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**(1926) 12 BOM CK 0008**

**In the Bombay High Court**

**Case No : O.C.J. Appeal No. 51 of 1926 and Suit No. 935 of 1924**

The Sheriff of Bombay

APPELLANT

Vs

Hakmaji Motaji and Co.

RESPONDENT

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**Date of Decision : 02-12-1926**

**Acts Referred:**

Civil Procedure Code, 1908 (CPC) — Section 2(17)(d)

**Citation : AIR 1927 Bom 521 : (1927) 29 BOMLR 1071 : (1927) ILR (Bom) 749**

**Hon'ble Judges : Blackwell, J; Amberson Marten, J**

**Bench : Division Bench**

**Final Decision : Allowed**

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## **Judgement**

Amberson Marten, Kt., C.J.—This case illustrates the fact that it is usually much easier to make mistakes than to remedy them.

2. On November 29, 1923, the bailiffs of the then Sheriff of Bombay Sir Temulji Nariman, had in their custody a judgmentdebtor named Bhavani Govind. That judgment-debtor escaped from their custody. The plaintiffs thereupon gave notice to the Sheriff of Bombay, claiming damages for the escape of the prisoner. Subsequently, on December 13, 1923, they gave formal notice of the suit, and followed this up on March 14, 1924, by bringing the present suit against "the Sheriff of Bombay" as defendant.

3. At the date of the suit Mr. Ishwardas Lakhmidas was the Sheriff of Bombay. The formal appearance for the defendant was entered by the Government Solicitor "for the Sheriff of Bombay." The written statement was put in on July 22, 1924, and signed, "Ishwardas Lakhmidas, Sheriff of Bombay."

4. It was amended on March 3, 1926, pursuant to an order of February 23, 1926. That amendment is only declared by the Deputy Sheriff. At the date of that amendment, Sir Fazalbhoy Currirabhoy was the Sheriff of Bombay.

5. The hearing of the case took place from February 25 to March 4, 1926.

Judgment was given on March 29 in favour of the plaintiffs for Rs. 2,400 and costs. In April 1926 Sir Fazalbhoy Currimbhoy resigned, and the present Sheriff Mr. Barodawalla was appointed Sheriff of Bombay. The formal decree was sealed on June 8, 1926, and directed "the defendant" to pay the above sum. The memorandum of appeal dated May 28, was expressed to be given by the defendant. At that date the Sheriff, as I have already said, was Mr. Barodawalla. The plaintiffs' cross-objections are undated but refer to "the appellant and defendant."

6. The main defence raised in the suit by the Sheriff of Bombay was that there was no negligence on the part of his bailiff, and alternatively, if there was any negligence the Sheriff was not responsible. On the point of negligence, the Sheriff failed. The bailiff was held to be negligent and the Sheriff to be responsible for his action, and, accordingly, on this point, the plaintiffs succeeded. Before us, the issue of negligence by the bailiff is not contested. Accordingly, the learned Judge's judgment in that respect stands.

7. The main point before us is whether a suit lies in this form against "the Sheriff of Bombay." As I have already pointed out, the Sheriff has changed three or four times during the material dates in this litigation, and consequently some absurd results may arise. Curiously enough, objection does not seem to have been taken in the first instance to the framing of the suit. It was not till the amended written statement was put in on March 3, 1926, that it was pleaded that this suit was not maintainable against the defendant as in any event the acts complained of in the plaint were alleged to have been committed by the bailiff at a time when the defendant was not the Sheriff of Bombay.

8. Unfortunately, the issues raised are not particularly clear on this point. There is not a preliminary issue, for instance, as to whether the suit as framed can lie against the Sheriff of Bombay. But one may point to issues Nos. 3 and 12; and, in any event we accept the statement of the Advocate General that he drew the learned Judge's attention to this point at the outset, and asked for a preliminary issue to be framed, and the learned Judge replied that he would not hear the case piecemeal, but would deal with the case as a whole. And in fact he dealt with the point in his judgment.

9. The plaintiff justifies the plaint on two grounds. He contends, first, that the Sheriff of Bombay is a corporation sole, and, alternatively, that the Sheriff is a public officer, and therefore the suit can lie against him in his official capacity. The learned Judge decided against the plaintiff on the first point, but in his favour on the second.

10. Now the Sheriff of Bombay is appointed under the Supreme Court Charter of 1823, the powers of which are retained by subsequent legislation to which it is unnecessary to refer. If one looks at Clause 15 (counting from the operative part and neglecting the recitals) it will be found that the Governor and Council of Bombay are empowered yearly to appoint a Sheriff for the ensuing year to be

computed from December 20. Clause 16 provides:-

That the said Sheriff and his successors shall, by themselves or their sufficient deputies, to be by them appointed and duly authorized, under their respective hands and seals, and for whom he and they shall be responsible during his or their continuance in such office, execute, and the said Sheriff and his said deputies are hereby authorized to execute all the writs, summonses, rules, orders, warrants, commands and process of the said Supreme Court of Judicature at Bombay, and make return of the same, together with the manner of the execution thereof to the said Supreme Court of Judicature at Bombay, and to receive and detain in prison all such persons as shall be committed to the custody of such Sheriff by the said Supreme Court of Judicature at Bombay.

11. Then in Clause 18 there is a provision as to the limits beyond which the Sheriff is not bound to go and for the grant of a special warrant in that event. And towards the end of that clause it is provided that "in that case,... the said Sheriff, his Executors or Administrators, shall not be responsible or liable for any Act to be done in, or in anywise respecting the Execution of such Process, under and by virtue of such special Warrant."

12. Now the reference to "executors or administrators" in Clause 18 to my mind clearly contemplates that the Sheriff is not a corporation sole, for otherwise there could be no question of executors or administrators of any one particular Sheriff being liable. And if there be still any doubt on the point, I think Clause 16 makes the matter perfectly clear, for it provides that each Sheriff is responsible for his own acts during the continuance of his own office. If, however, the contention of the plaintiffs was to prevail it would involve this that any particular Sheriff in any particular year might be made liable for the defaults of his predecessors. For instance, in this very case, Mr. Barodawalla, the Sheriff of 1926, is being asked to be responsible for a decree passed against his immediate predecessor Sir Fazalbhoy Currimbhoy, in a suit filed during the period of office of Mr. Ishwardas Lukhmidas, for an offence committed during the term of office of Mr. Ishwardas predecessor, namely, Sir Temulji Nariman.

13. We have been referred to the definition of "corporation sole" in Halsbury's Laws of England and elsewhere, but we are satisfied that the learned Judge was correct in holding that the Sheriff of Bombay is not a corporation sole within the ordinary meaning of that expression, any more than a Sheriff is in England. Speaking generally, English corporations sole are mainly ecclesiastical authorities, and it is clear that in England the Sheriffs are not corporations sole. As regards India it is clear that the Sheriff's office and duties have been borrowed from England, and in no way represent any local law or practice in India.

14. Then passing to the second point, it may well be that the Sheriff of Bombay is a "public officer" within the meaning of Section 2(17)(d) of the CPC as an "officer of a Court of Justice whose duty it is, as such officer, (inter alia) to

execute any judicial process", and (e) as being a "person who holds any office by virtue of which he is empowered to place or keep any person in confinement."

15. It may also be, and indeed it is conceded, that in his official capacity, Sections 79 to 82 of the same Code would apply. These sections relate to "suits by or against the Government or public officers in their official capacity." Section 79 provides that "Suits by or against the Government shall be instituted by or against the Secretary of State for India in Council." Section 80 provides that no suit should be instituted against the Secretary of State for India in Council or against a public officer except after a particular notice. Then Section 81 provides that in a suit instituted against a public officer the defendant shall not be liable to arrest. Section 82 provides that:

(1) Where the decree is against the Secretary of State for India in Council or against a public officer in respect of any such act as aforesaid, a time shall be specified in the decree within which it shall be satisfied; and, if the decree is not satisfied within the time so specified, the Court shall report the case for the orders of the Local Government.

(2) Execution shall not be issued on any such decree unless it remains unsatisfied for the period of three months computed from the date of such report.

16. An omission here is that though the decree directs that the defendant should pay to the plaintiffs the sum of Rs. 2,400 and costs, no time for payment is specified in the decree, as it ought to have been, u/s 82, That, however, is a bye point.

17. To my mind, the plaintiffs' main argument rests on this fallacy that because you can bring a suit against a public officer in respect of acts done by him in his official capacity, it follows that you can sue that officer by his official name, as for instance, the Sheriff of Bombay, just as if he was a corporation sole.

18. In dealing with this case I prefer to confine my observations to the Sheriff of Bombay. This is a suit on the Original Side, and I am not concerned with suits in mofussil Courts rightly or wrongly brought against various Collectors in various districts. But in some of these cases, at any rate, it has been held that suits against Government should be brought against the Secretary of State for India in Council.

19. So far as English law is concerned, it is clear to my mind that the Sheriff is personally liable for the actions and defaults of his bailiffs and servants, and, moreover, that anybody complaining of his default should sue him personally and not by the name of his office. It is an office of great antiquity and importance (See Halsbury's "Laws of England", Vol. XXV, p. 792), and in modern days is regulated by the Sheriffs Act 1887.

20. On looking at Bullen and Leake's Precedents of Pleadings (8th edition), p. 490, note (g), it will be seen that the cause of action for any such default is against the Sheriff personally. And on looking at the cases cited, it will be found

that in every case but one, the name of the defendant is given.

21. So, too, I may refer to Halsbury, Vol. XXV, where at pp. 820 and 826 the liability of the Sheriff for the escape of a prisoner, and for the fraud or other wrongful acts of his bailiff is dealt with. In the cases there cited, the name of the defendant is also given. Thus, as my brother Blackwell has pointed out, in *Benton v. Sutton* (1797) 1 B. & P. 24., which was an action against the Sheriff for allowing his prisoner to escape, there the description given is: "Debt against the Defendant as sheriff of Surry, for an escape of a prisoner in execution."

22. Mr. Bhagwati has said all that could fairly be urged on behalf of his clients the respondents, and he very strongly relied on certain cases which would at first sight appear as if in England the Sheriff can be sued as such. He referred us to the case of *Marylebone Vestry v. Sheriff of London* [1900] 1 Q.B. 111, on appeal [1900] 1 Q.B. 591. There from the short title the suit is described no doubt, as against the Sheriff of London. But if the facts at pages 111 and 112 in 1900 1 Q.B. are looked at, it will be seen that the plaintiffs' claim was in respect of rates due to the plaintiffs from one T.M. Bush, whose goods had been taken in execution "by the defendant as Sheriff of London." And at p. 112 it is stated that: "At that date, the defendant as Sheriff of London was in possession of the goods,..." I have therefore no doubt that the description "Sheriff of London" is merely a compendious one by the law reporter, and that in fact the suit was against the Sheriff personally.

23. In Bullen and Leake's *Precedents of Pleadings*, 8th Edition, page 490, paragraph 1 runs : "The defendant is and at all times hereinafter mentioned was Sheriff of the County of...." And then, in the notes, as I have already pointed out, the name of the defendant Sheriff is given in all the cases, except one case of *Townend v. Sheriff of Yorkshire*, (1890) 24 Q.B.D. 621 which would appear to have been a case of taxation of costs. And here again it may well be that the description of the defendant in the report is not a full one, and that production of the record would show that in fact the Sheriff was sued personally.

24. In the view then which I take, this action against the Sheriff of Bombay does not lie, and if a proper application had been made, the plaint should have been returned to the plaintiffs for the requisite amendment.

25. But I should here deal shortly with one further point and it arises in this way. The Advocate-General was content to accept the English law relating to Sheriffs as applicable to the Sheriff of Bombay down to the date of the Government Resolution No. 4164 of 1897, dated June 1, 1897. But he contended that if that resolution effected a change in the status of the Sheriffs, so that they became as it were officers in a Government Department, then certain principles of law would apply, which would prevent any particular Government Officer from being sued for the acts of his subordinates, unless he has in effect made those acts his own.

26. Now, whether any Government Resolution could really vary the terms of the Letters Patent is, to say the least of it, open to question. The Letters Patent may

be varied by legislation or by further Letters Patent issued by His Majesty, but in general it is not open for the Letters Patent to be varied by mere resolutions either of the Government of Bombay or the Government of India, Be that as it may, it appears to me that this resolution did not have that effect. All that it really purported to do was that the fees formerly payable to and retained by the Sheriff of Bombay were now to be paid by him to Government.

27. If, however, contrary to the view which I take, this resolution did effect a change in the legal status of the Sheriff and his office, then it would seem that the principles referred to in *Raleigh v. Goschen* [1898] 1 Ch. 73 and *Roper v. Public Works Commissioners* [1915] 1 K.B. 45 would apply. In the former case, decided by Mr. Justice Romer, the head-note in part is :

The head of a Government Department is not liable for wrongful acts of officials in the Department, unless it can be shown that the act complained of was substantially the act of the head of the Department himself.

That particular case was a suit against the Lords Commissioners of the Admiralty.

28. So, too, in *Bainbridge v. The Postmaster-General* [1906] 1 K.B. 178, it was held that the Postmaster-General was not liable in his official capacity, as head of the telegraph department of the Post Office, for wrongful acts done by his subordinates in carrying on the business of the department.

29. If, therefore, contrary to my view, it can be maintained that Clause 16 of the Charter of 1823 no longer applies, then, it seems to me that in the present case the Sheriff" of Bombay could not be sued in his official capacity for the acts of his bailiffs, inasmuch as the acts complained of were not substantially the acts of the Sheriff himself.

30. There is a further case to which I may refer, viz., *Brasyer v. Maclean* (1875) L.R. 6 P.C. 398. That was a case against the Sheriff of the Colony of New South Wales. It was held that the Sheriff of the Colony was liable, without proof of malice or want of probable cause, in an action for a false return of rescue made by him upon a writ of *capias ad respondendum*, for the damage which resulted to the plaintiff therefrom. It will be noticed that in that case the Sheriff was sued in his own name, and not by his official title.

31. And I may here point out that the distinction between the two forms of action is not merely a technical one. The Sheriff of Bombay is an officer whose office runs for a period of one year. And hence it is only right and fair that he should only be liable for any wrongs committed during his period of office. On what principle then can he be sued for the acts or defaults of his predecessors ? Accordingly, this apparent technicality involves questions of principle and of common justice. In this connection I may quote what Lord Parker said in *London Association for Protection of Trade v. Greenlands, Limited* [1916] 2 A.C. 15

In some cases no doubt a waiver of technical points may be conducive to substantial justice being done between the parties. In others, again, it may be

dangerous if only because the dividing line between technicality and substance is not always clearly defined, A rule of practice, however technical it may appear, is almost always based on legal principles, and its neglect may easily lead to a disregard of the principle involved.

32. The learned trial Judge seems to have thought that provided he passed a decree against the Sheriff of Bombay, Government would pay whatever the amount of the decree might be, because they take the emoluments of his office. This may be a fair argument for the Sheriff to use against Government. But sitting as a Court of law I do not think we can assume it would succeed. Nor do I think that it makes any difference in law. The decree here is in fact against the Sheriff of Bombay ordering him to pay a certain sum to the plaintiffs. And I think that Mr. Barodawalla is entitled to object to that liability being foisted on him, whether or no he might eventually induce Government to relieve him of that burden.

33. The third point urged by Mr, Bhagwati was that supposing the suit was wrongly framed, yet, one must treat it as brought against the Sheriff of Bombay in 1924 or the Sheriff of Bombay in 1923 when the wrongful act was committed. Accordingly, that plaintiffs ought to be allowed to begin de novo after making the necessary amendments in the plaint, so as to sue personally Mr. Ishwardas Lukhmidas or Sir Temulji Nariman. The answer to that is this. The plaintiffs have chosen to sue the entity, whom they call, the Sheriff of Bombay. They insisted that he was a corporation sole despite the amended written statement. They have got judgment in that form and they have tried to make the Sheriff of Bombay for the time being pay the amount of that decree. Moreover, they have actually tiled their cross-objections against the award of the lower Court, and have claimed increased damages. The plaintiffs having deliberately taken and insisted on that form of action I think it would be wrong under till the the circumstances of the case to convert their present action into a different one at this late stage. If any new suit is open to them, let them bring it. It may be, that such a suit is now barred by limitation, but that is no sufficient reason for the present application. I would accordingly reject that application for amendment.

34. It follows, from what I have already said, that the appeal must be allowed and that the cross-objections must be dismissed.

35. As regards costs, the points in favour of the plaintiffs are that the main portion of the written statement and the greater portion of the five days trial were taken up by the issues of fact as to negligence. On these issues, the defendant failed. Moreover, until the amended written statement was put in, the defendant never clearly brought to the notice of the plaintiffs that the suit would not lie. On the other hand, as the learned trial Judge overruled the contention of the defendant as to the frame of the action, and moreover, has passed a decree against the Sheriff of Bombay based on the finding that the Sheriff of Bombay for the time being is liable under that decree, I think the Sheriff for the time being must be allowed to come to this Appeal Court and appeal against that decree.

Accordingly, I think the present Sheriff Mr. Barodawalla has a locus standi before us, and none the less so, because we are informed by counsel that the plaintiffs have been sending solicitors' letters to him demanding payment of the moneys awarded by the decree in the Court below. It, therefore, seems to me that as regards the costs of the appeal, we should direct the plaintiffs to pay to Mr. Barodawalla, Mr. Barodawalla's costs of this appeal.

36. Then, as regards the costs of the suit it seems to me that to a certain extent, the same line of argument prevails. The Sheriff of Bombay for the time being was in one sense entitled to appear because the plaintiffs were endeavouring to make the Sheriff for the time being liable for the claim in the suit. I think, therefore, that the plaintiffs ought to pay to Mr. Barodawalla the costs incurred by the defendant, the Sheriff of Bombay, in defending this suit in the lower Court, but with this exception, viz., that I would recognize the extra time and expense involved on the issues of fact on which the hearing was eventually rendered unnecessary. Accordingly as regards the issues as to negligence, I would direct the Sheriff to bear his own costs. These issues are in effect Nos. 1, 2, 4, 5, 6, 7, 8 and 9.

37. In the view which we take of this case, it has become unnecessary to determine the question of the quantum of damages. Both parties appealed on this question, but it is unnecessary for us to go into it having regard to the view we take on the other point in the case.

Blackwell, J.

38. I desire to add a word only on one part of this case, namely, upon the second contention that was raised by counsel for the respondents. That contention was to this effect, that the Sheriff was a public officer within the meaning of Section 2, Sub-section (17)(d), of the Civil Procedure Code, and that the Sheriff being a public officer, that fact would enable the plaintiffs to file a suit against him in his official capacity, and that, therefore, the suit as filed was in proper form. Now it is quite true that Sections 79 to 82 of the CPC contemplate suits by or against Government or public officers in their official capacity, and the learned counsel for the respondents referred to Order XXVII, in the First Schedule to the Code and in particular to Rule 7 of that Order, which is to the effect that-

Where the defendant is a public officer and, on receiving the summons, considers it proper to make a reference to the Government before answering the plaint, he may apply to the Court to grant such extension of the time fixed in the summons as may be necessary to enable him to make such reference and to receive orders thereon through the proper channel.

39. The learned counsel for the respondents argued from that that it was clear that the Code contemplated a suit against a public officer in the name of the office which he held. Now, there, with all respect, I think the contention is ill-founded. It seems to me that there is nothing in any of the sections, from 79 to 82 of the Code or in Order XXVII, which contemplates a suit being brought, if I



may say so, against the office as distinguished from the individual for the time being holding the office, and in my judgment, all that Sections 79 to 82 and Order XXVII contemplate is this, that if an individual holding an office has an action brought against him in respect of an act purporting to be done by him in his official capacity, then he shall have an opportunity of bringing the matter to the notice of the Government so as to enable the Government to defend, if the Government chooses to undertake his defence. But neither the sections nor the Order, in my judgment, give any warrant for the contention that the action can be brought in any other way except against the individual as an individual.

40. I entirely agree with the remarks that have fallen from the learned Chief Justice in regard to the other contentions, and I do not think I could usefully add anything to those remarks.

41. I, therefore, agree that the appeal ought to be allowed and the decree set aside, and I concur in the order that the learned Chief Justice has directed in regard to the payment of the costs.

Marten, C.J.

42. The formal order of this Court will be:-

PER CURIAM, Appeal allowed, decree discharged. Plaintiffs to pay Mr. Barodawalla's costs of the appeal and also the costs of the suit in the Court below incurred by the Sheriff of Bombay for the time being, except the costs of issues Nos. 1, 2, 4, 5, 6, 7, 8 and 9, the costs of which last mentioned issues, the Sheriff of Bombay for the time being should bear. Cross-objections dismissed with costs to be paid by the plaintiffs to Mr. Barodawalla.