

(1919) 07 BOM CK 0009
In the Bombay High Court
Case No : O.C.J. Suit No. 339 of 1918

Muradally Shamji

APPELLANT

Vs

B.N. Lang

RESPONDENT

Date of Decision : 07-07-1919

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1919) 21 BOMLR 980

Hon'ble Judges : Pratt, J

Bench : Single Bench

Judgement

Pratt, J.—On the 26th of September 1911 the plaintiff in this suit was adjudicated insolvent and an order was made vesting his estate in the Official Assignee. The plaintiff thereafter applied for his discharge and on the 2nd of October 1912 an order was made in the following terms:—"It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day of October 1913". In 1916 and 1917 the plaintiff acquired a saddlery business. On the 22nd day of January 1918 the Official Assignee considering that no final order of discharge had been made took possession of the plaintiff's stock-in-trade and then restored possession and allowed the plaintiff to continue his business on condition of his making payments for the benefit of his scheduled creditors. On the 7th of March 1918 the Official Assignee threatened to retake possession and on the 8th of March the plaintiff filed this suit to recover the sums which he had paid to the Official Assignee as he says under coercion, for damages for the alleged trespass and for an injunction to restrain the threatened trespass.

2. A preliminary objection has been taken that the suit is not maintainable as the plaintiff has not given notice as required by Section 80 of the Code of Civil Procedure.

3. There is no question but that the Official Assignee is a "public officer" entitled to such a notice: Joosub Haji v. N. W. Kemp I.L.R (1902) . 26 Bom 809; 4 Bom.

L.R. 920. It is sought, however, to take this out of the operation of the section as one of the reliefs claimed is for an injunction to restrain a future act of trespass. Section 80 is as follows:?

No suit shall be instituted against the Secretary of State for India in Council, 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, etc.

4. It is said that the words "act purporting to be done by such public officer in his official capacity " refer to past and not to future acts. If the matter were *res integra* I should have found no difficulty in deciding that they do refer to future acts. If the words were limited to past acts it would have been easy to express that limitation by such words as " purporting to have been done "as for instance in Section 167 of the Bombay District Municipalities Act, 1901. I think it quite clear that the clause " purporting to be done by such public officer in his official capacity " is merely an adjectival clause qualifying the substantive word "act". The section refers to official acts without any reference to the time when the act was or is or is expected to be performed. The act may be past, present or future; but the only qualification imposed by the section is that it is one committed or likely to be committed in the execution or intended execution of some public duty.

5. In *Flower v. Local Board of Low Leyton* (1877) 5 Ch.D. 317, a similar provision in the Public Health Act (38 & 39 Vic. c. 55) was held to be inapplicable to suits for an injunction. The judgment proceeded on the ground that a Court of Chancery would not have held that its jurisdiction to grant equitable relief was limited by the section ; for otherwise irreparable injury might be done before the Court could intervene. The fallacy of this argument has been exposed in *Colls v. Home and Colonial Stores, Limited* (1904) A.C. 179. The Court of Chancery in its concurrent jurisdiction enforced legal rights by equitable remedies. But by inadvertence equitable doctrines were sometimes applied to the right instead of to the remedy. This process was stopped by the House of Lords in *Colls v. Home and Colonial Stores, Limited*. The Chancery Court had granted an injunction to restrain a building which would deprive plaintiff of some of the light he had been enjoying, but yet would not interfere with his common law right to such light as was necessary to make his house habitable. The Court of Chancery had thus inadvertently enlarged the plaintiffs common law right. The House of Lords overruled multitude of decisions of Chancery Judges and held that the equitable remedy must be limited to the legal right. Lord Macnaughten said:

Courts of Equity had no original jurisdiction in the matter. Their province was simply to grant an injunction in aid of the legal right where there was danger of irreparable mischief, or where an injunction was required to prevent multiplicity of actions.

6. Now, in *Flower v. Local Board of Low Leyton* an injunction was granted where plaintiff had under the Statute no right of action and thus the equitable

jurisdiction of the remedy was inadvertently used to enlarge the legal right on which the remedy was claimed. This is the very abuse condemned in the judgment of the House of Lords.

7. Flower v. Local Board of Low Leyton is, therefore, no longer good law; and it is perhaps unnecessary to add that the Courts in India cannot invoke the equitable jurisdiction of the Court of Chancery to override the law as enacted in the Acts of the Indian Legislature.

8. However, Flower's case was followed by this Court in Secretary of State v. Gajanan Krishnarao I.L.R.(1911) 35 Bom. 362; 13 Bom. L.R. 273 and Naginlal Chunilal Vs. The Official Assignee, . In the former case it was stated that if the future act was so imminent that it was practically impossible for the plaintiff to give notice and serious injury was threatened, the Court would not be debarred from entertaining the suit. This was an obiter dictum, as the suit was held to be barred. But it was followed in the second case where the suit was filed to restrain a threatened sale by Official Assignee and was held maintainable in spite of the fact that no notice had been given. Though I respectfully differ from this case I am bound by it.

9. In this suit there are two distinct causes of action: a tort already committed and a threatened trespass on the plaintiff's property. Damages are claimed for the first, and an injunction to restrain the second. The suit under the first cause of action is not maintainable. But the injunction is a substantive relief claimed under the second cause of action. The threat of trespass was made on the 7th of March. Danger was indeed BO imminent that the suit was filed on the 8th of March, and the trespass was restrained by an interim injunction granted on the same day. Mr. Ghaswalla drops his claim on the first cause of action and elects to proceed only on the injunction in respect of the second cause of action, and under Naginlal's case I think he is entitled to do so.

10. The finding on the second issue will be: Plaintiff having dropped the claim for damages and for recovering the money payable under coercion, suit is maintainable in respect of the injunction to restrain the threatened trespass.

11. THE case was further argued and the following judgment was delivered on the 25th July 1909.

Pratt, J.

12. In view of the judgment on the 2nd issue, the only issue that survives is the first as to whether the plaintiff is entitled to an injunction.

13. There is a suggestion in paragraph 2 of the written statement that the property which the Official Assignee claims is not the property of the insolvent acquired after his discharge. If this were so, it might be contended that this property was vested in the Official Assignee and that the effect of the order of discharge was not to re-vest this property in the insolvent: In re Thomas Pereira (1863) 1 M.H.C.R. 217. The point was raised at the time the order was made

suspending the insolvent's discharge but it was not clear whether the question was then decided.

14. However Mr. Wadia does not make this defence and rests his case solely on the ground that the order of 2nd October 1913 did not operate as a discharge from 2nd October 1913, and that therefore the property, even though acquired by the insolvent after that date, is divisible among the insolvent creditors u/s 52(2) (a).

15. But I think the words of the order of discharge are too clear to admit of this construction. The order runs in the form prescribed by the rules of this Court and it is as follows:—

It is ordered that the insolvent's discharge be with protection suspended for one year and that he be discharged as from the 2nd day of October 1913.

16. The order therefore expressly grants his discharge from the 2nd of October 1913. Again the words of Section 38 (b), under which the order was made, imply that the discharge is granted though its operation is suspended. The word "operation" would have no meaning unless there were an order which did operate as a discharge. It is not the making of the order that is suspended but the operation of the order made. The Act makes no further proceedings necessary after an order of suspension u/s 38 has been passed.

17. If authority is needed, the case of *In re Dove* (1884) 27 Ch.D. 687 is very much in point. That was under the English Bankruptcy Act, 1847. Under that Act the order of discharge was made by grant of certificate of conformity which was not effective until confirmed. An order was made suspending the grant of certificate of conformity in the following terms:—

The said Commissioner did adjudge...that the grant of...certificate of conformity be suspended for the period of three years from the 30th day of June now last and ordered it to be adjourned to the 30th day of June which would be in the year 1851.

18. After this order, the new Act of 1849 abolished the necessity for the confirmation of the certificate. It was then held that the order operated as a discharge from the 30th June 1851 and that the order was a final order although in terms it adjourned the proceedings till that date. The Court said that the order of suspension of certificate was a grant of the certificate subject to such amendment. That is exactly the case here.

19. It is true that the practice of the Court is to require the insolvent whose discharge has been suspended to appear and obtain the final and absolute discharge after the expiry of the period of suspension. Practice is a useful guide where a statute uses a language of doubtful import but a practice which is in contravention of the law, even if such practice be the practice of a High Court, cannot make lawful that which is unlawful: *Balkaran Rai v. Gobind Nath Trwari* I.L.R.(1890) All. 129.

20. The plaintiff's therefore entitled to the injunction he seeks and in the circumstances I direct that he do recover half his costs from the defendant

21. I find on the first issue in the affirmative.

22. Decree for the plaintiff" in terms of prayers (a) and (b) of the plaint and that plaintiff do recover half his costs from the defendant.