

(1951) 08 CAL CK 0036

In the Calcutta High Court

Case No : Full Bench Ref. No. 1 of 1951 (in Ref. No. 2 of 1948)

Bansi and Others

APPELLANT

Vs

Governor-General of India in Council

RESPONDENT

Date of Decision : 20-08-1951

Acts Referred:

Presidency Small Cause Courts Act, 1882 — Section 18
Railways Act, 1989 — Section 77

Citation : AIR 1952 Cal 35 : 56 CWN 83 : (1953) 1 ILR (Cal) 162

Hon'ble Judges : Harries, C.J.; Das, J.; Banerjee, J

Bench : Full Bench

Advocate : Balai Chand Mukherjee, for the Appellant; Atul Chandra Gupta and Bhabesh Narayan Bose, for the Respondent

Judgement

Das, J.—The facts giving rise to the reference are as follows: 10 different suits were instituted in the Court of Small Causes, Calcutta, for recovery of compensation for loss of certain goods consigned for carriage from stations on the North Western Railway to Howrah, a station on the East Indian Railway.

2. In the plaint it was alleged that a part of the cause of action arose within the jurisdiction of the Court, as the notices of claim u/s 77 of the Indian Railways Act were issued from Calcutta and were served on the 1st defendant, East Indian Railway, in Calcutta within the jurisdiction of the Court.

3. The defendants in these suits were described as follows : (1) Governor General for India in Council representing East Indian Railway; (2) Governor General for India in Council representing North Western Railway.

4. A common defence to these suits inter alia was that the Court had no jurisdiction to try the suits.

5. By consent of parties, the above 10 suits were directed to be heard together.

6. By an order dated 19-12-1947, the learned trial judge decreed the suits.

7. In overruling the plea as to want of jurisdiction of the Court, the learned judge observed that the consignment forms one cause of action and as the Court has jurisdiction over the East Indian Railway, the suits are maintainable in the Court of Small Causes, Calcutta u/s 18 of the Presidency Small Cause Courts Act, 1882. In each of the suits the defendants filed applications for a new trial u/s 38 of the Presidency Small Cause Courts Act, 1882.

8. The applications came up for hearing before the learned Chief Judge and the trial judge. As the learned judges entertained reasonable doubt as to the interpretation of Section 18(c), of the Presidency Small Cause Courts Act, 1882, they made a reference to this Court u/s 69 of the Presidency Small Cause Courts Act, 1882 for the opinion of this Court on the question :

"Whether on the facts of these cases, this Court has jurisdiction to try the suits so far as the North Western Railway is concerned."

9. The learned judges recorded their opinion as follows :

"In the premises we are of opinion that this Court has jurisdiction to try the suits against the defendant Governor General in Council representing North Western Railway u/s 18(c), Presidency Small Cause Courts Act."

10. The learned judges reserved judgment in the applications for new trial pending receipt of the opinion of this Court.

11. The reference to this Court was numbered as Reference No. 2 of 1948.

12. The reference was heard by their Lordships Mookerjee and J. P. Mitter JJ.

13. By their order dated 22-3-1951 their Lordships referred the following question to a Full Bench for decision:

"whether service of notice u/s 77 of the Indian Railways Act is part of the plaintiff's cause of action."

14. In the referring order, their Lordships held that (1) there was only one defendant viz. the Governor General in Council and the learned judges of the Small Cause Court were wrong in presuming that there were two defendants representing the two railway administrations : (2) The Governor General in Council representing the two railway administrations could not be said to have actually or voluntarily resided or carried on business or personally worked for gain within the jurisdiction of the Small Cause Court even though the head office of the East Indian Railway administration was within such jurisdiction; (3) On the point as to whether service of notice u/s 77 of the Indian Railways Act on a place within the jurisdiction of the Court is part of the plaintiff's cause of action and attracts Section 18(a) of the Presidency Small Cause Courts Act, 1882, they differed from the Bench decision of this Court in the Case of "Dominion of India v. Gopal Chandra" 55 Cal W N 113. The learned referring judges gave their unreserved opinion on the question whether Section 18(c) of the Presidency Small Cause Courts Act was applicable or not, and as such answered the

question of interpretation of Section 18(c) on which the reference was made to this Court by the learned judges of the Small Cause Court, Calcutta.

15. It also appears that leave of the Small Cause Court was given only u/s 18(c) and not u/s 18(a) of the Presidency Small Cause Courts Act, 1882. In these circumstances there might have been room for argument that the reference to the Full Bench was unnecessary.

16. Mr. Gupta learned Counsel for the defendant however waived the above irregularity in the proceedings and invited us to give our opinion on the point referred to the Full Bench by their Lordships Mookerjee and J. P. Mitter JJ.

17. I shall preface my discussion by referring to the material provisions of the Presidency Small Cause Courts Act, 1882 which deal with the jurisdiction of the Court of Small Causes, Calcutta.

18. Section 17 of the Presidency Small Cause Courts Act, 1882 defines the local limits of the jurisdiction of the Calcutta Small Cause Court.

19. Section 18 provides that subject to the provisions of Section 19, the Calcutta Small Cause Court shall be competent to entertain and try all suits of a civil nature: (1) when the amount or value of the subject matter of the suit does not exceed a sum of Rs. 2000 and (a) where the cause of action has arisen, either wholly or in part, within the local limits of the jurisdiction of the Small Cause Court, and the leave of the Court has, for reasons to be recorded by it in writing, been given before the institution of the suit; or (b) all the defendants at the time of the institution of the suit, actually and voluntarily reside, or carry on business or personally work for gain, within such local limits; or (c) any of the defendants at the time of the institution of the suit, actually and voluntarily reside, or carry on business or personally work for gain, within such local limits, and the leave of the Court has been given before the institution of the suit, or the defendants who do not reside, carry on business, or personally work for gain, as aforesaid, acquiesce in such institution. The proviso to the section and the explanations appended thereto are not material for the purposes of the present case.

20. Section 19 deals with the nature of the subject matter- of the suits and need not be quoted, as they are not relevant. It is not disputed that the Calcutta Small Cause Court can try a suit of the present description. It is also no longer disputed that the present cases do not come within Section 18 (b) or (c) The only question is whether the Calcutta Small Cause Court has jurisdiction on the ground that a part of the cause of action arose within the jurisdiction of the Calcutta Small Cause Court.

21. The only part of the cause of action which it is suggested, arose within the jurisdiction of the Small Cause Court, Calcutta, is that notice of claim u/s 77 of the Indian Railways Act was served on the 1st defendant East Indian Railway, within jurisdiction.

22. If this question is answered in the affirmative then u/s 18(a) of the

Presidency Small Cause Courts Act, 1882, the Small Cause Court, Calcutta, will have jurisdiction to try the suits. If the question is answered in the negative, the Calcutta Small Cause Court will have no jurisdiction to try the suits.

23. The expression "cause of action" has not been defined in any statute. It has been variously defined in various cases. I shall refer to the cases which were cited before us or are referred to in the judgment of this Court in "Dominion of India v. Gopal Chandra" 55 Cal WN 113.

24. In "Cooke v. Gill" (1873) 8 CP 107, Brett J. observed :

" "Cause of action" has been held from the earliest time to mean every fact which is material to be proved to entitle the plaintiff to succeed, - every fact which the defendant would have a right to traverse" (p. 116).

In that case, the accepted position was that in order to give the Lord Mayor's Court jurisdiction, the cause of action must arise and the garnishee must reside within the City.

25. The action was brought against the defendants as the drawers and indorsers of several bills of exchange. It was pointed out that to maintain the action it would be necessary to prove that the defendants drew and indorsed the bills, that they were presented to the drawers for acceptance, that acceptance was refused, and that defendants had notice of such refusal. It appeared that the bills were drawn in America, that probably the indorsement and delivery took place in America, that they were to be presented for acceptance in London. Hence some material fact arose in America, and some in London. In these circumstances Brett J. held that

"the jurisdiction to issue an attachment does not exist unless every fact material to establish a cause of action accrued within the city."

26. In "Read v. Brown" (1888) 22 Q B D 128 Lord Esher M. R. repelled the contention that the definition of the expression "cause of action" in "Cooke v. Gill" (1873) 8 C P 107 was too broad and stated the real meaning of the expression to be

"every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved", (p. 131).

In the same case Fry L. J. observed, "everything which, if not proved, gives the defendant an immediate right to judgment, must be part of the cause of action" (p. 132).

The above case arose out of an action in the Mayor's Court, brought by the plaintiff as assignee of a debt alleged, to be due in respect of the price of goods sold and delivered to the defendant by the assignee. The sale and delivery had taken place without the City of London. It was held that the assignment of the

debt was part of the cause of action and the Court had jurisdiction.

27. In "Engineering Supplies, Ltd. v. Dhandania & Co." 58 Cal 539, which turned on the meaning of the expression "cause of action" in clause 12 of the Letters Patent, Rankiri C. J. opined that

"the only definition that will work if it has to be applied to cases of all kinds, is the entire set of facts that gives rise to an enforceable claim."

28. In "ML Chand Kour v. Partab Singh" 15 IA 158 which related to a bar u/s 103, Act X of 1877 (corresponding to Order 2, Rule 2 of the Civil P. C, 1908), Lord Watson said :

"Now the cause of action has no relation whatever to the defence which may be set up by the defendant, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set forth in the plaint as the cause of action, or, in other words, to the media upon which the plaintiff asks the Court to arrive at a conclusion in "his favour."

29. Most of the cases bearing on the point were reviewed by their Lordships of the Judicial Committee in the case of "Mohammad Khalil Khan v. Mahbub Ali" 75 IA 121, where again the question was whether a later suit was barred under Order 2, Rule 2 of the Civil P. C, 1908.

30. In the case of "Dominion of India v. Gopal Chandra" 55 Cal W N 113 the learned judges quoted the definition given by Lord Esher M. R. in "Read v. Brown" (1888) 22 Q B D 128 and observed that the definition is

"wide enough to include the service of notice u/s 77 of the Indian Railways Act because service of the notice is one of the facts which it was necessary for the plaintiff to prove in order to support his right to the judgment of the Court."

31. It is the correctness of this view which requires our consideration.

32. We are concerned with the meaning of the expression "cause of action" as occurring in Section 18(a) of the Presidency Small Cause Courts Act, 1882 as conferring jurisdiction on the Court.

33. Order VII, Rule 1 of the Civil P. C, 1908 provides that the plaint shall contain the following particulars : (a) to (d)-omitted; (e) the facts constituting the cause of action and when it arose; (f) the facts showing that the Court has jurisdiction; (g) to (i)- omitted.

34. Order VII, Rule 11 reads as follows : The plaint shall be rejected in the following cases : (a) Where it does not disclose a cause of action; (b) to (c) omitted; (d) Where the suit appears from the statement in the plaint to be barred by any law; (e) omitted.

35. The above rules clearly show that the facts constituting the cause of action must pre- cede the suit. This view was taken in the case of "Gobind Ramanuj Das v. Debendrabala Dassi" IV Pat LLJ 387. It is hence necessary to consider if

the service of a notice u/s 77 of the Indian Railways Act must precede the suit.

36. Section 72 defines the measure of the liability of the railway administration for the loss, destruction or deterioration of animals or goods delivered to it for carriage.

37. Sections 73, 74, 75, 78 restrict the above liability if certain requirements are not complied with at the time of the delivery of animals or goods. They refer to facts antecedent to suit.

38. Section 76 relieves the plaintiff from the burden of proving loss, destruction or deterioration of animals or goods and has reference to the stage of the pendency of the suit. Section 77 then lays down :

"A person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by railway or to compensation for the loss, destruction or deterioration of animals or goods delivered to be carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods for carriage by the railway."

39. The section refers to certain requirements which must be fulfilled before the Court will pass a decree entitling the plaintiff to re-fund or compensation.

40. The expression "entitled to a refund or to compensation" does not connote that the suit cannot be filed till notice of the claim is given. If this was the intention of the legislature, the section would have been differently worded: cf. Section 80 of the Civil P. C, 1908. The above discussion leads to the conclusion that the giving of a notice of claim u/s 77 of the Indian Railways Act, is not a condition precedent to the institution of the suit. The notice may be given during the pendency of the suit, but subject to the condition that the notice is given within the prescribed period of 6 months.

41. The above view was taken by Henderson J. in the case of "Sristidhar Mandal v. Governor General in Council" 49 Cal W N 240 at p. 241.

42. A contrary view viz. that no suit can be brought before service of the notice u/s 77, would lead to anomalies. Limitation for the filing of the suit begins to run against the plaintiff under Articles 30, 31 of the First Schedule of the Indian Limitation Act from the date when the loss or injury occurred or when the goods ought to have been delivered. Section 15 (2) of the Indian Limitation Act speaks of a statutory notice of "suit" and not a notice of a "claim", and entitles the plaintiff to add the period of the statutory notice of suit but not the period of the notice of claim u/s 77 of the Indian Railways Act, in computing the period of limitation for the institution of a suit claiming compensation for the loss, destruction or deterioration of animals or goods.

43. It may be pointed out that the view taken by me does not run counter to the object of giving a notice of claim u/s 77 within six months of the date of delivery

of the animals or goods for carriage by a railway. The notice is intended not to enable the Railway administration to make amends to the claimant on receipt of such notice of claim but to enable the Railway Administration to make prompt inquiry and thereby to prevent stale and frivolous claims. The view that the notice of a claim u/s 77 of the Indian Railways Act need not precede a suit for a refund or for compensation necessarily leads to the conclusion that the service of such notice cannot form part of the cause of action, because, as already stated the facts constituting the cause of action must be antecedent to the suit and cannot follow the institution of the suit. The view contended for by the plaintiff viz. that service of a notice of a claim u/s 77 of the Indian Railways Act is a part of the cause of action for the suit, would also lead to inconvenient and unreasonable results.

44. Notice of a claim u/s 77 of the Indian Railways Act may be served in the manner prescribed by Section 140. The judicial decisions, however, do not speak with one voice on the question whether Section 140 is the only mode of serving a notice of claim u/s 77.

45. Section 140 runs as follows:

"Any notice or other document required or authorised by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government of a Native State, on the Manager and, in the case of a railway administered by a railway company, on the Agent in India of the railway company;

(a) by delivering the notice or other document to the Manager or Agent, or

(b) by leaving it at his office; or

(c) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office and registered under Part III of the Indian Post Office Act, 1866."

46. The notice may therefore be served by delivering the notice to the Manager or Agent. It is not said that such service must be at his office. Clause (b) of Section 140 would negative such a view. Such a notice may, therefore, be served at a place of itinerary of the Manager or Agent. This would be a variable place. If the service of notice u/s 77 of the Indian Railways Act were a part of the cause of action the place of suing would then be uncertain and dependent on the whim of the plaintiff. A much greater latitude as regards the place of suing would follow from Section 140 clause (c). This clause states that notice u/s 77 may be served by merely forwarding the notice by post in a registered prepaid letter addressed to the Manager or Agent at his office. The word "forwarding" obviously means posting. It has no reference to actual service. This would follow from the sequence of clauses (a) (b) (c) of Section 140 and a comparison of the language used in Ss. 140, 141 and 142. This view has been taken in the case of "Ram Gopal v. B. & N. W. Rly. Co." 6 Pat 256.

47. Hence it follows that the plaintiff may drive the railway administration to any place he likes by posting and registering his letter at a place of his choice, however inconvenient it may be to the railway administration.

48. The question before us may be looked at from another point of view.

49. The service of a notice of claim u/s 77, Indian Railways Act, is intended for the benefit and protection of the railway administration and may, therefore, be waived. Such waiver must be made in the suit for refund or compensation and cannot be prior thereto. That this is the correct position is supported by the decision of the Judicial Committee in the case of "Vellayan Chettiar v. Govt. of the Province of Madras" 74 IA 223, where Lord Simonds observed as follows :

"On the other hand, there appears to their Lordships to be no reason why the notice required to be given u/s 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required, if in the particular case he does not require that protection and says so, he can lawfully waive his right."

50. In repelling the argument that the waiver may be inferred from the earlier proceedings, Lord Simonds further stated :

"It is to be observed that the whole of the conduct upon which the appellants rely took place before ever an effective suit was instituted. It could not be suggested that, until a suit is instituted, the question of proper notice or the want of it could be raised."

51. This was a case of waiver of notice u/s 80 of the Civil P. C, 1908 but the same principles apply with much greater force in case of a notice u/s 77 of the Indian Railways Act.

52. In other words, the absence of a notice u/s 77 of the Indian Railways Act is a plea to be raised in the written statement and cannot be regarded as a part of the cause of action, on the principles discussed above.

53. It remains for me to refer to the cases to which our attention was drawn.

54. In "Golab Rai v. Secy, of State" ILR (1941) Cal 160, Lord-Williams J. held that the service of notice u/s 77 of the Indian Railways Act was part of the cause of action. The ground suggested was that :

"in the absence of such a claim, the plaintiffs would have no right to compensation. Consequently it is a fact which it is necessary to prove as stated above, and is part of the cause of action" (p. 166).

55. The above view was also taken in the case of "Dominion of India v. Jagadish Prosad" 84 Cal LJ 175. It appears however that in that case, the main question which was debated was whether the Governor General in Council could be said to carry on business within Section 18(c) of the Presidency Small Cause Courts Act, 1882. It appears to have been the accepted position that service of notice u/s 77

of the Indian Railways Act was part of the cause of action.

56. That this was so, appears from the following observations of the learned Chief Justice who was a party to the above decision, in the later case of "Nilima Sarkar v. Governor General in Council" 86 Cal L J 98 at p. 103 :

"I may say that in that case this point was not argued and was. conceded and it was a case relating to jurisdiction, namely, the jurisdiction of the Court of Small Causes, Calcutta. In any event it was an observation made without argument and therefore does not carry any great weight."

57. I have already referred to the grounds for the decision in Dominion of India Vs. Gopal Chandra Tapadar and Others, .

58. The cases cited before us did not advert to the reasons detailed in this judgment.

59. In my opinion, the service of a notice u/s 77 of the Indian Railways Act is not part of the plaintiff's cause of action within Section 18(a) of the Presidency Small Cause Courts Act, 1882.

60. The case of "Dominion of India v. Gopal Chandra Tapadar" 55 CW N 118 was not correctly decided.

61. As the reference was made for obtaining the opinion of this Court on the interpretation of Section 18(c) of the Presidency Small Cause Courts Act, 1882 and judgment was reserved in the applications for new trial pending the receipt of the opinion of this Court, final orders will now be passed by the Small Cause Court, Calcutta. Costs of the reference, the hearing-fee being assessed at 5 (five) gold mohurs, will abide the result of the applications for new trial.

Harries, C.J.

62. I agree. I desire to add that I am satisfied that the view taken in the case of "Dominion of India v. Jagadish Prosad" 84 Cal LJ 175, a decision to which I was a party, is erroneous. On further consideration. I find myself in entire agreement with the view expressed by my brother Das.

Banerjee, J.

83. I agree.