

(1961) 04 RAJ CK 0007
In the Rajasthan High Court
Case No : First Appeal No. 30 of 1955

Mst. Chandani	Vs	APPELLANT
Rajasthan State and Others		RESPONDENT

Date of Decision : 27-04-1961

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 1 Rule 10, Order 41 Rule 1, Order 7 Rule 11
Constitution of India, 1950 — Article 300

Citation : AIR 1962 Raj 36 : (1962) RLW 49

Hon'ble Judges : I.N. Modi, J

Bench : Single Bench

Advocate : Hastimal, for the Appellant; Rajanarain, A.G.A and S.K. Mal Lodha, for the Respondent

Final Decision : Partly Allowed

Judgement

I.N. Modi, J.—This is a Civil regular first appeal by Mst. Chandni, widow of Hiralal plaintiff, against the judgment and decree of the Civil Judge, Balotra, dated the 23rd December, 1954, dismissing the plaintiff's suit. The plaintiff Hiralal filed the decision of the suit by the trial court and before the present appeal was filed, and so this appeal was preferred by the present appellant, being his sole representative.

2. It is common ground between the parties that the plaintiff Hiralal worked as a retail cheap grain shop agent of the State for the Guda Chohtan area from the 16th June, 1949 to the 18th August, 1949. One Balchand Geimal was the whole-sale distributor of grain for this area at the relevant time. The plaintiff was caught having sold some 18 bags of grain in black-market, and for this it appears that he was subjected to a fine of Rs. 1500/-. The case of the plaintiff is that at that time there were some 221 bags of grain in his godown (with which alone we are concerned in this appeal), and a "Chepa" was put on it by defendant No. 3 Faujraj, a famine clerk in the office of the Tehsildar, under the orders of defendant No. 2, Radhakishen, the Tehsildar, on the 18th August, 1949, and

eventually these goods were removed from his godown in his absence on the 12th and 13th September, 1949.

According to the plaintiff, the total amount of grain in these bags weighed 551 maunds and 8 seers and the price thereof in accordance with the controlled rate of Rs. 13/5/4 per maund amounted to Rs. 7349/2/9. The plaintiff's case further was that, apart from the afore-mentioned bags, four bags of gram weighing 11 maunds and 12 1/2 seers were also removed by the order of the Tehsildar and the price thereof was Rs. 150/13/3, but this part of the plaintiff's case was not sought to be pressed before me, and, therefore, I shall say nothing more about this. Thus the plaintiff's claim is for a total sum of Rs. 7349/2/9 plus Rs. 150/13/3 equal to Rs. 7500/-. To this, he added a sum of Rs. 1300/- by way of interest from the date of actual removal of the bags namely the 12th. and 13th September, 1949, upto the date of suit, namely, the 12th September, 1952.

Before filing the suit, the plaintiff alleges to have given a notice to the Collector, Barmer, on behalf of the State on the 4th June, 1951, u/s 80 C. P. C. but without any result. It may be mentioned at this place that the plaintiff. did not give any separate notices to defendants Nos. 2. and 3 Radhakishen and Faujraj respectively, Eventually he filed the present suit in the court of the District Judge, Balotra, on the 12th September, 1952, claiming a sum of Rs. 8800/- against the defendant State and in the alternative against defendants Nos. 2 and 3 Radhakishen and Faujraj. This suit was transferred for trial, by the District Judge to the Civil Judge, Balotra.

On an objection having been raised, on behalf of the defendants Radhakishen and Faujraj that the suit against them was not maintainable as no notices had been given to them u/s 80 C. P. C. the trial Judge held that as both these defendants were being sued for certain acts done by them in their official capacity and as the contention raised by them that no notice had been given to them u/s 80 was correct, the suit could not proceed against them and he therefore reflected the plaint under Order 7 Rule 11 C. P. C. so far as these defendants were concerned. Thereafter the suit proceeded only against defendant No. 1 the States

3. The State resisted the suit. Unfortunately, however, the written statement filed on behalf of the State is a highly vague and an extremely unsatisfactory piece of pleading with the result that not more is sought to be read into it by the learned. Assistant Government Advocate, who has appeared before me on its behalf, than what can be legitimately read into it. Be that as it may, its main defence is contained in paragraphs 4, 5 and 6 of the written statement. That defence is that the plaintiff was not entitled to claim the price of the 221 bags of grain because he had not paid the price thereof presumably to the wholesale agent. Balchand Geimal and had committed a breach of the agreement dated the 4th November, 1949.

I pause here to point out that, for one thing, this agreement obviously bears a

date subsequent to the alleged seizure, and, therefore, it does not seem to be relevant, and, in any case, no one on the side of the defendant State has cared to prove it. Coming back from this digression to the main point, it was pleaded that the Government had a lien to retain the grain which was in the possession of the retail agent on the cancellation of his licence and had a further right to have it delivered to the new or the succeeding agent.

It may be mentioned here that no facts were stated as to how it was the duty of the State to see that the retail agent should have paid the price of the grain received by him to wholesaler, and how it came to the notice of the State that such price had not been paid. It was further mentioned in paragraph six of the written statement that defendant No. 2 had full authority to get the grain in question, delivered to another agent on the cancellation of the plaintiff's licence and when he had failed to pay the price thereof. It may also be noted that both in paragraphs No. 1 and No. 8, the State pleaded that it was responsible for all lawful acts done by defendants Nos. 2 and 3; but strikingly enough, not a word was said to indicate . that the acts of its officers mentioned above were outside the scope of their authority, though a faint attempt was made during the course of arguments before me to read this plea into the written statement which could not possibly be allowed.

It was also mentioned in the additional pleas that the wholesale agent Messrs. Balchand Geimal had filed a suit for the recovery of a sum of Rs. 2000/- from the plaintiff in the Court of the Munsiff, Barmer, and that that suit had been decreed. It is, however, not possible to understand what help the defendant State can derive from this allegation in the absence of certain other facts which have not at all been mentioned. Lastly it was pleaded that defendants Nos. 2 and 3 were necessary parties to the suit, and as the plaint had been rejected with respect to them already, this suit could not possibly be maintained against the State in their absence and the whole suit should be thrown out on that ground alone.

4. The plaintiff then filed a replication on the 15th March, 1954, in which he reiterated the stand which had been earlier taken up in the plaint. It was further averred that the contention of the State that the plaintiff had not paid the price of 221 bags to Balchand Geimal was altogether wrong and that the entire payment had been made to him, the last payment amounting to Rs. 8850/- having been made to him on the 16th August, 1949. In any case, it was contended that the defendant State was liable to pay to the plaintiff the price of the goods which had been carried away by its servants. It was further pleaded in this connection that the State could not divest itself of its responsibility in the matter inasmuch as on its own showing it had completely supported the action of the defendants Nos. 2 and 3 and identified itself with them.

5. On these pleadings, the following issues were framed:

(Issue No. 1--is irrelevant for the purposes of the present appeal.)

Issue No 2--Whether Radhakishen Tehsildar Barmer and Faujraj a clerk in that

Tehsil were within their rights in taking away the grain from the plaintiff and, therefore, whether the plaintiff was not entitled to receive the price thereof from defendant No. 1 ?

Issue No. 8--Whether the plaintiff did not pay the price of the grain in question and therefore he was not entitled to claim its price?

Issue No. 4--Whether by reason of the plaint having been rejected against defendants Radhakishen and Faujraj, the present suit was not maintainable against defendant No. 1 also?

Issue No. 5. Whether Radhakishen and Faujraj were necessary parties to the suit?

Issue No 6.--Whether the plaintiff was entitled to claim interest, and if so, to what extent

Issue No. 7-- Relief.

No evidence was recorded in the trial court on behalf of either of the parties. The findings of the trial court on issues Nos. 2 to 7 were briefly as follows. As regards issue No. 2 the finding was that there was no justification for Radhakishen and Faujraj to remove the grain from the plaintiff's godown. On issue No. 3, the learned trial Judge found that it was not proved that the plaintiff had not paid the price of the grain in question. The learned Judge clearly stated that it was for the defendant to prove that that grain was supplied to the plaintiff without payment or that it was substantially Government property in custody of the agent.

On issues Nos. 4 and 5 which were taken up together, the finding of the learned Judge was that the suit having been rejected against defendants Nos. 2 and 3, and since these defendants were necessary parties to it, it could not be maintained against the State and must be dismissed. Issue No. 6 as to interest was also decided against the plaintiff. As a result of these findings, the learned Judge dismissed the plaintiff's suit with costs. Aggrieved by this judgment and decree, the plaintiff has come up in appeal to this Court. 6. This case came up for arguments before me on the 1st and 2nd August, 1960. During the course of the arguments, a strong plea was raised on behalf of the defendant State that its evidence had been wrongly closed by the trial court. This point seemed to me to be good, and learned counsel for the appellant conceded that the trial court had fallen into error in closing the evidence of the defendant in the manner it did.

In these circumstances, by my order dated the 2nd August, 1960, I permitted the defendant State to adduce its evidence in this Court. Two witnesses namely Tehsildar Radhakishen and the clerk Faujraj were accordingly examined on the 29th November, 1960. There was one more important witness namely Balchand Geimal (who was the wholesale agent) who might well have been produced by the State in support of its case but he was not. Ample opportunity was given for the production of this witness, and if the State was not able to produce him, it has to thank itself. This is how the case has come for final arguments before me again.

7. As already stated, the main theme of the plaintiff's case was that the bags in question were his own property which lay in his godown and that the State or its officers had no business whatsoever to seize them in the manner they did, and that even though the plaint had been rejected as against defendants Nos. 2 and 3 for want of statutory notice, the suit was still perfectly maintainable against the State which had completely supported, justified, and identified itself with the acts of its servants.

This case of the plaintiff was sought to be met by the defendant State, it is evident from what has been stated above, on the principal ground that the plaintiff had never paid the price of the bags in suit to the wholesale agent Balchand Geimal, and, therefore he was not entitled to bring the present suit; and the other ground on which the State placed its reliance as a sort of second string to its bow was that this suit was not maintainable even against the defendant State as the plaint had already been rejected against the other two defendants, namely, Radhakishen and Faujraj for want of statutory notice, these being necessary parties to the suit.

On the first branch of the defendant's case the trial court gave a finding adverse to it, but on the second, branch, it was disposed to hold that the suit was not maintainable and it was on this score that it dismissed the suit.

8. The first and foremost question, in these circumstances, which emerges for consideration is whether the view which prevailed with the trial court as to the non-maintainability of this suit is correct. I may state at once that there is no case of our Court which governs the point. The decided cases of oilier High Courts unfortunately reveal that there is a conflict of judicial opinion on the point as to whether, where a suit is filed against a number of defendants and appears to be barred by law against some of them, the plaint may be rejected against some of them or it must be rejected as a whole. One view is that a plaint cannot be rejected in part and retained in part but must be rejected as a whole. See in this connection *Raghubans Puri v. Jyotis Swarupa*, ILR 29 All 325 . *Noor Mohammad Vs. Abdul Fateh and Others*, , *Harihar Mahapatra and Others Vs. Hari Otha and Others*, *Bansi Lal v. Som Prakash*, AIR 1952 Pun 38.

The other view is that in such cases the proper course for the court is to strike off the names of the defendants against whom the suit is not maintainable and to allow the suit to continue against the remaining defendants, provided of course the suit does not become bad for want of necessary parties. Reference may be made in support of this view to *Secy. of State Vs. Amarnath and Others*, , *Kilaparti Appalanarasamma Vs. Commissioner, Municipal Council and Another*, *Boyini Kanganna Vs. Pedini Ramlingam Subudhi*, *Shankarrao Balaji v. Shambihari*, AIR 1951 Nag 419 and *The State of Madras Vs. Sree Raja Ravu Venkata Kumara Mahipathi Surya Rao Bahadur Garu Maharajah of Pithapuram Trustee of Shree Rajah Ram Venkata Mahipathi Gangadhara Rama Rao Bahadur Garu and Others*,

On a careful consideration of these rival views, I am disposed to accept the latter as the sounder of the two. Order 7 Rule 11 C. P. C. undoubtedly lays down, inter alia, that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. It seems to me, however, that this rule, would be attracted into its full application where the suit as a whole would be so barred, and different considerations may reasonably arise where such a suit happens to be barred against some of the defendants but may still be good, against the others.

With utmost respect, I have not been able to persuade myself to accept the view that even where such a suit may be good against some of the defendants in spite of its being bad against certain others, the whole suit must necessarily be thrown out. This seems to me to be opposed to all considerations of common sense and to the dictates of justice, nor do I think that such a result should be held to be a necessary consequence of the rule as it is generally embodied in Clause (d) of Rule 11, and to my mind it is normally intended to be applicable to a case where there is a single plaintiff or a single defendant and a "suit by or against him is wholly barred by any law.

Thus, where a plaint does not disclose a right of action against one or some of the defendants but it does against the rest, or where a suit would be barred by law against one or some of the defendants but not against the rest, the just and proper course, in my opinion, should be not to reject the plaint as a whole but to strike out the names of the defendants against whom there is no cause of action or the suit is barred by law and allow it to proceed against the rest. This would of course be subject to the paramount consideration that such a suit, as a matter of substantive law, would be maintainable against the remaining defendants. I hold accordingly.

9. Applying the conclusion, to which I have come above, to the facts and circumstances of this case, I think that the present is a case, where, fully accepting that the present suit was rightly dismissed against defendants Nos. 2 and 3 for the plaintiff's failure to give statutory notice u/s 80 C. P. C. to them, I am not at all satisfied that there are any considerations of substantive law which would make the suit non-maintainable in the absence of the other defendants against defendant No. 1 namely the State to whom such a notice was indisputably given. This seems to me to be all the more so because, in the case before me, the State has not only supported, nay, justified the act of its officers which has given rise to this suit but has completely adopted, and identified itself with, all they did as would be evident from the stand taken by it in its written statement to which I have already made detailed reference. That being so, I entirely fail to understand the learned trial Judge when he felt. persuaded to make the following observations in deciding the issues in question:--

"What I mean by all this is that the plaintiff's suit is to recover the price of the grain which was taken away by Shri Radhakishen and Shri Faujraj. If this is the whole position, the Rajasthan Government cannot be made liable for the acts of

these two persons even if they are the Government Servants of that State..... AS I have already said that the plaint taken as a whole seems to be as if against the personal acts of defendants Nos. 2 and 3. If the plaintiff wants to make the defendant No. 1 responsible for those acts, he should have cleared the whole matter but it has not been done".

For one thing, the plaintiff's grievance in the present case is not against the so-called "personal acts of defendants Nos. 2 and 3" but as against their official acts, as the learned Judge himself felt disposed to hold when he threw out the plaintiff's suit against them for want of notice u/s 80 C. P. C. Then again, it is not easy to understand what further facts were required in all the circumstances of the case to be cleared by the plaintiff so far as the responsibility of the defendant State was concerned, the position taken up by the State being that what its officers had done was perfectly proper and not only that, what was further said in paragraph five of the written statement was that the Government had a lien on the unsold goods in possession of the plaintiff when he had failed to pay the price thereof.

As I look at the whole matter, I find it extremely difficult for me to agree with the opinion of the learned trial Judge that this suit on the pleadings on which it was founded could not be maintained against the State by itself, and I hold that it could very well be, and, therefore, in disagreement, with the conclusion arrived at by the court below, I hold that the present suit is maintainable against the State and that the trial court had fallen into serious error in holding that it was not maintainable.

10. This brings us to the merits of the case. It is admitted by the State that the goods when they were seized were in the godown of the plaintiff. They were, therefore, in his possession, and, that being so, a presumption of ownership would at once arise in his favour. In fact, when Tehsildar Radha Kishen was examined in this Court, he clearly stated that if at the time of the cancellation of the licence of Hiralal plaintiff, no money should have been due from him to Balchand Geimal, the wholesale agent, then they would have paid the former for the goods which remained unsold, or they would have got the price paid to him from the succeeding agent.

It is not the defendant's case, therefore, that any price was paid to the plaintiff when the bags in question were seized from his possession. The entire defence of the State on the merits clearly seems to me to have been that the plaintiff, when he obtained these goods from the wholesale agent Balchand Geimal, had not paid the price thereof to; the latter, and, therefore, when the plaintiff's licence was cancelled, 221 bags were returned to the latter in lieu of the price which was due to Balchand Geimal from the plaintiff therefor. The only question to decide in these circumstances on the merits, therefore, is whether the State has succeeded in proving this contention.

I regret to have to say that it has signally failed to do so in spite of the

opportunity which was given to it to lead its evidence at the appellate stage by this Court. (After discussing the evidence in this para and para 11 the judgment proceeded): The irresistible conclusion in such circumstances is that the defendant State has completely failed to prove the defence set up by it. And that being so, it is impossible to accept that the State had any justification, more than its officers who were the other defendants in the suit, to seize the plaintiff's goods in the manner adopted or that it had any lien on these goods to take back possession thereof from the plaintiff.

12. It may be pointed out at this place that there is authority for the proposition that an act done for another by a person not assuming to act for himself but for such other person, though without any precedent authority from the former, becomes the act of the principal, if subsequently ratified by him, and in that case the principal would be bound by the act, whether it be for his detriment or his advantage, and whether it be founded on a tort or a contract, to the same extent as if it were done by his previous authority. See *Wilson v. Tumman*, (1843) 6 Man and G 236.

13. Again, the same principle would seem to be applicable where acts are done by public servant for or in the name of their employer, the State, where such acts are ratified by subsequent approval, in much the same way as private transactions, and where this is done it would amount to this that the act had been done by the previous authority of the State. See *Secretary of State for India in Council v. Kamachee Boye Sahaba*, 7 Moo Ind App 476 and *Collector of Masulipatam v. Cavalry Vencata Narrainapah*, 8 Moo Ind App 529. I am quite conscious of the fact that where the acts done by public servants happen to be of a political character and therefore outside the scope of municipal law, that would preclude courts of law from entertaining any claim founded upon them.

But it is not the defendant State's case that the act impugned in this case was an "act of State" nor could it indeed be so contended, because it is much too well established to admit of any doubt or dispute at this date that there cannot be any act of State between a State and its subject. In these circumstances, the conclusion to my mind seems irresistible that the State having in no way disowned the action taken by its Officers in the case before me, but, on the other hand, having fully adopted it, must accept responsibility for the consequences of such action. I hold accordingly.

14. Confronted by this situation, the learned Assistant Government Advocate sought to argue that the act of the Tehsildar was outside the scope of his official authority, and, therefore, the defendant State would not be bound by anything that he did. It was further contended in this connection that the State had not derived any benefit from the transaction and, therefore, it was prayed that the State should not be held to be bound by the acts of its officers.

There is a very short answer to this contention. And that is that all these considerations which are sought to be raised at this stage are really beyond the

scope of this suit because it was never the case of the defendant State that the acts of its officers complained against were outside the scope of their authority; and, on the other hand, what was contended for on its behalf was that the Tehsildar had acted with perfect propriety in the circumstances of this case, and, finally, that the Government had a right to seize the goods of the plaintiff because the latter had failed to pay the price thereof to the wholesale agent Balchand Geimal, a contention with which I have dealt at full length above and found that the defendant State had completely failed to prove it. It will thus be seen that the position which the State now wishes to adopt is not only in the nature of an entirely new case which was never put forward in its written statement or developed at the trial but is entirely inconsistent with it.

There is abundant authority for the proposition that a party must not be permitted in appeal to make out a new case or a case different from or at any rate inconsistent with the case set up in the lower court. For, such an indulgence is bound to cause surprise to the opposite party and necessarily prejudice the entire trial of the case by raising altogether new issues and would subject him to a serious disadvantage from which he has a right to be saved on any reputable system of administration of justice. See *Gajapathi Radhika v. Vasudeva Santa Singaro*, ILR 15 Mad 503 (PC) and *Indur Chunder Singh v. Radhakishore Ghose*, ILR 19 Cal 507 (PC). My conclusion therefore is that the defendant State cannot be allowed to raise this new case at the stage of appeal.

15. As a last resort, the learned Assistant Government Advocate raised the plea that the plaintiff had led no evidence to prove the price of the grain which had been seized by the Tehsildar, and, therefore, the plaintiffs would still be not entitled to any decree against the State. This argument has hardly any legs to stand on. The plaintiff had clearly stated in paragraph five of the plaint the rate at which he evaluated the bags, and he, further stated that that was the controlled rate in force at the time. The defendant made no attempt to meet this in his written statement, and, therefore, it must be held that it impliedly admitted the allegation made in the plaint in this respect. I, therefore, overrule this contention also.

16. The only other question that remains to decide is that of interest. I am not quite satisfied that as a matter of substantive law the plaintiff can be held to be entitled to claim any interest upto the date of suit. Besides, it appears that his claim as to interest was founded on mercantile usage for which there is no evidence whatsoever on the record. I, therefore, see no reason to allow him interest from the date of seizure upto the date of suit. At the same time, I see no reason why he should not get interest from the date of suit upto the date of payment and I hereby allow interest for this period at the rate of six per cent. per annum simple on the amount decreed in his favour.

17. In the result, I partly allow this appeal, set aside the judgment and decree of the trial court and decree the plaintiffs suit against the State for a sum of Rs. 7349/2/9 being the price of 221 bags of grain which were seized from the

plaintiffs godown without its price having been paid to him. I further allow interest on this amount at the rate of six per cent. per annum simple from the date of suit upto the date of realisation. The plaintiff will have his proportionate costs from the defendant State throughout. I further fix three months' time for the State to satisfy the decree. The dismissal of the suit against the other respondents is maintained intact but without costs.