
(1947) 08 PAT CK 0005
In the Patna High Court

Kanailal Karmakar

APPELLANT

Vs

Governor General for India in Council and Others

RESPONDENT

Date of Decision : 20-08-1947

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1948 Patna 164

Hon'ble Judges : Ray, J

Bench : Single Bench

Judgement

Ray, J.—This is a plaintiff's application against an order of the District Judge of Purulis, dated 19-1-1946, dismissing the plaintiff's suit while confirming the decree of the trial Court. The suit was for recovery of damages for non-delivery of one bundle of bell-metal materials consigned for transmission over the East Indian and Bengal Nagpur Railways against the Governor-General of India (defendant 1) owner of the said E.I.R. company and the B.N. Railway Co. Ltd. (defendant 2) through their agent and General Manager. The suit was contested by both the defendants, and several issues were framed of which the one material for the purpose of this petition is: "2 Is the suit barred for want of compliance with the provisions of Section 80, Civil P.C.?" The material portions of the plaint and the written statement from which the above issue arose need reproduction. The plaintiff stated in his plaint that he

served a registered postal notice with an acknowledgment due upon the Secretary to the Governor-General in Council u/s 80, Civil P.C., on 4-5-1943.

Separate written statements were filed by the defendants. Defendant 2 raised no plea in bar of the plaintiff's suit based upon Section 80 of the Code. Defendant 1 pleaded "that no notice u/s 80 was served upon him." It would be relevant to mention here that none of the defendants raised any objection to the defective character of the plaint which is the subject-matter of consideration in this revision. It has been found by the Court below that notice u/s 80 has, in fact, been served, and the learned District Judge in this connection observes:

In fact, according to the record the notice was delivered but whether the notice was actually delivered or not is not the point.

2. The learned Munsif, in connection with the plaintiff's contention that the Deputy Director of the Railway Board to the Government of India had in his letter dated 28-5-1943 admitted receipt of the plaintiff's notice and as such, it was not open to defendant 1 to state anything to the contrary observed:

I should, however, think that there can be no question of estoppel on point of law nor can it be held that the Deputy Director will by his conduct be deemed to have waived the legal requirement.

After so observing, he said:

In the result I hold that there has been no strict compliance with the provisions of Section 80, Civil P.C., and the suit must fail on this ground,

Being aggrieved by the orders aforesaid, the plaintiff has approached this Court in revision.

3. In my judgment, there appears to be some misapprehension in the minds of the Court below in relation to the scope of that portion of Section 80 of the Code which bears upon the question before us. Section 80 may be divided into two parts. The first part deals with the service of notice in writing, and the second part with a rule of procedure as to what should the plaint contain. The first part begins with the words: "No suit shall be instituted against the Crown" and ends with "stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims." In this part is provided what should the notice in writing contain, to whom it should be delivered or at whose office it should be left. This provision is prefixed with the mandatory words: "No suit shall be instituted...until the expiration of two months next after notice in writing" etc. These words cannot be read as prefatory to the second part of the section which reads "and the plaint shall contain a statement that such notice has been so delivered or left." From the very language of the two parts, their respective significance will appear to be widely divergent. The one affects the plaintiff's right to sue, while the other relates to a matter of procedure. The second part may be classed with certain rules of procedure as to the contents of a plaint prescribed in Order 7 of Schedule 1 to the Code; for example, see Rule. 1 of the Order which reads: "The plaint shall contain the following particulars" etc. The other examples are furnished by Rules 2, 3, 4, 5, 6, 7 and 8.

4. Under the circumstances, I should hold that the defect in the contents of the plaint does not go to the root of the plaintiff's right to sue. In this case, as found by the learned Court below, the requisite notice in writing contemplated in the first part of Section 80 of the Code had been delivered to the right person, and the suit was instituted two months after the delivery of the notice. Therefore, the true perspective in which the question should be viewed is that the plaint was defective in the sense in which it is considered defective within the meaning of

Order 7, Rule 11, Civil P.C. In this view of the matter, I should hold that both the learned Courts below were wrong in dismissing the suit as they have done in this case. Considering that the plaint was defective, as the Courts below have held it to be, the order that they could pass would have been one under Order 7, Rule 11.

5. The next question to which I shall address myself is whether there is any defect in this plaint, or, in other words, whether the second part of Section 80 of the Code has not been complied with. I have already quoted the averment of the plaint by way of compliance with the provisions of the section. The section requires the plaint to contain a statement that such notice has been "so delivered or left." The present is not a case of leaving the notice at the office of the prescribed personnel under the section. It is a case in which the notice has, in fact, been delivered by post. The only question is whether the word "served" would lawfully and correctly replace the word "delivered." The learned lower appellate Court is of opinion, and I think rightly, that the word ""served" would mean "delivered." I should quote the passage in which he says so. The passage reads:

The learned Munsif has considered a ruling of the Sind Court reported in Gangaram and Rupchand & Co. Firm v. Secy. Of State AIR 1937 Sind 291 where the word "sent" had been used and the learned lawyer for the appellant says that the word "sent" and the word "served" are different. In my opinion it is. so. If a notice is served on somebody it is "delivered." It is not merely sent. If a letter is sent it does not mean to say that it has been delivered.

6. He, however, was of opinion that in the setting in which the word "served" was placed in the present plaint, it would be equivalent to "sent." In this connection he says:

But the question is not the word "served" by itself that one has to consider but what is the meaning of the sentence which I have just quoted from the plaint. The words that I have just quoted cannot mean sent through the post and the notice was delivered. The plaint says that the plaintiff served registered postal notice with acknowledgment due, that is to say, the plaintiff sent a registered letter through the post with "acknowledgment due. If the plaintiff had further gone on to say that to the Governor-General the letter was delivered the matter would have been clear.

7. In my view there is no room for doubt that the learned lower appellate Court was not entitled to read "sent" for the word "served." Particularly, in a technical matter like this, it should be borne in mind that rules of procedure are meant to advance the cause of justice but not to fetter it. In construing the word used in the plaint, the real context is the provisions of Section 80 of the Code. It is apparent that it was in fulfilment of the provisions of that section that the statement was made. Every lawyer understands that he has to show in the body of the plaint that the legal bar against institution of the suit as provided in first

part of Section 80, has been removed in this particular case. When the section provides that the notice in writing should either have been delivered to the person named therein or left at his office it provides the specific mode of service as applicable to the case of notice prescribed under the section. Under the circumstances, without anything more, the word "served" in the present case should mean that the notice has either been delivered to or left in the office of the person authorised under the section. It has been argued with some amount of conviction by Mr. S.N. Bose appearing for the opposite party that the words "with acknowledgment due" are characteristic enough to point rather emphatically to the construction adopted by the learned Court below. I do not, however, consider this contention to be sound. The words "with acknowledgment due" are descriptive of the words "registered post" or "registered postal notice." To my mind, it appears that what the plaintiff meant was that the notice had been served through registered post and acknowledgment was obtained. For the purpose of determination of the question whether there are defects in the plaint or not, it is sometimes necessary or rather evident before the Court exercises its power under Rule 11 of Order 7 of the Code to go into evidence; for example, the question whether the relief claimed is undervalued does not admit of ready solution without some evidence. When evidence is gone into, the Court is to consider the existence or otherwise of the defect in the light of the evidence. In this particular case when the Courts below expressed their opinion as to the meaning of the word "served," they had before them the admission of the defendant concerned, and besides, the proof of delivery of the notice by registered post and its due acknowledgment. Why should not the words in the plaint, therefore, be interpreted in the light of the evidence adduced? I should, therefore, hold that the plaint does not suffer from any defect which is sought to be assigned to it. On the contrary I am of opinion that the plaint does comply with the provisions of Section 80, Civil P.C.

8. Next, it is argued by Mr. Bose that however wrong the opinion of the Courts below might be, this Court should not interfere in its revisional jurisdiction. His submission is; that the case does not fall within the purview of Section 115, Civil P.C. If this argument is acceded to, the result will be that injustice to the plaintiff will be perpetrated.

9. Before applying my attention to this contention, it is necessary to examine what necessary consequences should befall the suit, in the event of non-compliance with the provisions of the second part of Section 80, Civil P.C., in the particular circumstances of the present case. It is a suit in which the Governor-General is not the sole defendant. The goods were to be carried partly by the East Indian Railway and partly by the Bengal Nagpur Railway, the destination of the consignment being one of the stations of the latter railway. The Governor-General was made defendant 1 as the owner of the East Indian Railway. As I have already pointed out, omission of the averment from the plaint would be more appropriately a ground for the rejection of the plaint than dismissal of the suit. Secondly, there are precedents of this Court showing the course to be

adopted where the Crown or the Secretary of State or the Governor-General, as the case may be, is only one of several defendants. In *Secy. of State v. Amarnath* AIR 1936 Pat. 339 the plaintiff had instituted a suit for recovery of rent of a holding impleading the Secretary of State as a pro forma defendant but no notice u/s 80, Civil P.C., was served upon him. The trial Court rejected the plaint but the lower appellate Court set aside that order, and remanded the case for disposal on the merits holding that as no relief was claimed against the Secretary of State, the notice u/s 80 was not essential. A Division Bench of this Court set aside the order of the lower appellate Court and directed expunction of the name of the Secretary of State from the action. In the well-known case in AIR 1927 176 (Privy Council) where the suit had been instituted before expiry of the prescribed period of notice u/s 80 of the Code, and the plaint had distinctly averred that notice as required u/s 80 had been given to the Collector, and it was also stated that as the suit was for injunction, the suit, was being filed before the completion of the period of two months, Viscount Sumner at p. 358 of the report said as follows:

The consequence is that the appellants' present position in regard to the taxes imposed upon them is as if their action had never been brought. It was unsustainable in limine. They commenced their suit before the law allowed them to sue, and can get no relief in it either by declaration or otherwise. Whatever may be the case between other parties, as against the respondents (the Collector and the Secretary of State oh whom no notice u/s 80 had at all been served) they must fail. They have taken their own course and have brought this result on themselves.

10. In *Tipan Prasad Singh v. Secretary of State* AIR 1935 Pat. 86 the plaint suffered from the defect of non-mention of service of notice on the Secretary of State. At a much later stage, the plaintiffs wanted to amend the plaint in order to state in express terms, as required by Section 80 of 4he Code, that notices had been served on the Secretary of State more than two months proper to the institution of the suit. The learned Subordinate Judge, relying upon a decision of the Calcutta High Court in 132 Ind. Cas. 634 corresponding to *Jagadish Chandra Deo Vs. Debendra Prosad Bagchi Bahadur and Others*, , held that the plaintiffs should not be allowed to state at that stage that the Secretary of State had already been served, Fazl Ali J. (as he then was) made a distinction between a case of non-service of notice u/s 80 and a case of non-averment of the fact of service, and held that *Jagadish Chandra Deo Vs. Debendra Prosad Bagchi Bahadur and Others*, does not warrant the view that the Court is not competent to allow the amendment if there is no averment in the plaint of the fact that notice u/s 80 has been served as required by that section on the Secretary of State, even though it may be proved as a fact that a notice required by Section 80 had been served in the manner provided by the section. In disposing of the civil revision, his Lordship held that as the lower Court Judge" apparently proceeded in the matter on the assumption that he had no power to allow the amendment, he had failed to exercise a jurisdiction which was vested in him by

law, and this brought the case well within the ambit of Section 115, Civil P.C. As I have already indicated that if the District Judge was satisfied, as he has been in this particular case, that the alleged defect was a real one, he should have either expunged the name of the Governor-General from the category of the defendants, or should have called upon the plaintiff to remove the defect as the Court is empowered to do under the provisions of Order 7 of Schedule 1, Civil P.C., before rejecting the plaint, but he was never" justified in dismissing the suit as a whole. While expressing this view, I am fully alive to the observations of their Lordships of the Privy Council in AIR 1927 176 (Privy Council) already referred, in relation to an argument distinguishing between the effects of non-service of the notice u/s 80 on the Secretary of State and service of notice upon the Collector. The observation was:

Their Lordships cannot accept this. Not only has the suit been throughout a joint proceeding against the officials concerned, for the purpose of getting a joint declaration that the Government notification was bad as the foundation of everything done, but without the presence of the Secretary of State before the Court, the notification could not be assailed and if it stands as valid, the Collector's own action cannot be successfully impugned.

11. The facts of this case, however, present quite a different feature. It is a case of either joint or several liability as between the two defendants. In fact, in this case, relying upon Section 80, Railways Act, it was argued in the trial Court by the plaintiff's pleader that either of the two Railway companies may be made liable for the plaintiff's claim as the one would be presumed to be the agent of the other for the purpose of carriage. Whatever may be fate of this argument, it makes it clear that it was not being proceeded, with as a case of joint liability in which failure of the suit against one must necessarily mean failure of the suit against both, and, therefore as a whole. I would, therefore, hold that the learned lower appellate Court in dismissing the suit as a whole has proceeded on a wrong notion of his jurisdiction as to the disposal of the suit. He assumed that he had no jurisdiction to pass any other order but to dismiss the suit as a whole. In this view, he did not proceed to consider the other issues involved in the suit. In my view, therefore, in dismissing the suit as a whole, he has not only failed to exercise his jurisdiction which was vested in him by law but has acted illegally in the exercise of his jurisdiction. His order, therefore, dismissing the suit as a whole must be set aside. In this view of the matter, the rulings relied upon by Mr. Bose of which the case in *Amir Hasan Khan v. Sheobux Singh* (85) 11 Cal. 6 was the principal need not be considered as I do not hold in this case that the lower appellate Court, in deciding the point of law wrongly acted illegally or with material irregularity in exercise of his jurisdiction. But, on the contrary, I hold even on his own decision he acted illegally in exercising a jurisdiction to dismiss the suit which legally speaking he had not.

12. After having set aside his order, I shall have to make such order in the case as I think fit according to Section 115, Civil P.C. The order that I make in this

particular¹ case is that the plaint does not suffer from any defect as to its contents re: an averment of delivery of notice on defendant 1, and the plaint, therefore, is in order. Under the circumstances, I should send the appeal to the learned lower appellate Court for disposal on merits. The petition is allowed with costs. Hearing fee one gold mohur.