Courts on behalf of the Sovereign Prince or Ruling Chief concerned. It seems to me therefore that this is not a mere matter of procedure, but this provides for the foundation for the right to file or defend a suit. Section 85 requires that there must be, first, a " special appointment" ; secondly, " by order of the Government" which according to the latest amendment is the Central Government; and, thirdly, that such appointment must be made at the request of the Sovereign Prince or Ruling Chief concerned or on behalf of or at the request of any person competent in the opinion of the Government to act on behalf of such Prince or Chief. In the present case no such authority was produced before the stage of the first appeal before the Assistant Judge of Thana. The special authority was signed on January 29, 1934, and it is admitted that nothing whatever was done after that date by the person in whose favour the authority was granted, namely, the Administrator of the Jawhar State, by way of applying for the amendment of the plaint to rectify the omission or mistake, nor was any act done by which it could be proved that this. authority was thereafter passed on to the Daftardar by the Administrator after it had been received from the Central Government by him. While it is true that Sub-section (3) of Section 85 does not require that a person appointed under this Section should authorise or appoint persons to make appearances by any writing, but considering the fact that the defect was agitated in the trial Court and before the first appeal Court, it was essential, in my opinion, that there should have been some proof of the fact that after the authority was received from the Central Government the Daftardar had been authorised by the Administrator to continue the suit. Section 85, Sub-section (3), to my mind, implies necessarily an active appointment by the person in whose favour the special appointment is received, and this cannot be substituted by the mere passive attitude of allowing the Daftardar to continue the suit which had been admittedly filed by him under instructions from the Administrator who had then no authority as required by Section 85. *Maharaja of Rewah v. Swami Saran* ILR (1903) All. 635 was a case in which the plaint was filed and signed by a person not originally authorised u/s 432 of the then CPC (corresponding to Section 85 of the present Code), but was properly so appointed before the period of limitation had expired ; and the plaint was held to be a valid one. It is stated (p. 637) :-

The mere fact that a plaint contained a defect in the matter of signature or verification does not make it a void and inadmissible plaint... We have in this case the fact that after the plaint had been returned) for amendment, it was filed again on the 22nd of December 1899, duly verified and signed by Abdul Rahman. From that date up to the date of the decision of the suit the plaint was before the Court.

2. It therefore appears that after the receipt of the order of special appointment, the plaintiff re-presented the plaint after having again signed and verified it. But such is not the case in the suit before us, there being no evidence of ratification even by the Administrator.

3. In Venkatrav Raje Ghorpade v. Madhawrav Ramchandra ILR (1886) 11 Bom. 53, where a suit was brought by the Political Agent, Southern Maratha Country, as administrator of the estate of the Chief of Mudhol, it was held to have been badly filed as the Political Agent was not a " recognised agent" u/s 37, nor as properly nominated u/s 432 of the old CPC at the request of the Chief to conduct the suit for him. It was held that a general appointment of the administrator to manage the Chief's estate could not enable him to sue on his behalf in British Courts, and the learned District Judge dismissed the suit despite the fact that the Chief himself was represented in the Appeal Court.

4. I think it is an important circumstance to remember in this case that when the decision of the trial Court was given dismissing the suit, no certificate of authority required by Section 85 was in existence. It was first produced in the Appeal Court. It is sought to be argued that the appeal was a continuation of the suit and that therefore the defect could be remedied there. By the dismissal of the suit by the trial Court the defendant, I think, acquired some rights which cannot be entirely or lightly brushed aside.

5. In Dinesh Chunder Roy v. Golatn Mostapha ILR (1888) Cal. 89 is reported a batch of three cases under the Court of Wards Act (Beng. Act IX of 1879) where a special Section stated " no suit shall be brought on behalf of any ward, unless the same be authorised by some order of the Court." The three suits there were filed by a person without such authority, and, as in this case, the defect was not remedied in two suits till after the decree of the trial Court, and was first sought to be remedied in appeal. The learned Judges remarked (p. 94) :-

It would be a strange construction of the Section which would give the department which, under the name of the Court of Wards, carries on the suit through its manager the power of rendering valid after decree proceedings which up to that date were invalid, and so empower it, if it pleased, in the interests of those for whom it managed the estate to affirm, or to disaffirm a suit, according as it had or had not resulted in success.

6. While it is true that the Section under which the objection was raised in that case is in stronger terms than Section 85, yet the distinction drawn between an attempt to remedy a defect before and after a decree is, I think, relevant for consideration in the present case. In the second suit of that batch reported in Dinesh Chunder Roy v. Golctm Mostapha some papers were sought to be produced before the Appeal Court from which it was contended authority could be spelt out; but it was held that these papers could not remedy the fatal objection as to the authority not being in the form required. In the third suit where the defect was sought to be remedied before the decision of the trial Court the learned Judges drew a distinction and stated (p. 96) :-

In the two cases with which we have just dealt, the proceedings had gone as far as judgment and decree before the question was raised. Here the question was raised before the judgment in the original Court, and the suit was dismissed on

the ground of the absence of proof of some order.

7. I am therefore of opinion that the defect is not one merely of procedure but goes to the root of the merits of the suit, and cannot now be remedied, as the suit is without any authorised foundation. Therefore the oral application made by the learned advocate for the respondent to have the plaint amended at this stage cannot be granted. The appeal will therefore be allowed.