

(1942) 08 BOM CK 0012

In the Bombay High Court

Case No : Civil Revision Application No. 622 of 1941

Erachshaw Hormusji Ginwala

APPELLANT

Vs

The Secretary of State

RESPONDENT

Date of Decision : 19-08-1942

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1943 Bom 160 : (1943) 45 BOMLR 220

Hon'ble Judges : Divatia, J

Bench : Single Bench

Judgement

Divatia, J.—This is a revisional application by the plaintiff against an order granting the application made by the defendant, the Secretary of State for India in Council, for amendment of the written statement by adding the plea that the suit was barred u/s 80 of the CPC for want of a proper and adequate notice and that it was not properly valued for pleaders fees.

2. The suit was brought for a declaration that the defendant was not entitled to recover from the plaintiff the amounts which were paid from time to time as tagavi loans to certain persons from whom the plaintiff held an ijara. It was averred in the plaint, among other things, that a notice had been given by the plaintiff to the Secretary of State for India in Council on July 12, 1935, as required by Section 80 of the Civil Procedure Code. The suit was filed on February 18, 1936, the written statement was filed on October 9, 1936, and although a large number of points were taken, there was no plea that the suit was bad on the ground that the notice given was insufficient or invalid u/s 80 of the Civil Procedure Code. Issues were framed on February 18, 1937, and there was naturally no issue about the notice. When the suit was fixed for hearing for the first time on December 3, 1941, the Assistant Government Pleader applied for leave to amend the written statement by adding the plea that the plaintiff's suit was barred u/s 80 for want of a proper and adequate notice and that the plaint was not properly stamped for pleaders fees. The defects alleged were that

the description of the plaintiff's cause of action and the reliefs sought were not mentioned and that there was no averment in the plaint regarding the delivery of the notice. The plaintiff objected to the grant of the application on the same day and asked for time for replying to it. The learned Judge, however, was of the opinion that the contentions sought to be added by the defendant were all legal contentions and there was no element of surprise in them. According to him the plaintiff was not materially prejudiced by the grant of the application and he therefore allowed the application on the same day, and added two more issues to those already framed. Those issues were whether the suit was barred for want of an adequate and proper notice u/s 80 of the CPC as contended by the defendant, and what should be the value of the suit for the purposes of pleaders' fees.

3. The plaintiff has applied to this Court in revision against that order. It is contended by Mr. J.C. Shah on behalf of the plaintiff-applicant that the Court acted with material irregularity in granting the amendment to the written statement at such a late stage and at a time when any other suit by the plaintiff on the same cause of action after giving a proper notice, assuming that the notice given was invalid, would be time-barred. It is contended that if, as a matter of fact, a notice is given to the Secretary of State, it is open to him to waive any defect in the notice, that the fact that there was no plea of invalidity of the notice for more than five years after the written statement was filed would create a presumption that the defect was waived by the Secretary of State, and even apart from that the plaintiff should not be prejudiced by granting the application at such a late stage. I think there is force in this contention because if the Government had taken the plea when the written statement was first filed on October 9, 1936, that the notice was invalid or insufficient, it would have been open to the plaintiff to apply to the Court for permission to withdraw the suit and bring another suit on the same cause of action after giving a proper notice. On the defendant's own case the cause of action arose on July 25, 1934, when the Collector ordered the plaintiff to make the payment. According to the Government the suit should be filed within one year from that date under Article 14 of the Indian Limitation Act. Whether that article applies to the present case or not is still to be decided because there is an issue on that point. According to the plaintiff a suit for injunction could be filed within six years from the date of the accrual of the cause of action, i.e. July 25, 1935, and that period would expire on July 25, 1940. If, therefore, the plea was taken at the proper time in October, 1935, the plaintiff had sufficient time to withdraw the suit, give notice to Government and bring a second suit within the period of six years. As it happened however, the second suit would be time-barred on December 3, 1941, when the application for amendment was made and granted. There is no doubt, therefore, that if a defect in the notice could be waived, it must be regarded in the circumstances of this case to have been waived, and the plaintiff would be materially prejudiced by the granting of the application.

4. In *Manindra Chandra Nandi v. Secretary of State for India* (1907) ILR 34 Cal.

257 it has been held that a notice u/s 424 of the old Civil Procedure Code, corresponding to Section 80 of the present Code, is given for the benefit of the defendant, and it may be presumed that the intention of the Legislature was that the Secretary of State should have an opportunity of investigating the alleged cause of complaint and of making amends, if he thought fit, before he was impleaded in the suit. There is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of notice at the trial. It was further observed that under the circumstances disclosed in that case the right to a notice of action was waived, and that if the objection had been taken, as it ought to have been taken, when the application for amendment of the plaint was made, it would have been open to the plaintiff to bring a separate action in respect of the claim for the refund of the amount. But not only was objection not taken on the ground of want of notice when leave was granted to amend the plaint, but it was actually taken at a time when, if the objection was allowed to prevail and the plaintiff was driven to institute a separate suit for the recovery of the Income Tax, he would be successfully met with the plea of limitation. It appears that in that case the notice was given originally as required by the previous Section 424, but the plaintiff had applied for amendment of the plaint for the additional relief of the refund of Income Tax, and it was contended that a further notice was necessary for that relief. It can no doubt be said that after the decision of the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India* (1927) L.R. 54 IndAp 338 this would not be good law with regard to the necessity of giving notice, because that decision is a clear authority for the proposition that a notice u/s 80 is necessary for every kind of suit brought against the Secretary of State. But the question still remains whether, if a notice has been given and if there is also an averment of the giving of the notice in the plaint, any defect in the notice can be waived by the Secretary of State. In my opinion *Bhagchand's* case does not go to the length of holding that a suit brought after two months from the date of giving the statutory notice must be dismissed if it does not fulfil all the requirements of Section 80 even in absence of any plea by the Government. In that case, the suit was brought within two months after giving the notice though the section required that it should be brought after the expiration of that period and it was contended that the notice was not required in the special class of suits like that for injunction where speedy and urgent relief was required. That contention was overruled and it was observed that Section 80 was express, explicit and mandatory and admitted of no implications or exceptions. But that means that the giving of the notice was mandatory and the suit cannot be brought before the statutory period expired. It is pertinent to note that their Lordships observed in their judgment that it did not appear that any notice was served on the Secretary of State though the section required it, but they did not take that circumstance into consideration because "no independent ground of defence has been raised on this." It can be said therefore that their Lordships thought that ground of defence as waived as it was not taken up although the service of the notice and its recital in the plaint were obligatory under the section.

5. There are some reported decisions subsequent to Bhagchand's case which may be noted here. In *Purna Chandra Sarkar v. Radharani Dassya* (1930) 53 C.L.J. 31 and in *Ramnarain Prasad Vs. Ram Kishun Prasad*, no notice was given at all u/s 80, and still it was held that it was open to the Court to infer that the defendant by his conduct had waived the notice. It may be said that those decisions would not be good law after the decision in Bhagchand's case which makes the giving of the notice mandatory in all cases. It is not necessary for the purpose of the present case to go into that question because notice has been given and the suit is filed two months thereafter, but it may be noted that Bhagchand's case is distinguished in the Patna case even on those facts. The Allahabad High Court has held in *Murari Lal v. E. v. David* (1924) ILR 47 All. 291 that two months' notice u/s 80 was a necessary condition precedent to the filing of a suit against Government or a public officer, and that the right to such a notice cannot be considered as waived if the receiver does not take objection to the absence of the notice till a late stage of the proceedings. In that case no notice was at all given by the plaintiff, and it was held that the defendant's failure to raise the objection in the written statement cannot per se be regarded as a waiver even if a waiver were otherwise admissible, because the objection was raised practically before the trial had commenced and before any prejudice could have been caused to the plaintiffs by the lateness of the stage at which the objection was raised. Thus even though no plea was taken in the written statement, the amendment was allowed on the ground that it did not cause prejudice to the plaintiff.

6. The decision in *Secretary of State Vs. Pullela Rangaswami Naidu and Others*, is that there was no waiver by the defendant where in a suit against Government no notice u/s 80 of the CPC was given and the plaint was silent as to that fact and due to the negligence of the Government Pleader and the Subordinate Judge the suit was tried and disposed of without raising an issue on that point. That case is also to be distinguished as no notice was given at all.

7. In *Jagadischandra Deo Dhabal Deb v. Debendraprasad Bagchi* (1930) ILR 58 Cal. 850 it was held that it was the duty of the Court to look into the plaint in a suit filed against the Government or a public officer, and when, on the face of it, there was no averment as to service of the notice u/s 80, the Court should hold that the suit was one which could not be instituted and should reject the plaint instead of going on with the suit. It is contended on behalf of the opponent here that that case is an authority for the view that if the provisions of Section 80 are not satisfied, the suit must be dismissed even though no plea as to the invalidity of the notice is raised in the written statement. In my opinion, however, that case is also distinguishable from the present case. There was in that case no service of the notice on the defendant at all. There was only a service of an application made by the plaintiff to the Court for leave to sue the defendant who was a public officer, and it was held that the service of the application was no service of the notice of the intended suit. In the plaint it was not even stated that a notice was sent or delivered to the proper officer, and it was therefore held that

the plaint ought to have been rejected. In the present case there is no question of any absence" of notice or of averment in the plaint as to the giving of the notice.

8. Lastly there is a decision in *Gangaram and Rupchand & Co. v. Secy. of State* AIR [1937] Sind 201 where it was held that the provisions of Section 80 were mandatory and cannot be waived. In that case the suit was filed on June 26, 1931, and the notice was alleged to have been given on April 25, 1931. The written statement was filed on January 14, 1932, but it did not challenge the validity of the notice. On August 25, 1932, the defendant asked leave to amend the written statement raising the plea of want of notice. That application was granted. At the hearing the plea as to notice was successful and the suit was dismissed. It was argued in the appeal that the defendant had waived the notice by not challenging its validity in the written statement, and that in any case permission ought not to have been granted to amend the written statement. The Court held that the principle of waiver did not apply to the notice u/s 80. It was, however, observed that where there was in the plaint a proper averment that notice was served within the meaning of Section 80 and that averment was not traversed in the written statement, service of notice may be taken as admitted and that leave thereafter should not be granted to deny what had once been admitted either expressly or by implication, but that did not amount to a waiver. Moreover it was not stated in the plaint in that case that the notice was delivered or left at the proper place. All that was stated was that a notice was sent, and it appears that the notice was delivered to the Collector on April 27, 1931, and the suit had got to be instituted after two months from that date. As a matter of fact it was instituted on June 25 of that year, i.e. within two months. It was also held that there was no question of prejudice to the plaintiff because another suit would have been time-barred even when the first written statement was filed, because the cause of action had arisen as early as June 28, 1928. This decision cannot apply to the facts of the present case. The observations are, however, in favour of the view that the principle that where an averment in the plaint is not traversed in the written statement, it must be taken as admitted applies to a notice u/s 80.

9. These are all the authorities brought to my notice, and I am of the opinion that the decision in *Bhagchand's* case is not opposed to the contention that amendment of the written statement should not be granted where the notice u/s 80 has been given and the suit is brought two months thereafter, and where also the granting of the amendment would have the effect of disentitling the plaintiff from bringing another suit. Assuming that it would be open to the Court to dismiss the suit without any plea of want of notice if, as a matter of fact, no notice had been given, the invalidity of the notice given is a matter of plea and proof and it could be waived by the defendant. The object of Section 80 is to inform the Government, or the public officer of the plaintiff's claim and the relief which he wants so that the claim may be settled after investigation. Government may think that in spite of any irregularity or defect in the notice it had sufficient

information of the plaintiff's claim and the relief sought. It would, therefore, be open to the Government not to contend, if it likes, that the notice was bad. In a proper case the Court may raise a presumption of waiver, and on the facts of the present case I think such a presumption would arise when the Government was apprised of the fact of the notice and still for five years nothing was done in that matter. If the plaintiff had asked for amendment of the plaint at a time when his suit would be time-barred, it would have been open to the Government to contend that it should not be allowed on the ground that it would deprive it of the defence of limitation. I do not see any reason why such an argument should not be open to the plaintiff when the Government applies for amendment at a stage which would materially prejudice him. The order of the lower Court, therefore, is, in my opinion, materially irregular and should be set aside. The amendment of the written statement about the plea of notice u/s 30 is disallowed and the added issue is deleted.

10. The plaintiff does not object to the framing of an issue with regard to the proper valuation of the suit for pleader's fees.

11. The rule is, therefore, made absolute with costs, and the order of the lower Court with regard to the newly added issue about notice u/s 80 is set aside.