
(1957) 01 BOM CK 0006
In the Bombay High Court
Case No : First Appeal No. 113 of 1951

Narayan Badlaji Sali

APPELLANT

Vs

State of Bombay

RESPONDENT

Date of Decision : 23-01-1957

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (1957) 59 BOMLR 532

Hon'ble Judges : Mudholkar, J;Datar, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Mudholkar, J.—This is a plaintiffs' appeal from the rejection of their plaint. Plaintiffs Nos. 1 to 5 and Laxman, the father of plaintiffs Nos. 6 to 8, and the husband of plaintiff No. 9, and Pandurang, the brother of plaintiff No. 10 and the husband of plaintiff No. 11, had along with certain other persons, formed an association at Ellichpur for carrying on a business of selling yarn. At the relevant time certain Control Orders were in force by virtue of which they could carry on their business only after obtaining licences from the Deputy Commissioner. By their order dated January 24, 1947, the former Provincial Government of the Central Provinces and Berar cancelled their licences and they were given time to dispose of their stock within one month. This time was extended by one month by the Deputy Commissioner, Amravati, by his memorandum dated February 25, 1947. Before this order of the Deputy Commissioner was communicated to the plaintiffs, the Civil Supplies Inspector, Ellichpur, asked these dealers to hand over all the undisposed of stock to the dealers whose licences were not cancelled. After the Deputy Commissioner had passed the order of extension, one of the yarn dealers Vishnu Parashram approached the Deputy Commissioner offering to pay the price of yarn together with profits admissible to the dealers and on the basis of this promise the Deputy Commissioner cancelled his order granting extension of time to the dealers. This was done on February 27, 1947. By virtue

of the later order of the Deputy Commissioner, Vishnu Parashram was thus entitled to receive the stock held by the dealers and sell it.

2. According to the plaintiffs, the Civil Supplies Inspector, Elliehpur, illegally and highhandedly seized and locked the stock lying with the dealers along with all account-books, papers, furniture etc. on February 26, 1947, and eventually handed over the stock to Vishnu Parashram. The plaintiffs' grievance is that the dealers were deprived of their stock but, were not paid the price thereof. They, therefore, made various representations to the Government. Nothing having come out of it, the plaintiffs, Laxman and Pandurang served a notice on the Government u/s 80 of the CPC on August 10, 1949, in which they claimed a sum of Rs. 7,248-11-0 from the Government and also interest at Re. 1 per cent. per month from February 27, 1947, till realisation.

3. Before the suit was instituted, Laxman as well, as Pandurang died. The legal representatives of these persons were therefore shown as plaintiffs in their places. They, along with plaintiffs Nos. 1 to 5, therefore instituted the suit out of which this appeal arises.

4. On the first date which was fixed for settling issues, the defendant's counsel made an application in. winch he sought certain particulars from the plaintiffs. That application was granted and the plaint was accordingly amended by the plaintiffs. Thereafter, a written statement was filed on behalf of the defendant. In that statement one of the points taken is that the notice served on the Government was not proper inasmuch as it did not disclose the names of all the plaintiffs as required by law. The trial Court thereupon framed the following preliminary issue:

Whether the notice served by the plaintiffs is improper and invalid?

It found against the plaintiffs on this issue. Though the trial Court has, at the end of its order, stated that it dismissed the suit, it has made certain observations in para. 8 of its order from which it would appear that what it purported to do was to reject the plaint. In view of the observations of the learned Judge we would treat his order not as one dismissing the suit, but as rejecting the plaint.

5. It is contended on behalf of the plaintiffs that the defendant had waived the objection regarding the notice inasmuch as that objection was not raised at the earliest possible opportunity and that, therefore, the Court below was in error in rejecting the plaint.

6. No doubt, the defendant in the first instance asked for certain particulars from the plaintiffs and only after receiving those particulars filed a written statement in which the plea regarding the sufficiency of notice was taken. The mere fact, however, that the defendant sought certain particulars from the plaintiffs before filing the written statement and raising therein the question of sufficiency of notice would not, in our judgment, amount to a waiver of the plea as to the validity of a notice u/s 80 of the Code of Civil Procedure. Now, waiver has been

dened in Wharton's Law Lexicon as follows:

The passing by an occasion to enforce a legal right whereby the right to enforce the same is lost... Mere lying by is no waiver for this purpose; there must be some positive act... which act, however, if done, is a waiver in law....

In Mitra's Limitation Act, 13th fed., at p. 447, it is stated-

Waiver may be express or implied; thus, where one party consents, at the request of the other, to extend the time for performance or to accept performance in a different mode from that contracted for, there is a waiver.

It is thus clear that waiver is a matter of intention and can be either express or implied. "Whether it is one or the other, it must be deliberate in the sense that the party waiving a right should after applying his mind to the matter decide to abandon the right. Can it be said that the defendant had decided expressly or by implication to abandon the defence with regard to the validity of the notice?

7. In order to infer a waiver some positive act on the part of the party which is supposed to have waived is necessary. Has such an act been proved against the defendant? All that is shown by the plaintiffs is that there was delay in filing the written statement and that the defendant asked for particulars. A mere delay in doing a particular act or in raising a particular objection would not of itself justify an inference of waiver. In the instant case, the objection was taken, as we have said, in the written statement itself, and, therefore, it would not be right to say that there was even any delay in taking the objection. It is true that the written statement was not filed within the time specified in the summons but that was because the defendant wanted to give a full reply to the plaintiffs' case in the written, statement which was not possible without obtaining certain particulars from the plaintiffs. Again, by seeking particulars, the defendant cannot be said to have waived the right to take the defence. We accordingly hold that there was no waiver as pleaded by the plaintiffs.

8. It is then said that the objection about the sufficiency of notice taken in. the written statement is itself insufficient inasmuch as the defendant has not stated the names of the particular plaintiffs which were omitted from the notice or were not disclosed in the notice given by some of the plaintiffs and others on August 10, 1949. In our opinion, it was not at all necessary for the defendant to make any mention of that fact. The defect, according to the defendant, was that the names of all the plaintiffs were not mentioned, and that being the only defect nothing more was required to be stated by the defendant.

9. Then it is said that Laxman and Pandurang having joined in the notice their heirs could well join in the suit as co-plaintiffs along with, others who had given notice of the suit. This contention however cannot be accepted in view of the decision in Mahadev Dattatraya Rajarshi Vs. Secretary of State for India, . In that case a division bench held that the notice of suit required by Section 80 must be given by the person who actually becomes the plaintiff and by no other, and that

a notice given by the plaintiff's father in respect of the same cause of action is not therefore sufficient. The learned Judges who decided the case followed the decision of the Allahabad High Court in *Bachchu Singh v. The Secretary of State for India* in Council ILR (1902) 25 All. 187. To the same effect is the decision in *Appa Rao v. Secretary of State for India* ILR (1930) 54 Mad. 416. We may, however, mention that a different view has been taken in *Peer Ammal and Another Vs. Nalluswami Pillai and Others*, . In that case Varada-chariar J. has expressly dissented from the view taken in the Allahabad and Bombay cases. However, as the view taken in the Bombay case has not been departed from for all these years, we do not wish to question it.

10. It was then argued on behalf of the plaintiffs that the Court below was in error in rejecting the plaint even though in so far as five of the plaintiffs are concerned, there was proper and adequate notice. The learned Judge of the Court below in rejecting the entire plaint, followed the decision in *Appa Rao v. Secretary of State for India* (cit. sup). In that case the learned Judge who decided the case observed (p. 420) :

...The plain meaning of that rule (rule 11, Order 7) seems to be that, if any of the defects mentioned therein is found to exist in any case, the plaint shall be rejected as a whole. It does not imply any reservation in the matter of the rejection of the plaint. Non-compliance with the requisites of Section 80 of the CPC was taken to be a ground covered by clause (d) of Rule 11 above referred to...

What Order VII, Rule 11, of the CPC says is that the plaint shall be rejected, among other things, where the suit appears from the statement in the plaint to be barred by the law. Clearly, therefore, what is meant is that the entire suit cannot be said to be barred by any law because notice has been given by some of the plaintiffs. A perusal of the plaint would show that though several persons have been shown in the suit as plaintiffs, each of them purports to make an independent claim against the Government, i.e. their claims are several and not joint. Where such, is the case, it will not be open to the Court to reject the plaint unless it came to the conclusion that the claim made by each of the plaintiffs is unseverable.

11. Where the claims of the various plaintiffs are several and not joint, we are of opinion, that the plaint cannot be rejected under Order VII, Rule 11. As observed by Sen J. in *Secretary of State for India in Council v. Sheoramjee* [1949] Nag. 875

...So far as the plaint is concerned it has to be rejected as a whole under Order VII, Rule 11, Code of Civil Procedure, 1908, or not at all.

Now, since there is no defect in so far as the claims of five of the plaintiffs are concerned, the plaint could not be rejected. For that reason, the whole plaint also cannot be rejected, No doubt, in the view we have taken some of the plaintiffs will not be able to continue the suit. An opportunity should, therefore, be given

to the plaintiffs now to amend their plaint and strike out those plaintiffs whose claims can no longer be entertained because of the bar of Section 80 of the Code of Civil Procedure.

12. In this view, we allow the appeal, set aside the order of the Court below and remit the case to it with a, direction that an opportunity be given to the plaintiffs to amend the plaint.

13. Costs in this Court will be borne by the defendant. Costs so far incurred in the Court, below except those by the plaintiffs who are not entitled to sue will be costs in the suit. The costs incurred by the latter will be borne by them.