
(1940) 08 MAD CK 0012
In the Madras High Court

Marina Ammayi

APPELLANT

Vs

Secretary of State and Others

RESPONDENT

Date of Decision : 30-08-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : AIR 1941 Mad 446 : (1941) 53 LW 233

Hon'ble Judges : Venkataramana Rao, J

Bench : Division Bench

Judgement

Venkataramana Rao, J.—The question for decision is whether the suit out of which this second appeal arises is liable to be dismissed for

want of proper notice u/s 80, Civil P.C. Both the lower Courts dismissed the suit. The question now is whether the dismissal is proper. The notice

of suit given to the Collector was dated 20th October 1932. Both the Courts have concurrently found that the notice was served on 21st October

1932. The suit was instituted on 21st December 1932. In the plaint, the allegation is that defendant 1, the Secretary of State for India represented

by the Collector of East Godavary acknowledged the notice on 21st October but however failed to comply with the demand therein. The plaintiff

claimed exemption of the two months' time occupied; by reason of the said notice. The reply of the Collector on behalf of the Secretary of State

was that the amount of claim was not mentioned in the said notice and the suit was bad for want of proper notice. The following issue was raised:

Whether the suit is not maintainable for want of proper notice u/s 80, Civil P.C. When the case was taken up for trial, the Secretary of State

under a mistaken impression contended that the notice was served on him on 22nd October 1932 and the learned subordinate Judge accepted this

contention but his decision was reversed on appeal on the ground that notice was actually delivered at the Collector's office on 21st October 1932

and in remanding the appeal the learned District Judge remarked thus:

It was contended by the Government Pleader that even if the notice had really been received on 21st October 1932 the suit filed on 21st

December 1932 would still be within two months of the date of the receipt of the original notice. This point too does not appear to have been

brought to the notice of the learned subordinate Judge. I consider that the disposal of the suit in the lower Court is unsatisfactory in the sense that

none of these points have been adjudicated upon.

2. The learned subordinate Judge who dealt with the case after remand came to the conclusion that the suit having been filed within two months of

the date of receipt of the notice provisions of Section 80, Civil P.C. were not complied with. He therefore dismissed the suit. On appeal the

learned District Judge concurred in this view. Mr. Lakshmanan on behalf of the plaintiff-appellant contends that this view is wrong. He submits that

both the lower Courts have wrongly construed Section 80, Civil P.C., and in computing the period of two months the day on which notice was

served ought to have been included and not excluded and that if it was so included, the suit was in compliance with Section 80, Civil P.C. He

further contends that in any event it must be held that the Government has waived this specific plea. Section 80, Civil P.C., so far as it is relevant

for the present discussion runs thus:

No suit shall be instituted against the Crown, 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, in the case of a suit against a Provincial Government,

delivered to, or left at the office of, a Secretary to that Government or the Collector of the District....

3. This section therefore provides a condition precedent to the institution of a suit. As observed by their Lordships of the Privy Council in AIR

1927 176 (Privy Council) , Section 80, Civil P.C., is explicit and mandatory. If the suit is filed before the expiration of two months after notice had

been delivered or left at the office of the Collector, it is not maintainable and the Court is bound to dismiss it. The question therefore is whether two

months expired after the notice in question was served on the Collector. The language of the section indicates that there must be full two months

after delivery of the notice. This in my opinion follows from the use of the words ""next after."" It seems to me the principle that ought to be applied

in construing this section is that whenever a period of time is to be computed from or after an act done or an event happened, the day on which the

act was done or the event happened should be excluded. In *Blunt v. Heslop* (1838) 8 A & E 577 an action was filed by an attorney for recovery

of an amount due to him from his client. The defence was that the action was premature. It was based on statute 2, Geo. II, c. 23, Section 23,

which provided that

no attorney or solicitor shall commence any action for the recovery of any fees, charges, or disbursements at law or in equity until the expiration of

one month or more after such attorney or solicitor respectively shall have delivered into the party or parties to be charged therewith, or left for him,

her or them, at his, her or their dwelling house or last place of abode, a bill.

4. The bill was delivered on 12th January 1886 and the action was commenced on the ensuing 9th February. The contention of Mr. Alexander on

behalf of the defendant was that the words of the statute ""the expiration of one month or more after"" imply exclusion. This contention was upheld

and the plaintiff was non-suited. Littledale J., observed thus:

The words being "one month or more" we must suppose that the client was intended to have a full month after the delivery of the bill.

5. Patterson J., observed as follows:

Whatever may be the case where the thing is to be done "within" such a time after an act done, Mr. Alexander's construction is correct here,

where the action is not to be brought "until the expiration of one month or more after" the delivery of the bill.

6. In *Young v. Huggon* (1836-47) 6 M & W 49, the action was for trespass against the defendant, a Magistrate, for breaking and entering the

plaintiff's dwelling house and seizing his goods. Under 24 Geo. II, c. 44. Section 1, notice of suit was necessary and the section ran thus:

No writ shall be sued out against, nor any copy of any process at the suit of a subject shall be served on any Justice of the Peace for anything done

in the execution of his office, until notice in writing of such intended writ or

process shall have been delivered to him, etc., at least one calendar month before the suing out or serving the same.

7. The notice in that case was served on 26th March 1838 and the suit was filed on 26th April and it was held that the action was premature.

Parke, B. observed thus:

When time for a particular period is allowed to a party to do any act, the first day is to be reckoned exclusively.

8. Alderson, B. agreed with him in that opinion and remarked thus:

Where there is given to a party a certain space of time to do some act, which space of time is included between two other acts to be done by

another person, both the days of doing those acts ought to be excluded, in order to ensure to him the whole of that space of time. Here is a case in

which one party is required to give notice to another a certain time before a particular act can be done by the former; the party to whom the notice

is given cannot fix the period of the day when it is to be given; but the Act of Parliament allows him a month, as an intervening period "within"

which he may deliberate whether he will do a certain act, viz., tender amends; and unless you exclude both the first and the last day, you do not

give him a whole month for that purpose.

9. In the present case the statute allows two months' time within which the Secretary of State can deliberate whether he will comply with the

demand made in the notice. In *Lester v. Garlona* (1789-1817) 33 E.R. 748, the question arose with reference to a will. Certain properties were

devised in trust to the following effect : in case A shall within six calendar months after the testator's decease give security not to marry B, then,

and not otherwise, to pay to the children of A; with a proviso to go over, if she shall refuse or neglect to give such security. The testator died on

12th January and security was given on 12th July. It was held that the condition precedent of giving security within six months was satisfied on the

ground the day of the testator's death must be excluded from the computation of six months. Sir William Grant observed thus:

It is not necessary to lay down any general rule upon this subject; but upon technical reasoning I rather think, it would be more easy to maintain,

that the day of an act done, or an event happening, ought in all cases to be excluded, then that it should in all cases be included. Our law rejects

fractions of a day more generally than the civil law does. The effect is to render the day a sort of indivisible point; so that any act, done in the compass of it, is no more referable to anyone, than to any other, portion of it; but the act and the day are co-extensive; and therefore the act cannot properly be said to be passed, until the day is passed.... In the present case the technical rule forbids us to consider the hour of the testator's death at the time of his death for that would be making a fraction of day. The day of the death must therefore be the time of the death; and that time must be past, before the six months can begin to run. The rule, contended for on behalf of the plaintiffs, has the effect of throwing back the event into a day, upon which it did not happen; considering the testator as dead upon the 11th, instead of 12th January, for it is said, the whole of the 12th is to be computed as one of the days subsequent to his death. There seems to be no alternative but either to take, the actual instant, or the entire day, as the time of his death; and not to begin the computation from the preceding day.

10. The principle of these decisions was applied and followed in *In re Railway Sleepers Supply Co.* (1885) 29 Ch. D. 204. When as here, the statute says that no suit should be instituted till after the expiry of two months after the doing of a particular act, that is, in this case the delivery of the notice, the day of the delivery must be excluded. Following the principle of the above decisions, I would hold that the suit was premature and ought to be, dismissed. The next question is whether there has been a waiver of the plea. Mr. Lakshmanan has not been able to put forward any argument to convince me that the plea has been waived in this case. The Secretary of State has pleaded that the notice was not a proper notice. No doubt the specific plea as to the suit not having been instituted within two months was not taken but the plaintiff has to make out that he has complied with the provisions of the section because it is a condition precedent to the institution of the suit. Further, having regard to the imperative provisions of the statute it is not open to the Collector to waive this plea. If authority is needed, I would refer to the recent decision of the Privy Council in AIR 1938 165 (Privy Council) where their Lordships dealing with the provisions of Sections 86 and 87, Civil P.C., observed thus:

As already pointed out, the provisions relating to this matter are statutory. They are contained in Sections 86 and 87, Civil P.C., they are

imperative, and having regard to the public purposes which they serve, they cannot, in their Lordships' opinion, be waived in the manner suggested by the High Court.

11. I therefore hold that it would not be open to the Secretary of State to waive this plea. In the result the second appeal" fails and is dismissed but

having regard to the circumstances of this case, I direct each party to bear his own costs throughout. Leave to appeal refused.