

(1940) 11 PAT CK 0005
In the Patna High Court

Nand Kumar Sinha

APPELLANT

Vs

Rai Bahadur Pashupati Ghosh and Others

RESPONDENT

Date of Decision : 22-11-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Penal Code, 1860 (IPC) — Section 116

Citation : AIR 1941 Patna 385

Hon'ble Judges : Rowland, J; Fazl Ali, J

Bench : Full Bench

Judgement

Rowland, J.—These two applications in civil revision have been heard together as they raise questions substantially identical, namely whether institution of the two suits, as against some of the defendants is barred by Section 270(1), Government of India Act, in the absence of consent of the Governor of the Province. The section by its terms applies to a suit against any person in respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown. The words used are similar to those in Section 80, Civil P.C.

2. The most authoritative decision on Section 270(1), Government of India Act, is that in AIR 1939 43 (Federal Court) and on Section 80, Civil P.C., in AIR 1927 176 (Privy Council) . The words of the statute, it has been authoritatively said, are to receive their natural meaning. We have then to see whether the facts of each of the cases before us fall within the terms of the statute. Civil Revision No. 137 arises out of Suit No. 215 of 1938 in the Court of the Munsif of Begusarai.

3. The facts are that during the pendency of a dacoity case one of the prosecution witnesses by name Sitaram Sahu on 27th November 1935, presented an affidavit in the Court of Rai Bahadur Pashupati, S.D.O., to the effect that the plaintiff had instigated this witness not to identify correctly before the Court some accused persons whom he had identified at a test identification. After the conclusion of the sessions trial, a complaint was presented to the District Magistrate by Rai Bahadur Pashupati Ghosh, S.D.O., Begusarai, against the

plaintiff charging him with offence punishable u/s 193 read with Section 116, Penal Code, in relation to the proceedings in the dacoity case. The plaintiff was put on his trial and acquitted. In the trial of the plaintiff Babu Rampriti Pandey, an Inspector of Police, was a witness and so was Babu Bhubaneshwar Prasad, Sub-Inspector.

4. The plaintiff instituted the present suit impleading Eai Bahadur Pashupati Ghosh as defendant 1, Babu Rampriti Pandey as defendant 2 and Babu Bhubaneshwar Prasad as defendant 6 along with three other defendants, persons not in the service of the Crown. The plaint alleges that the complaint filed by defendant 1 was false and malicious and was the outcome of a conspiracy between him and the other defendants, that the affidavit of Sitaram Sahu was also false, that these were the outcome of a conspiracy among the defendants to procure the wrongful prosecution and harassment of the plaintiff.

5. The, relief claimed is that the Court may be pleased to declare that the complaint filed by defendant 1 was absolutely false, malicious and without any reasonable and probable cause and on adjudication of the above Rs. 499 be declared as expenses and damages. Notices u/s 80, Civil P.C., were served on defendants 1, 2 and 6 before the institution of the suit. These defendants raised the plea in bar that the plaintiff should also have obtained the consent of the Governor of the province as a condition precedent to the institution of suit u/s 270(1), Government of India Act.

6. It is conceded that the acts complained of took place before the "relevant date" referred to in that section, namely 1st April 1937. The Munsif held that the suit as against defendants 1, 2 and 6 fell within the statute and that the suit was not maintainable against these defendants. He took the view that the suit was brought against defendant 1 in respect of acts, namely receiving of an affidavit and the filing of a complaint, done ostensibly in the performance of his duty as a Magistrate and that it had been brought against defendants 2 and 6 in respect of acts, namely the giving of their depositions in the trial of the plaintiff, done in the performance of their duty as police officers. He allowed the suit to proceed against the other defendants by striking off the names of these defendants.

7. Civil Revision No. 175 of 1939 arises out of Suit No. 362 of 1938. The facts are that defendant 1 Babu Ajodhya Prasad Tewari presented a complaint before defendant 4, Rai Bahadur Pashupati Ghosh, alleging criminal trespass, with intent to annoy, insult and intimidate, to have been committed by the plaintiff. Defendant 4 received the complaint and took cognizance. He summoned the plaintiff and enlarged him on bail. The plaintiff was tried before another Magistrate and convicted, but on appeal he obtained an acquittal. The suit is brought to recover damages for alleged false and malicious prosecution said to have been started as a result of a conspiracy among the defendants. Notices u/s 80, Civil P.C., were served, but the plea was urged that the plaintiff should also have obtained the consent of the Governor u/s 270(1), Government of India Act. The Munsif held that the section barred the suit as against defendant 4 Rai

Bahadur Pashupati Ghosh, but that it could proceed against the other defendants. The application before us is against this order so far as it declines to allow the suit to proceed against defendant 4.

8. The learned Advocate-General has taken a preliminary objection that neither of these applications ought to succeed, because the petitioner has not availed himself of the more appropriate remedy that was open to him. He could have appealed to the District Judge from the decision of the Munsif as from a decree.

9. We are referred to the definition of "decree" in Section 2(2), Civil P.C. It means a formal expression of an adjudication which so far as regards the Court expressing it conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit, and it is deemed to include the rejection of a plaint.

10. It is argued for the petitioner that the order striking off those defendants against whom the suit was held to be not maintainable was an order under Order 1, Rule 10, Civil P.C., and so not appealable. The answer is that as between the parties the Munsif had finally decided that the plaintiff could get no relief in the suits against those defendants, such an order, even if erroneously the Court refers to Order 1, Rule 10, has been held to be a decree and appealable as such in *Rama Rao v. Raja of Pittapore* AIR 1919 Mad.871 and *Shair Ali Vs. Jagmohan Ram and Another* , the substance rather than the form of the order is to be regarded. A similar view is taken in *Ramji Pandey v. Alaf Khan* AIR 1925 Pat. 121, a decision of this Court.

11. It is then said that if the suit appeared to the Munsif to be barred by law, his proper course was not to proceed as under Order 1, Rule 10 by expunging the names of some defendants but under Order 7, Rule 11(d) by rejecting the entire plaint. Such an order would have been on its face appealable and the plaintiff would have been left in no doubt as to his proper remedy. Whether the Munsif ought to have rejected the entire plaint in each suit may be a question of some difficulty.

12. The cases cited before us have been u/s 80, Civil P.C., no decisions u/s 270, Government of India Act, being available. Some observations in *Vekata Rangiah v. Scretary of State* AIR 1931 Mad. 175 have been cited in support of the argument; on the other hand in a case of this Court, *Secretary of State v. Amar Nath* AIR 1936 Pat. 339, the name of the Secretary of State was expunged and the action was allowed to proceed against the other defendants. But we have not to express an opinion whether the whole plaints should have been rejected, not having been moved by the other defendants in these suits to revise that part of the Munsif's order which permitted the suits to proceed against them. It is sufficient to say that the decision of the Munsif on the preliminary issue finally negatived the claim of the plaintiff to get any damages against certain of the defendants and as between him and them must be considered to be a decree within the meaning of Section 2(2), Civil P.C., and therefore appealable. The

practice in this Court is to abstain from interference in revision in favour of a party who had another remedy by way of appeal and has not availed himself of it. The preliminary objection therefore seems to be well founded and the applications are liable to be dismissed on this ground. As however both the cases have been fully argued I shall indicate the view I take on merits.

13. In the civil Revision No. 137, stress is laid on the allegation in the plaint that the defendants had conspired together to bring a false case against the plaintiff. This, it is said, could not be or purport to be an act done in execution of their duty and therefore the bar in Section 270(1), Government of India Act, has no application.

14. It is further argued that the maintainability of the suit must be decided on the allegations in the plaint alone and without reference to any matters of fact not contained in the plaint. The latter proposition is not to be accepted unreservedly as applying without qualification to every suit of this nature. If an act done by a public officer is apparently an official act, its character as such will not be changed by allegations that it was done in bad faith or that it had not that character which it purports to have. Applicability of the statute depends on what the act purports to be and is not affected by allegations that the apparent state of things is not the real one. Were it not so, ingenious allegations could be invented and criminal motives recklessly attributed in every case so as to nullify the effect of the statute which the Court would be unable to apply until the entire suit had been heard out and those imputations proved on the facts to be untrue. The suit would, in that case, fail u/s 270(2), Government of India Act, and the defendant would have no additional protection by reason of the existence of Sub-section (1) of this section. The allegation that an official act was maliciously and corruptly done will not derogate from its official character if it had that character; and what applies to the attribution of malice or corrupt motive in the mind of a single officer applies no less in my opinion where the same malice is attributed to him jointly with others. I can find no magic in the word conspiracy which only means that a malicious purpose is entertained by two or more persons jointly.

15. The cause of action is incomplete without acts done under the influence of the corrupt motive or done in pursuance of the conspiracy. We have to see on what such acts the cause of action rests. Defendant 1 received the affidavit of Sitaram Sahu and presented a complaint to the District Magistrate. Without these acts the cause of action is not complete. The malicious prosecution cannot be separated from them, nor can the alleged conspiracy to prosecute the plaintiff be separated from the institution of proceedings against him so as to form a self-contained cause of action. The receipt of the affidavit and the making of the complaint before the District Magistrate were both official acts of defendant 1 in his capacity of S.D.O. Whether rightly or wrongly done, no suit will lie in respect of these acts without the previous consent of the Governor of the Province. The Munsif therefore rightly held that no suit could be instituted against defendant 1.

16. As regards defendants 2 and 6 the position is not so clear. In the criminal

proceeding against the plaintiff they figured as witnesses for the prosecution, but the giving of evidence is not an act necessarily referable to their duty as police officers. The Munsif however has said that the giving of evidence by these two defendants against the plaintiff were acts done by these persons in the execution of their duty as servants of the Crown. It has been pointed out in *Jogendra Nath Roy v. Price* 24 Cal. 584 that an act may be one which on its very face could be nothing but an official act or it may be an act in respect of which the question would have to be determined the facts whether the defendant in committing the act was or was not acting in his official capacity. The giving of evidence by a public officer may be an act regarding which it is to be determined on the facts of the particular case whether it was or was not done in an official capacity. There may be cases in which a public officer giving evidence does so in the execution of his duty as such officer.

17. In the case of a Civil Surgeon who holds a post mortem examination and is examined as a witness to prove the post mortem report and the results of that examination, or in the case of an investigation Sub-Inspector who after investigation submits a charge sheet and is examined to prove the course of his investigation and the submission of the charge sheet, it can very well be argued that the giving of such evidence is an act done in the discharge of their official duties. The proceedings in the trial of the plaintiff including the depositions of these witnesses are not before us, but they may have been placed before the Munsif and I do not think that in revision we should go behind his finding that the giving of evidence by these defendants was done in the execution of their duty. On that finding the Munsif was entitled to hold that the statute was applicable and the suit was not maintainable against these defendants.

18. In Civil Revision No. 175, as in the other application, the allegation as to conspiracy is stressed and we are asked to hold that the basis of the suit is conspiracy and not the institution of a criminal proceeding against the plaintiff. As the conspiracy could be no part of the S.D.O.'s duty it is said, the suit is not in respect of anything purporting to be done in the execution of his duty and therefore the statutory bar does not apply.

19. In my view the argument fails for reasons similar to those already given in discussing Civil Revision No. 137. The taking of cognizance of an offence on complaint whether done in good or bad faith was clearly an official act of S.D.C. purporting to be done in the execution of his duty as a Magistrate. It was an act which he could not do in any other capacity and it was an act without which there could be no institution of the criminal proceeding and so no foundation for the suit. It cannot be said that the claim against the defendant is irrespective of that act. On the contrary it is clearly in respect of it.

20. It follows that both these applications should be dismissed with costs.

Fazl Ali, J.

21. In my judgment these applications fail on the preliminary ground raised by

the learned Advocate-General. Order 7, Rule 11 provides that the plaint in a suit shall be rejected when the suit appears from the statement in the plaint to be barred in law. It has been held in many cases that non-compliance with Section 80, Civil P.C., where the notice required under the section is necessary as a preliminary to the institution of a suit will bring the case under this provision. As the language of Section 270, Government of India Act, is similar to the language used in Section 80, Civil P.C., there can be no doubt that where Section 270 applies and it has not been complied with, the plaint is liable to be rejected. Section 2, Civil P.C., states that the rejection of a plaint will amount to a decree. The order rejecting the plaint, therefore, is appealable and if the order passed by the Munsif in the present case is taken to amount to rejection of the plaint as against the parties represented by the Advocate-General, that order must be held to be a decree and was as such appealable.

22. It is, however, contended that the order of the Munsif was not passed under Order 7, Rule 11, because that provision contemplates the rejection of the plaint as a whole and not the rejection of the plaint in part or against some of the defendants. The learned Advocate General does not concede that this is so. But assuming that the contention is correct, we have still to enquire whether the order passed by the Munsif was appealable or not under the Civil Procedure Code." In my opinion, the order was appealable, because it is fully covered by the definition of the decree in Section 2 of the Code. The question which was raised before the Munsif was whether in law any suit could be instituted against the opposite party before us without obtaining the consent of the Governor as laid down in Section 270. The Munsif has held that such a suit cannot be instituted. This decision conclusively determines the rights of the parties so far as regards the Court which decided the matter and must, therefore, be held to be a decree. The Munsif has not merely dismissed some of the defendants out of the action, but he has held that the suit against them cannot proceed.

23. As to what is meant exactly by dismissing some of the defendants out of the action, it will be sufficient to quote the following observations made by Beasley C.J. in *Jujishiti Panda v. Lakshmana Dola Behara* AIR 1933 Mad. 435:

It is quite clear that where the parties have been wrongly joined and the suit against them is given up by the plaintiff or upon that ground he exonerates them or there is a finding come to that they have been wrongly joined, then the correct procedure is to strike out their names as having been improperly impleaded. On the exoneration or the striking out of the names of persons on the ground of misjoinder they cease to be parties to the suit. That is quite clear from the judgment of the Full Bench. In this case the learned District Munsif has adopted the correct procedure. He clearly by the decree is shown to have treated these defendants as persons who had been dismissed from the suit and not as persons against whom the suit had been dismissed.

24. In the present case the opposite party, who are represented by the learned Advocate-General, cannot be said to have been dismissed from the suit because

they were proper parties and if the procedure laid down in Section 270 had been complied with, the suit should have proceeded against them as it is proceeding against the other defendants. The order passed by the Munsif is in effect an order dismissing the suit as against these persons on a preliminary ground. Such an order, in my opinion, is clearly appealable and that being so, the plaintiff cannot be allowed to invoke the special remedy afforded by Section 115 of the Code.

25. This view is supported by many decisions, but I shall refer only to the decision of the Allahabad High Court in *Razaur Rahaman v. Udit Singh* AIR 1939 Pat. 570. That decision is an authority for the following two propositions: (1) where the cause of action against the defendant has been specifically pleaded and a distinct relief has been claimed against him, an order under Order 1, Rule 10, Clause (2) of the Code, directing the removal of his name from the array of parties is in substance, although not in form, a decree and is open to appeal as such, because the effect of the order is the refusal to grant the relief to the plaintiff; and (2) the right to file a civil revision u/s 115, (Civil P.C.), is dependent upon the fulfilment of the condition that no other remedy by suit, by application or by appeal is available to the applicant. As the applicant did not pursue the right remedy, namely appeal to the lower appellate Court, he could not be permitted to invoke the special and extraordinary remedy afforded by the exercise of revisional powers.

26. This Court has also pointed out in *Razaur Rahaman v. Udit Singh* AIR 1939 Pat. 570, that it is the established practice of the High Court not to exercise its revisional powers in cases where the party entitled to appeal has not appealed. I, therefore, agree with my learned brother that these applications should be dismissed with costs and in the view that I have taken I do not consider it necessary to express any opinion on the merits of the applications.