
(1959) 06 KL CK 0018
In the High Court Of Kerala
Case No : A.S. No. 76 of 1956 (K)

Dahyabhai Patel and Co.

APPELLANT

Vs

Union of India (UOI)

RESPONDENT

Date of Decision : 29-06-1959

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 80
Railways Act, 1890 — Section 77 , 80

Citation : AIR 1960 Ker 135

Hon'ble Judges : K. Sankaran, C.J; Anna Chandy, J

Bench : Division Bench

Advocate : C.K. Viswanatha Iyer and C.H. Subramonia Iyer, for the Appellant;
K.P. Pathrose, for the Respondent

Final Decision : Dismissed

Judgement

Anna Chandy, J.

This appeal is by the plaintiff in O. S. 46 of 1954 in the Court of the Subordinate Judge of Palghat.

2. The plaintiff was the consignee of 173 bags of beedy tobacco sent from Cochin Harbour Terminus by wagon No. E.B. 15358 under invoice dated 7-7-53. When the wagon was opened at its destination on 9-7-1953 it was found that a portion of the goods was damaged by rain water. The damage was estimated at Rs. 7.201-9-0 and this suit was filed against the Union of India as represented by the General Manager, Southern Railway, Madras for recovery of damages. The suit notice Ext. B1 was dated 7-7-54 and it was served on the General Manager on the same day. The suit was filed on 7-9-1954. Thus it is seen that excluding the day on which the notice was actually served, the period of the notice was one day less than the statutory period of two months. The defendant contended inter alia that! the suit was premature for want of compliance with Section 80 C. P. C. That contention was upheld by the learned Sub-Judge and the suit was dismissed.

3. The position that in computing the period of 2 months mentioned in Section 80 C. P. C., the day on which the notice was actually served must be excluded, is not disputed. The only points urged in appeal are (1) that Exts. B13 and 12 notices dated 29-5-1954 and 4th June 1954, respectively sent by the plaintiff to the Chief Commercial Superintendent, Southern Railway, Trichinopoly. are to be treated as the statutory notices u/s 80 C. P. C. and (2) that even if these two notices which were addressed to the Chief Commercial Superintendent instead of the General Manager are defective, for that reason, the management must be deemed to have waived their right to object by not taking such an objection in the reply notice Ext. A9, wherein the plaintiffs' claims were repudiated.

4. It may be mentioned even at the outset that the plaintiff has not put forward in his pleadings the case that the earlier notices are to be treated as the statutory notice u/s 80 C. P. C. Even granting that it is open to the plaintiff to put forward such a plea at a later stage, a reading of the records would show that his original intention was not in conformity with his present plea. It is seen from para 8 of the plaint that after referring to the correspondence which passed between the plaintiff and the Commercial Superintendent, the plaintiff goes on to say that realising that he was unable to get justice except through court he had no option but to cause the formal and statutory notice of the suit u/s 80 C. P. C. to be served on the General Manager of Southern Railway Madras, and that such notice has been served on such officer on 7-7-54.

It was argued by the learned counsel for the appellant that the last sentence in the suit notice, viz., "I am to add that the entire correspondence on this subject which my client has had with the railway may be referred to in this connection and treated as part of the notice," would indicate that the plaintiff was for treating the earlier notices Exts B12 and 13 as the statutory notices u/s 80 C. P. C. This contention cannot be accepted.

Section 37 of the Indian Railways Act prescribes :

"that a person shall not be entitled to a refund of an over-charge in respect of animals or goods carried by railway or any compensation or loss or destruction of animals or goods delivered to be so 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 railway."

It is clear that all the previous correspondence between the plaintiff and the railway administration including Exts. B12 and B13 related to the claim the plaintiff was obliged to make u/s 77 of the Indian Railways Act.

5. Even accepting the plea that the plaintiff intended Exts. B12 and B13 to be substituted for the statutory notice we do not think that Section 80 of the C. P. C. permits such a procedure. The section reads:

"No suit shall be instituted against the Government or against a Public Officer in

respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to or left at the office of (a) in the case of suit against the Central Government except where it relates to a railway, a Secretary to the Government; (b) in the case of a suit against the Central Government where it relates to a railway, the General Manager of that railway; (c) in the case of a suit against a State Government, a Secretary to that Government or the Collector of the District, and in the case of a public officer, delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

The principle that the provisions of Section 80 C. P. C. are explicit and mandatory and should be strictly complied with is a well recognised one and in our opinion a notice sent to the Chief Commercial Superintendent relating to claim u/s 77 Railways Act cannot be treated as the notice which the section enjoins; notice u/s 80 should be addressed to the General Manager of the Railway.

6. We shall refer to a few decisions where notices wrongly addressed were held to be defective. *Secretary of State and Another Vs. Nawal Kishore*, was a case in which notice u/s 80 C P, C. was sent to the Collector, Agra, in a suit against the Secretary of State as representing G. I, P. Railway-It was held that the notice was wholly defective. Similarly in the case reported in *Kumar Bros. v. Governor-General-in-Council* AIR 1949 Lah 105 it was held that where the notice u/s 80 should have been sent to a "Secretary to the Central Government" a notice which was acknowledged by the "Secretary, Railway Board" was defective. Again in *Sandhya Trading Co. Vs. Governor-General, Dominion of India*, the Calcutta High Court held that a notice u/s 80 which was addressed to the Railway Board. Delhi instead of the General Manager of the Railway concerned was not a good notice in law.

7. The learned counsel for the appellant brought to our notice the remark made by his Lordship Bhagwati in *Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI)*, that "though the terms of Section 80 are to be strictly complied with, it does not mean that the terms of the notice should be scrutinised in a pedantic manner or in a manner completely divorced from common sense," and argued that a substantial compliance with the provisions of section 80 is sufficient. The learned counsel for the appellant also cited the following decisions which according to him would support his argument. They are *Kanailal Karmakar Vs. Governor General for India in Council and Others*, ; *Lakshmi Narayan Gauri Shankar Vs. Union of India (UOI)*, ; *Subrahmanyam v. Union of India*. AIR 1951 Mad 416 ; *Governor-General in Council v. G. Sankarappa*. AIR 1958 Mad 838, and *Kanailal Karmakar Vs. Governor General for India in Council and Others*, dealt with a case where all the mandatory provisions of Section 80 were complied with. In the plaint instead of stating that the notice was "delivered", it was stated that the notice was "served" by registered post with acknowledgment

due. There it was held that the first part of the section affects the plaintiff's right to sue, while the second relates to a matter of procedure and a mis-description in the second does not go to the root of the plaintiff's right to sue, and the plaint at the most would be considered defective within the meaning of Order 7 Rule 11. *Lakshmi Narayan Gauri Shankar Vs. Union of India (UOI)*, dealt with a suit against the Union of India in respect of a claim for non-delivery of goods by the East Indian Railway. A notice u/s 80 C. P. C. served on the management of the railway was held to be perfectly valid so as to make it liable even though notice u/s 80 was not served on the management of the South Indian Railway which was the despatching Railway. *Chekka Subrahmanyam Vs. The Union of India (UOI)*, dealt with a case in which the notice was properly addressed and all the requirements fulfilled, but there was a statement in the notice that on failure of compliance suit will be filed, instead of stating specifically that a suit will be filed against the Governor-General-in-Council. It was held that the notice left no doubt that it was a suit proposed to be filed against the Crown or the Government, and Section 80 was complied with. *Governor-General in Council Vs. Gujrathi Sankarappa* being minor by next friend and paternal uncle *Moroji*, dealt with a case in which a notice claiming damages for loss of goods in railway transit was sent to the Member-in-Charge of the Railway Board and was forwarded by the Railway Board to the General Manager, M. S. M Railway as the competent authority.

It was held that the notice was a proper notice u/s 80. *Rambrahma Chabri Vs. The Dominion of India at present Union of India (UOI) and Others*, is a case where the notice u/s 80 C. P. C. was delivered properly to the General Manager of the B. N. Railway, However the name of the proposed defendant was mentioned as "The Governor General of the Indian Dominion in charge of B. N. Railway" instead of "Dominion of India representing the B, N. Railway." It was held that the misdescription of the defendant in the copy of the plaint that was attached to the notice could never have misled the Government and that notice was not bad or insufficient.

8. None of the above cases can help the appellant. Here it is not a case of a misdescription in the notice, or a slight or immaterial mistake in the address. This is a case in which the statutory notice to the General Manager being found defective, the plaintiff turns round and claims that his earlier notices to the Chief Commercial Superintendent should be treated as substitutes for the statutory notice. As noted earlier Exts. B12 and B13 evidence the plaintiff's desire to settle the matter out of court and the only references to the filing of the suit found in them are:

"If the railway insists on not viewing the case aright, the only course left Open to us is to seek redress through a court of law, which will be further harassment for us in addition to the loss and delay that the railway has already caused, which we hope you will avoid for us." (Last para of BIS)

"Before we go to court which is an expensive affair being a large claim involving

seriously the future of our business we would request you, good Sir, to personally review the case, realise the railway's responsibility and compensate our loss".

"We beg to seek an interview with you in your office at Madras so that we may explain further and place all our original documents before you for perusal. Kindly intimate to us the date and hour suitable to you." (Last two paragraphs of B12)

It is clear that such conditional notices to the Chief Commercial Superintendent can never take the place of a formal statutory suit notice to the General Manager.

9. The next question for consideration is whether the railway authorities on whom Exts. B12 and B13 notices were served have waived their right to contend that these are not addressed to the proper authority, because of the failure to raise such a contention in the reply (Ext. A9), sent to these notices. No question of waiver could arise in this case where Exts. B12 and B13 were apparently not notices issued u/s 80, C. P. C. As already mentioned they were notices issued u/s 77 of the Railways Act and were only intended as such. The decisions relied upon by the learned counsel for the appellant in support of the contention of waiver are also not applicable to the facts of this case.

In *Vellayan Chettiar v. Madras Province* AIR 1947 P.C. 197 it was observed generally that the notice required to be given u/s 80 is for the protection of the authority concerned and if in a particular case, he does not require the protection and says so, he can lawfully waive such notice. *South Indian Co-operative Stores Ltd. Vs. Union of India (UOI)*, was a case relating to notice u/s 77 of the Railways Act. There the Chief Commercial Superintendent, in replying to the notice of claim refused to entertain the claim on the ground that there was no negligence or misconduct on the part of the railway or its servants, but he did not say that no claim could be entertained until and unless notice as required u/s 77 has been served.

It was held that it amounted to waiver by the Chief Commercial Superintendent of the protection of Section 77, and as he was dealing with the claim for compensation as the agent of the railway administration -- which term included the defendant -- the Union of India. Waiver by the Chief Commercial Superintendent amounted in law to waiver by the Bengal and North Western Ry. Co. Ltd. Vs. *Kameshwar Singh Bahadur*, which was referred to by the appellant is also of no help to decide the question in issue in this case. In that case a notice u/s 77 of the Railways Act was issued to the District Traffic Superintendent of the B. and N. W. Railway. The notice was accepted by him and he replied that the claim was receiving his attention.

It was held that inasmuch as a Company must conduct its business through its authorised agents, and if the Company by its course of business holds up any particular official as competent to deal with claims, then the service of notice upon such official must be taken as service upon the Province of Bihar Vs. *Kamakshya Narain Singh*, cited by the appellant is also not relevant to the point

in issue. That was a case where the cause of action against the Government was the passing of an Act which deprived the plaintiff of his rights to property, & the Government knowing that notice u/s 80 C. P. C. required a period of 2 months gave effect to the Act whereby the plaintiff was actually deprived of his rights to property within a month of the coming into operation of the Act. It was held that the Government must be held to have waived their right to notice under the Section. It is evident that none of the above decisions would support the position that the Chief Commercial Superintendent while dealing with notices which were intended and treated both by the sender and the addressee as notices u/s 77 of the Railways Act could have waived a right which was conferred by Section 80, C. P. C.

10. The only other point urged in appeal is that even if the Section 80 notice is held to be defective the proper course for the court was to have rejected the plaint under Order 7 Rule 11, and not to have dismissed the suit. That contention also cannot be accepted, Order 7 Rule 11 deals with the rejection of the plaint before notice is issued to the defendant and the learned Subordinate Judge was right in dismissing the suit. The same view was taken by the Madras High Court in the case reported in *The Governor-General of India in Council Vs. U. Raghunandan Shenoy*, . There it was held that where a suit could not be maintained due to a defective notice u/s 80, C. P. C. the only order that could be passed is an order dismissing the suit and not rejecting the plaint under Order 7 Rule 11 (d).

11. In the result the appeal fails and is dismissed with costs.