
(1940) 10 PAT CK 0009
In the Patna High Court

Secretary of State

APPELLANT

Vs

Sagarmal Marwari and Another

RESPONDENT

Date of Decision : 03-10-1940

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Railways Act, 1890 — Section 77

Citation : AIR 1941 Patna 517

Hon'ble Judges : Manohar Lall, J;Chatterji, J

Bench : Full Bench

Judgement

Manohar Lall, J.—This is an appeal by the Secretary of State for India in Council against the concurrent decisions of the Courts below by which they decreed the suit of the respondents which was instituted for compensation for the loss of their goods not delivered to them in the following circumstances:

2. The plaintiffs' case is that certain bales of cloth were made over in two consignments by a firm Kaloo Ram Brijmohan at Bombay to the G.I.P. Ry., in January 1936 under Risk Note Form H for delivery to the plaintiffs at the Khagaria station of the E.I. Ry. in this province. Out of the two consignments only portions were delivered but the remaining portions were never delivered to the consignee. In February 1936, the Station Master of Khagaria informed the plaintiffs that the portions which were not delivered were lost by fire. Accordingly the plaintiffs preferred their claim to the Chief Commercial Manager, E.I. Ry. who by his letter dated 2nd June 1936, refused to entertain the claim. The plaintiffs accordingly gave notice u/s 77, Railways Act, to the Agents of the E.I. Ry. and G.I.P. Ry. and also served notice on the Secretary of State for India in Council u/s 80, Civil P.C. The cause of action for the suit arose on 27th February 1936, when the articles were not delivered. The Secretary of State failed in both the Courts to satisfy them that the loss by fire was not caused by misconduct of the administrative employees of the E.I. Ry. Hence the second appeal to this Court.

3. The only question argued by the appellant before us is that the suit was not

maintainable on account of its having been instituted "during the currency of the notice" u/s 80, Civil P.C., and reliance has been chiefly placed upon the decision of their Lordships of the Judicial Committee in the now well-known case in AIR 1927 176 (Privy Council) . On behalf of the respondents it is vehemently urged that the Secretary of State must be deemed to have waived his objection to the want of a valid notice u/s 80 in the circumstances of this case. It is necessary therefore to consider closely the facts upon which the argument of waiver is founded. As required by Section 80, Civil P.C., there is an averment in the plaint filed on 30th August 1936, that

inasmuch as the aforesaid two railway companies are State owned railway hence as required by law a notice as contemplated by Section 80, Civil P.C., has been regularly sent to the Secretary of State for India in Council through the Collector of Monghyr.

4. It may be observed that there is clear indication in the plaint that the notice u/s 80 was sent to the Collector on 15th June 1936, and it has been found as a fact that this notice was served on 19th June 1936. The suit was therefore instituted before the two months prescribed by Section 80, Civil P.C., had expired. The Secretary of State took the defence that the suit as framed was not maintainable but did not deny the allegation in para. 10 of the plaint that the notice u/s 80, Civil P.C., had been regularly sent to him although he insisted that the suit should be dismissed against him. This written statement was filed on 2nd December 1936.

5. The trial of the case began in December 1938, when it was contended for the first time on behalf of the Secretary of State that the suit was not maintainable inasmuch as it was instituted before the period of two months had expired from the date of the service of the notice. But the Courts below overruled this contention on the ground, to use the words of the learned Subordinate Judge in appeal:

In the present case the defendant Secretary of State did not dispute service of notice and did not question the maintainability of the suit on the ground that the period of two months had not expired from the service of it in the written statement. The point was raised for the first time at the hearing when more than two years had already elapsed from the cause of action and a second suit would be time-barred. The rulings of the Calcutta and Patna High Courts have direct application to the facts of the present case and the defendant Secretary of State will be deemed to have waived the objection. Then the provision for institution of suits after the expiration of two months from the date of service of notice seems to have been meant for giving ample time to the public officer to make up his mind as to the claim made against him. In this particular case the Secretary of State had made up his mind before the institution of the suit and had given intimation to the plaintiff that they would pay no compensation to them. The purpose of the notice had thus been served. I am therefore of opinion that there is not any the least substance in this plea.

6. It seems to me that the argument of the learned advocate for the appellant must prevail in view of the clear and authoritative pronouncement of their Lordships of the Judicial Committee in AIR 1927 176 (Privy Council) . It is to be observed that in that case the plaintiff distinctly averred in para. 17 that notice as required u/s 80, Civil P.C., had been given to the Collector on 26th June 1922, and it was also stated that as the suit was for an injunction the suit was being filed before the completion of the period of two months; the Secretary of State for India in Council was a defendant along with the Collector but no notice was served upon the Secretary of State, although the section requires it, and therefore no independent ground of defence was raised on this point on behalf of the Secretary of State. Nevertheless, it was held by their Lordships--I am quoting from the concluding portion of the judgment by Viscount Sumner at p. 358:

The consequence is that the appellants' present position in regard to the taxes imposed on them is as if their action had never been brought. It was unsustainable in limine. They commenced their suit before the law allowed them to sue, and can get no relief in it either by declaration or otherwise. Whatever may be the case between other parties, as against the respondents, they must fail. They have taken their own course and have brought this result on themselves.

7. It was also argued before their Lordships that the provisions of Section 80 being in a Code of Procedure should be treated as regulating a mere procedure, but their Lordships repelled the argument observing that Section 80 imposes a statutory and unqualified obligation upon the Court:

The Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its words. Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions.

8. These remarks of their Lordships apply a fortiori to the present case which cannot be distinguished in the least. But it was argued by the learned advocate for the respondents that the decision of their Lordships of the Judicial Committee does not overrule the long line of cases in India which held that the Secretary of State may in certain circumstances, not dissimilar to those present in this case, be deemed to have waived his objection by not taking the defence in the written statement. Before examining these cases I wish to observe that I fail to see how the Secretary of State has in this case waived this defence founded on Section 80, Civil P.C., and has prevented the Courts from being alive to their statutory duties.

9. The Secretary of State has not admitted by his silence in the written statement that the provisions of Section 80, Civil P.C., are not a bar to the suit. Indeed the facts stated in the plaint themselves show that the suit had been instituted before the expiry of the two months from the issue of notice to the Secretary of State. It may be conceded that where the applicability of the section

depends upon proof of certain facts and the Secretary of State does not deny the facts alleged in the plaint then he would under the ordinary rule of pleadings be held to have waived his objection to the proof of those facts.

10. For instance where the plaintiffs state in the plaint that the notice has been served on a certain date which is beyond two months of the date of the suit and the Secretary of State does not raise any objection, the Secretary of State would be debarred from challenging those facts in the course of the trial. Again where it has been alleged in the plaint that notice was sent with all the requisites beyond the period of two months and the Secretary of State does not deny that the notice was received by him, he cannot during the trial be heard to say that he has not received the notice.

11. But where the facts are admitted by the plaintiff himself and he fails tender the express provisions of the statute albeit in a Procedure Code, I do not see how any question of waiver arises. The argument upon the question of waiver is really no more than an argument based upon hardship or irreparable injury which would be caused to the plaintiff if the provisions of the statute were rigorously enforced. But this argument was held to be fallacious by Viscount Sumner when delivering the judgment of the Board in AIR 1927 176 (Privy Council) in these words:

The argument that a statutory provision as to procedure is subject to some exception of cases, where hardship or even irremediable harm might be caused, if it were strictly applied, might be used with equal cogency in connexion with a Code fixing the admissibility of evidence or with a limitation section, recognizing rights but barring remedies. For this, however, there is no authority.

12. I now briefly deal with the cases relied upon by the learned advocate for the respondent.

13. In *Manindra Chandra Nandi v. Secretary of State* 34 Cal. 257 a suit was instituted for refund of certain sums of money which were alleged by the plaintiff to have been illegally levied on him by the Collector of Burdwan as road cess. He instituted the suit on 28th January and on 10th May 1902 he applied to be allowed to amend his plaint by adding in the alternative a claim for the refund of a certain sum paid by him as Income Tax on the ground that he was not liable to pay both road cess and Income Tax. The plaint was allowed to be amended on 9th July 1902. After the trial of the case had begun and the case for the plaintiff had been closed a new issue was framed on 21st January 1905 at the instance of the Secretary of State for India in Council as to whether the plaintiff's alternative claim as to refund could be enquired into inasmuch as no notice under the provisions of Section 424, Civil P.C., had been given to the defendant--Section 424, Civil P.C., corresponded to Section 80 of the present Code. Rampini J. did not deal with the effect of the want of notice in the view which he took that the plaintiff was liable to pay Income Tax. Mookerjee J., however, dealt with the matter exhaustively at p. 266 and pointed out at p. 280 that ample time was

given to the Secretary of State to object to the proposed amendment (already referred to by me) when he urged that a separate and distinct cause of action could not be joined nor could a suit of one character be converted into a suit of another and inconsistent character. But no suggestion was made that a fresh notice u/s 424, Civil P.C., was necessary. The amendment having been allowed the issues were framed on 16th August and no issue was raised again on this point. The Secretary of State filed a second additional written statement on 11th June 1903 wherein he put forward other legal objections. Upon the objections having been taken for the first time during the hearing the Subordinate Judge took the view that the claim for refund of Income Tax was not maintainable without a fresh and appropriate notice u/s 424. At page 282 Mookerjee J. observes:

A notice u/s 424, Civil P.C., is given for the benefit of the defendant, and it may be presumed that the intention of the Legislature was that the Secretary of State should have an opportunity of investigating the alleged cause of complaint and of making amends, if he thought fit, before he was impleaded in the suit. There is nothing to prevent the defendant from waiving the notice or from being estopped by his conduct from pleading the want of notice at the trial. This is amply borne out by the case in *Davey v. Warne* (1845) 14 M & W 199, *Edwards v. Great Western Railway Co.* (1851) 11 C.B. 588 and *Arnold v. Hamel* (1854) 9 Ex 404. Under the circumstances disclosed in the case before us, it appears to me that the right to a notice of action was waived. It has further to be observed that, if the objection had been taken, as it ought to have been taken, when the application for amendment of the plaint was made, it would have been open to plaintiff to bring a separate action in respect of the claim for the refund of the income tax after due service of notice u/s 424, Civil P.C..... It is well-settled that, if provisions of law are waived in the course of a trial, they cannot afterwards be set up by way of objection to any step taken or about to be taken upon the footing of the waiver; when a litigant has, without mistake induced by the opposite party, taken a particular position in the course of a litigation, he must act consistently with it, especially if to allow him to do otherwise would be to prejudice his opponent.

14. Although these are the views of a Single Judge, as Rampini J. did not give his opinion on this question, but as these views, are of a very distinguished and eminent Judge his opinion is entitled to the greatest weight.

15. But I am of opinion that these observations are no authority after the decision of the Privy Council in AIR 1927 176 (Privy Council) where the Secretary of State succeeded although he had never raised any defence of want of even the initial notice u/s 80, Civil P.C. The observation of the learned Judge appears to have been based upon the question of hardship or prejudice which argument has been negated by Viscount Sumner in the Privy Council case as already observed.

16. In *Bhola Nath v. Secretary of State* 40 Cal. 503 the notice which was given u/

s 80, Civil P.C., was held to be defective inasmuch as the notice contained the names of two only out of 63 plaintiffs. But the judgment at page 510 shows that the objection to the want of notice was being taken by defendant 2 who prayed just before the trial began that an additional issue may be raised upon the question of the validity of the notice--defendant 2 was the Maharaja of Kassimbazar.

17. The learned Judges held that it was clearly incompetent to defendant 2 to raise the question at a late stage and relying upon the case in *Manindra Chandra Nandi v. Secretary of State* 34 Cal. 257, just considered by me, observed that it was competent to the Secretary of State to waive the notice and he might be estopped by his conduct from pleading the want of notice at a late stage of the trial and, therefore, held that in the events which had happened it was clear that notice was waived on behalf of the Secretary of State and the question could not have been raised by defendant 2.

18. Here again, the case in AIR 1927 176 (Privy Council) lays down a different proposition. In that case also attempt was made to distinguish between the effect of Section 80 in the case of the Secretary of State and in the case of the Collector and it was argued that even if it defeated the action as against the Secretary of State, it would fail to protect, the Collector who had received a notice. But their Lordships held at page 858:

Their Lordships cannot accept this. Not only has the suit been throughout a joint proceeding, against the officials concerned, for the purpose of getting a joint declaration that the Government Notification was bad as the foundation of everything subsequently done, but, without the presence of the Secretary of State before the Court, the notification could not be assailed, and, if it stands as valid, the Collector's own action could not be successfully impugned.

19. It seems to me, therefore, that this Calcutta case is no longer good authority on the question of waiver. Rowland J., in *Baldeo Prasad v. Sukhi Singh* AIR 1938 Pat. 127 has also doubted the correctness of the decision in this case in these words at page 924:

It is said in reply that a defect such as absence of notice or non-compliance with Section 80, Civil P.C., can be waived by the Secretary of State and that unless the Secretary of State presses an objection on this ground another defendant would not have been heard to raise it. In support of this, reference is made to *Bhola Nath v. Secretary of State* 40 Cal. 503. In that case no issue had been raised in the Court of first instance. I am not sure, however, whether this case can be treated as still an authority after what has been said by the Privy Council in AIR 1927 176 (Privy Council) .

20. Similarly in *Secretary of State v. Amarnath* AIR 1936 Pat. 339 the plaintiff had instituted a suit for recovery of rent of a holding impleading the Secretary of State as pro forma defendant but no notice u/s 80, Civil P.C., was served upon him. The trial Court rejected the plaint but the lower appellate Court set aside

that order and remanded the case for disposal on the merits holding that as no relief was claimed against the Secretary of State notice u/s 80 was essential.

21. But a Division Bench of this Court relying upon the case in AIR 1927 176 (Privy Council) held that it was impossible to accept the interpretation that in a suit instituted against the Secretary of State no notice was required where no relief is sought against him and set aside the order of the learned District Judge to this extent that the Secretary of State was expunged from the action.

22. The next case relied upon is the case in *Sadsook Ramprotap v. Hoare Miller & Co.* AIR 1923 Cal. 719. In that case the plaintiff sued for damages for breach of contract as assignee from Balfour & Co. with whom the defendants had entered into certain contracts. The main question which arose for decision was whether the provisions of Section 181, T.P. Act, were complied with in that although the notice of the transfer in writing was given, the notice while setting the name of the transferee did not specify his address. It was argued before the trial Court that the provisions of Section 131 could not be waived in any circumstances and it is in connexion with this argument that Mookerjee J. made these observations, which were relied upon by the learned advocate for the respondents before us at page 182:

We observe that Buckland J. has ruled that the provisions of Section 131 could not be waived under any circumstance. Sir Benode Mitter has controverted this view which I am not prepared to accept as well founded. Our attention has been drawn to the oases in *Ashutosh v. Behari Lal* 35 Cal. 61, *Manindra Chandra Nandi v. Secretary of State* 34 Cal. 257 and *Bhola Nath v. Secretary of State* 40 Cal. 503 to establish the position that even though a statutory provision may be expressed in a mandatory form, non-compliance therewith does not necessarily invalidate a transaction. This position is incontestable, and the answer to the question whether it is permissible to waive a particular provision depends upon its true nature. If the object of the Legislature is to protect or benefit an individual litigant, it is open to him to waive the positive provision of the statute. On the other hand if the provision has been enacted from reasons of public policy, he cannot be permitted to waive it. The provisions of Section 131 fall, in my judgment, within the latter category; but I am not prepared to maintain as an abstract proposition of law, that under no conceivable circumstance can the provisions of Section 131 be waived by the debtor. This harmonizes with the view adopted in *Venkata v. subba* AIR 1916 Mad. 242 as to the applicability of the principles of estoppel and waiver to assignments of actionable claims under Sections 180 and 181, T.P. Act.

23. The facts stated at p. 188 show that no foundation was laid for a case of waiver or estoppel in the trial Court and the learned Judge refused to explore the attractive problem whether a plea of waiver may not be analyzed and distributed into one or other of the four heads: election, estoppel, contract and release. Rankin J. (as he then was) while pointing out at p. 184 that

In this Court learned Counsel for the plaintiffs was asked to indicate what was the case of waiver he desired to have an opportunity to raise. He informed us quite frankly that he was not able to say whether it was a case to be raised by oral evidence but that, in any case, he would contend on the correspondence and pleading that as the defendant company repudiated the assignment altogether and made no point at all as to the absence of the plaintiffs' address from the written notice their conduct amounted to a waiver of this requirement of Section 131, made these important remarks at p. 185:

In construing Sections 180 and 131, T.P. Act, it has to be remembered that they contain a very special scheme which must be regarded as a whole in itself. At common law a chose in action was not assignable; in equity it was freely assignable upon certain principles, as to notice. The Indian Legislature in 1900 has composed a new scheme which has some of the features of both; and, as I read Section 130 it says this, that the law, while regarding the transfer of an actionable claim as valid if effected in a certain manner will not undertake to enforce against a debtor the assignment except upon the terms that the debtor may arrange with his original creditor unless and until he has received in writing a particular kind of notice. If therefore the plaintiffs' claim is entirely on the basis of an assignment and if this claim is wholly without any other juristic basis, it seems to me that the section which enacts certain conditions must be rigidly complied with. I do not assent to all the learned Judge has said with regard to the general impossibility of making any case of waiver. It is difficult to distinguish between waiver and estoppel. Under the name of waiver, it may be said that liability or responsibility to an assignee has been incurred by a debtor independently of Section 120 by conduct or by representation;

and then pointed out that as no issue was raised it was impossible to allow the question to be agitated at that stage. In my opinion this decision is not of any assistance because no question of waiver was allowed to be raised or could be raised upon the facts of that case.

24. The next case relied upon is the case in *Purna Chandra Sarkar Vs. Radharani Dassya and Others*, , where the question was as to whether a notice u/s 80, Civil P.C., should have been served upon the receiver. Costello, J., Suhrawardy, J., concurring, observed that

at the time when the matter was before the lower Courts there was apparently no decision of any of the High Courts which in terms decided that a receiver appointed by the Court in a suit came within the definition of a public officer contained in Section 2, that consequently he was entitled to the privilege conferred on a public officer by Section 80, Civil P.C., Since the judgment was given in the lower appellate Court however there has been a decision of this Court which seems to constitute a direct authority for the proposition that a receiver is a public officer for the purpose of Section 80, Civil P.C. I refer to the case in *Radharani Dassya and Others Vs. Purna Chandra Sarkar and Another*,

25. The learned Judges assumed for the purposes of the appeal before them that the receiver was entitled to a notice u/s 80 and relying upon the cases in *Manindra Chandra Nandi v. Secretary of State* 34 Cal. 257 and *Bhola Nath v. Secretary of State* 40 Cal. 503, held that the defendant in the circumstances must be considered to have waived this objection and distinguished the case of *Baldeo and Others Vs. Bhagwan Misir*, (noticed below). This case merely proceeds upon the Calcutta case already examined by me. *Baldeo and Others Vs. Bhagwan Misir*, , it was held that

under Section 80, Civil P.C., two months" notice is a necessary condition precedent to the filing of a suit against an Official Receiver appointed u/s 57 of the Prov. Insol. Act, 1920, and the right to such notice cannot be considered as waived if the receiver does not take objection to the absence of notice till a late stage of the proceeding.

26. But the learned advocate for the appellant relied upon the passage at page 293 where the learned Judges observed that the receiver"s

failure to raise such an objection in the written statement cannot per se be regarded as a waiver, even if a waiver were otherwise admissible, because the objection was raised practically before the trial had commenced and before any prejudice could have been caused to the plaintiffs by the lateness of the stage at which the objection was raised.

27. The learned Judges then referred to the Calcutta cases already considered by me. The observation relied upon undoubtedly proceeds upon the view of prejudice or hardship, but this is now negated by the decision of the Judicial Committee in AIR 1927 176 (Privy Council) .

28. Reliance was then placed upon the case in *Satyamma v. Official Receiver Masulipatam* AIR 1933 Mad.917, where a Single Judge of that Court merely accepted the finding of the learned Subordinate Judge that the Official Receiver must be held in the circumstances to have waived his objection u/s 80, Civil P.C., and relied inter alia upon the cases in *Manindra Chandra Nandi v. Secretary of State* 34 Cal. 257 and *Bhola Nath v. Secretary of State* 40 Cal. 503.

29. Lastly strong reliance was placed upon the case of this Court reported in *Narain Prasad v. Ram Kishun Prasad* AIR 1934 Pat. 354 , where the case of AIR 1927 176 (Privy Council) was cited before the Bench and distinguished by the late Chief Justice Courtney-Terrell, Varma, J., concurring, on the facts before them. It is enough to indicate that in that case it was pointed out at p. 355 that

no issue had been raised at any time in the case as to whether or not notice had been served and inasmuch as the defendant had not at any time taken any point on the subject of notice to him, it must be held that the want of notice had been waived,

and reliance was placed upon the case in *Purna Chandra Sarkar Vs. Radharani Dassya and Others*, . It seems to me that this case is distinguishable because

there was no finding of fact such as would attract the operation of Section 80, Civil P.C. The learned advocate further referred to some passages in Bigelow on Estoppel and to the case in Suarez v. Suarez (1918) 1 Ch. 176, which discussed the principle when a foreign ambassador will be held to have submitted to the jurisdiction of the English Courts, but, in my opinion, the principles stated therein have no application to the facts of this case. There is no question of submitting to any jurisdiction here. The bar to the maintainability of the present suit was sought to be established upon the facts alleged by the plaintiff himself and not controverted by the defendant.

30. The learned advocate for the appellant drew our attention to the Calcutta case reported in Prasaddas Sen and Others Vs. K.S. Bonnerjee, , where three plaintiffs instituted a suit against the Official Receiver of the Court without serving a notice u/s 80, Civil P.C., on the defendant. The suit had been dismissed by the learned Subordinate Judge on this ground. The plaint originally did not contain an allegation that any notice of action had been given, but it was amended by an order by the addition of a statement that notice as contemplated by the section was duly served upon the Official Receiver. No defence u/s 80 was taken originally in the written statement and the Official Receiver later on applied for leave to amend the written statement. It was pointed out that in these circumstances no question of waiver or estoppel arose to prevent the Official Receiver from making good the plaint as to want of notice. I do not see how this case is of any assistance.

31. It will be noticed that except the Patna case in Narain Prasad v. Ram Kishun Prasad AIR 1934 Pat. 354 , all the cases upon which reliance has been placed by the learned advocate for the respondents were cases decided before the Privy Council case in AIR 1927 176 (Privy Council) . We, therefore, asked the learned advocates if they could cite any case in support of their respective contention after the Privy Council case in AIR 1927 176 (Privy Council) . But although we gave time none was cited at the Bar. We discovered, however, that the matter arose for direct consideration in two cases.

32. In Secretary of State v. Rangasami Naidu AIR 1938 Mad. 583, the suit had been instituted for sale of certain properties in satisfaction of two mortgages executed by defendants 1 to 3. Defendants 4 to 6 were impleaded as persons claiming to be puisne mortgagees but the only contesting defendant was defendant 7, the Secretary of State for India in Council, who was a mortgagee of some of the properties under the provisions of the Land Improvement Loans Act. His defence inter alia was that the suit be dismissed summarily as no notice of the suit was given to him prior to suit as required by law. But for some reason or other this objection to the maintainability of the suit was not made the subject-matter of a separate issue and as no argument was advanced before the learned Subordinate Judge the judgment was silent upon this point. The objection was repeated in the appellate stage. The learned Judges pointed out that in the plaint there was no statement that notice had been served upon the Secretary of State

nor was it contended that any notice was actually given, and, therefore, this was a case in which no notice whatever was given to the Secretary of State as required by Section 80, Civil P.C.

33. It was, however, argued that the point as regards notice must be deemed to have been waived in the Court below on behalf of the Secretary of State on the ground that there was an omission to frame an issue. But the learned Judges held that no such inference could be drawn because

the omission seems to have been on a par with the omission to adduce evidence which was obviously necessary and which was ready to hand, such as the order of the Director of Industries which was necessary to support the case put forward on behalf of the Secretary of State, which was nevertheless not tendered in evidence till perhaps it was too late. In any case negligence is more likely to have been the cause of the omission to frame an issue on the point of want of notice and the omission to make any application regarding it. This negligence does not seem to have been confined to the Government pleader appearing in the trial Court, but seems to have extended to the learned Subordinate Judge himself who neglected his plain duty in the matter. It was his duty to see that a plaint which did not satisfy the provisions of law was not allowed to proceed further so far as the Secretary of State was concerned. The suit should have been dismissed by him on this ground alone in limine against defendant 7. We are unable to accept the contention that there was any waiver in this case. The suit was throughout resisted by the Secretary of State and it is impossible to believe that there would have been any deliberate waiver on his behalf of a defence which was sufficient to non-suit the plaintiff. Waiver being out of the question, the non-maintainability of the suit as against defendant 7 is patent. The suit should have been dismissed in limine so far as defendant 7, that is the appellant in this appeal, was concerned, on the ground that the suit is prohibited by the provisions of Section 80, Civil P.C.

34. The matter also directly arose for consideration in a Sind case reported in *Gangaram Rupchand & Co. v. Secretary of State* AIR 1937 Sind 291. In that case the plaint was rejected by the original Court on the ground that the notice required u/s 80 was not given. The plaintiffs were contractors for certain work on the Sukkur Barrage and instituted a suit against the Secretary of State and, other officers claiming certain sum for work done. The suit was filed on 26th June 1930 and the notice u/s 80 was alleged to have been given on 25th April 1930. The written statement which was filed on 14th January 1932, was silent on the question of notice, but in August 1932 the defendants asked leave to amend their written statement so as to raise the plea of want of notice. The amendment was allowed with the result that the plea as to want of notice was successful and the suit of the plaintiff was dismissed. It was argued in the appellate Court that the Secretary of State had waived notice as he was entitled to do and that in any case no permission ought to have been granted to him to amend the written statement, for it was granted at such a late stage of the proceeding that the

plaintiffs were prejudiced as in consequence of the delay they could not file another suit. It will be noticed that this is a case where the direct question of prejudice to the plaintiff was considered, but the learned Judicial Commissioner who delivered the judgment of the Division Bench overruled this contention in these words:

Now, our opinion is that the notice required by the provisions of Section 80, Civil P.C., cannot be waived. Our attention has been drawn to the case in Baldeo and Others Vs. Bhagwan Misir, and to certain other decisions in unauthorized law reports to which we shall not refer; but speaking for myself I think the judgment of the Privy Council in AIR 1927 176 (Privy Council) appears to leave no room for argument.... We can understand the argument that where there is in the plaint a proper averment that notice was served within the meaning of Section 80, and that averment is not traversed in the written statement, service of notice has been admitted, and that leave thereafter should not be granted to deny what has been once admitted, either expressly or by implication, but that is something quite different from waiver. In AIR 1932 51 (Privy Council) the Privy Council held that the question whether a suit had been properly instituted u/s 92, Civil P.C., could be raised for the first time before their Lordships' Board, but the words of Section 80 are even more imperative than the words of Section 92. Section 80, Civil P.C., contains a clear and unqualified prohibition upon the institution of suits without the statutory notice, and indeed it would appear that if it were clear upon the record that no notice had been given in accordance with the provisions of Section 80, far from it being possible to argue the objection as to notice had been waived, it would be the duty of the Court to discharge the statutory and unqualified obligation imposed upon it and to reject the plaint: see also Jagadish Chandra Deo Vs. Debendra Prosad Bagchi Bahadur and Others, . We do not think in view of the statutory obligation imposed upon the Court the question of waiver of notice or prejudice to the plaintiffs by the delay in taking objection can be in any way decisive. It is argued that in this case there was in the plaint in para. 20 an averment that the provisions of Section 80, Civil P.C., had been satisfied, but it is not an averment that satisfied the provisions of Section 80, Civil P.C., though it is so worded as likely and even calculated to mislead.

35. The learned Judges then pointed out that in fact the notice was delivered to the Collector of Sukkur on 27th April 1931, so the suit could not have been instituted before 27th June and it was instituted on 25th June 1931, a day too soon and the statement in para. 20 of the plaint was false and misleading. While considering the argument as to the question of prejudice to the plaintiffs in that case whose cause of action arose long ago on the completion of the contract on 28th June 1928, the learned Judges observed:

In our opinion Section 80, Civil P.C., lays down a rule of public policy which it is for the officers of Government to obey. It cannot have been the intention of the Legislature and it is not in the public interest that the provisions of Section 80, Civil P.C., as to notice can be waived at the whim or caprice of an individual

officer. In our opinion, a strict adherence to the provisions of that section will be quite, if not more, important in the future as in the past.

36. With respect I agree with these observations. The decision of the Privy Council in AIR 1927 176 (Privy Council) was also noticed in Jagadish Chandra Deo Vs. Debendra Prosad Bagchi Bahadur and Others, , just referred to. In that case the suit of the plaintiff for accounts and compensation against the receiver was dismissed on the ground that the provisions of Section 80, Civil P.C., had not been strictly complied with. The plaintiff-appellant relied upon the service on the receiver of a notice of an application which he made to the Calcutta High Court for leave to institute a suit and it was urged that all the particulars which were subsequently embodied in the plaint are to be found in that application and that application should be treated as equivalent to the service of notice as required by Section 80, Civil P.C. But the learned Judges observed at p. 162 (of 35 C.W.N.):

It is true that the object of a notice u/s 80 seems to be to give the public officer an opportunity of investigating into the truth of the alleged cause of action and of making amends or settling the claim" if so advised. But even the notice of a suit is entirely different from notice of an application for leave to sue. Their Lordships of the Judicial Committee have pointed out that Section 80 is express, explicit and mandatory and admits of no implication or exception: AIR 1927 176 (Privy Council) . There is no reason why its provisions should not be strictly complied with. In our opinion, the words of Section 80, as to how the notice is to be served, are also mandatory and not controlled by the provision contained in Order 48, Rule 2, which in our judgment should be read as subject to the special procedure as to service contained in Section 80 itself.

37. The learned Judges then pointed out that the proper course in such a case, where the requirements of Section 80 have not been complied with nor there is any averment in the plaint to that effect, is that the Court should look into the plaint, and when on the face of it there was no averment as to service of the notice, the Court should have rejected the plaint instead of going on with the suit. It will be noticed that in the circumstances there was no prejudice whatsoever to the receiver because he knew of the contents of the plaint which were substantially the same as in the application for leave to sue the receiver. But nevertheless the contention was, if I may say so respectfully, correctly rejected in view of the decision in AIR 1927 176 (Privy Council) . This review of the case law satisfies me that it is impossible to hold that in the circumstances such as exist in the present case the Secretary of State can be held to have waived the objection when the provisions of Section 80, Civil P.C., had not been complied with on the admitted facts. The appeal therefore must be allowed and the suit of the plaintiffs dismissed but in the circumstances each party will bear his costs throughout.

38. Civil Revision No. 200 of 1939.--The suit out of which this application in revision arose was tried along with the suit out of which the second Appeal No. 878 of 1939 arose. Both the suits were tried together and disposed of by one

judgment by the learned Munsif who decreed the suit of the plaintiffs by his decision dated 22nd December 1938. It is necessary to state the facts briefly in order to understand the nature of the grounds taken in revision. Suit No. 466/37 / 38/38 was instituted as a money suit by Deokaran Das Ganpat Ram to recover a sum of Rupees 265-15-0 as the price of goods not delivered to them together with certain incidental expenses and interest. The total claim was laid at Rupees 303-1-0. The consignees were Deokaran Das Ganpat Ram to whom these goods were despatched from Bombay by a firm Kalu Ram Brijmohan to be carried by the G.I.P. Ry. under Risk Note Form H for delivery to the consignees at Khagaria. The goods were lost in part being destroyed by fire while in the hands of the employees of the E.I. Ry, or of their ferry contractors. The plaintiffs preferred their claim to the Chief Commercial Manager, E.I. Ry., who refused by his letter dated 2nd June 1986 to entertain the claim and directed them to take delivery of the salvaged goods. The plaintiffs thereupon served a notice to the Railway defendants u/s 77, Railways Act, and u/s 80, Civil P.C., on the Secretary of State for India in Council and instituted the present suit on 13th August 1936. The plaint was filed before the Munsif in his ordinary jurisdiction, but as the amount involved was small the suit was triable as a Small Cause Court suit.

39. Accordingly the plaint was returned by an order dated 4th January 1987 for presenting to the proper Court where it was filed on 17th March 1937 and therefore the objection as to the suit being premature could not be raised and it is not surprising to see that the objection was not pressed before the learned Munsif. On 15th December 1937 the plaint was amended by adding the new plaintiffs, namely Sagarmal and Bansidhar. This was in consequence of an objection taken in the written statement by the Secretary of State that the suit was not maintainable as the firm in whose name the suit was instituted, namely Deokaran Dass Ganpat Ram, was not a firm registered under the Partnership Act.

40. In reply to this the plaintiffs amended their plaint by filing a petition on 15th December 1937 substituting the names of the owners of the firm in place of the original firm. It had been already stated in the plaint that the firm Deokaran Dass Ganpat Ram was a joint family firm and in the petition for amendment Ganpat Ram was described as the son of Deokaran Das and Satnarain as the son of Ganpat Ram. The amendment was allowed subject to limitation on payment of costs to defendant.

41. It was contended in these circumstances on behalf of the defendant before the learned Munsif that as a notice u/s 80, Civil P.C., was given in the name of the firm Deokaran Das Ganpat Ram the present plaintiffs are not competent to maintain the suit and that at any rate the claim must be thrown out as time-barred on the ground that the real plaintiffs should be deemed to have filed the suit on 15th December 1937 when the plaint was allowed to be amended. But the learned Munsif over-ruled the objection and pointed out that the defendant did not file any additional written statement specifying the objections which were being taken at the time of the argument. He observed:

In accordance with the provisions of Order 1, Rule 10, Civil P.C., pleadings are allowed to be amended. The amendment contemplated by the rule is one of bona fide mistakes which may be of fact or of law. The point in the present suit is whether the mistake rectified by amendment was merely a misdescription of a bona fide mistake. There is no doubt that it was so. Deokaran Das is the deceased father of Ganpat Ram. In spite of his death the family firm was carried on in the names of the deceased father and the son, viz. "Deokaran Dass, Ganpat Rai." Plaintiffs who are father and son represent the firm. The suit could not have been maintained in the name of the firm for want of registration. But it was a bona fide mistake which was rectified. Want of notice was not pleaded by defendant as a bar to the suit at any time subsequent to the amendment. The two issues were raised just before the hearing. I therefore hold that the objections covered by the issues have no force. I answer issue 3 in the affirmative and issue 4 in the negative.

Issue 3 was:

Have the plaintiffs given notice to the Secretary of State for India in Council u/s 80, Civil P.C., and are they competent to maintain the suit?

Issue 4 was:

Is the claim barred by limitation?

42. The learned Munsif then went into the facts of the case and held that the accident which resulted in the partial loss of the goods took place on account of the misconduct of the railway employees and the ferry contractor's men and therefore the defendant is liable for damages. He also approved of the conduct of the plaintiffs in refusing to take the salvaged articles which were offered to them at the Khagaria out agency station on 27th February 1936. In the result he passed a decree in favour of the plaintiffs for Rs. 303-1-0, that is to say, in full, with costs and future interest at 6 per cent, per annum. The present application in revision is against this order. It is impossible to say that the petitioner has any grievance which can be remedied by this Court. So far as the decision on the question of fact is concerned it is impossible for this Court to revise that conclusion.

43. The only question of law urged was that a notice u/s 80, Civil P.C., which was given to the Secretary of State on behalf of Deokaran Dass Ganpat Ram should in the circumstances narrated above be held to have been not a notice on behalf of the substituted plaintiffs. But in view of the findings of fact arrived at by the learned Munsif that the name Deokaran Dass Ganpat Ram was the name of the firm in which the present plaintiffs carried on their business and that this was known to the Secretary of State, the objection has been rightly overruled. No question of limitation arises because the substituted plaintiffs were always upon the record initially under the name of Deokaran Dass Ganpat Ram and later on when the Secretary of State took the defence that the plaintiff's firm was an unregistered firm they came forward as the owners of that very firm.

44. For these reasons the application fails and must be dismissed with costs.

Chatterji J.

I agree.