
(1981) 08 MAD CK 0035

Madras High Court

Case No: None

Doom Doma Tea
Company Limited and
Another

APPELLANT

Vs

The Union of India
(UOI) and Others

RESPONDENT

Date of Decision: Aug. 10, 1981

Citation: (1982) 95 LW 41 : (1982) 1 MLJ 85

Hon'ble Judges: V. Ratnam, J

Bench: Division Bench

Judgement

@JUDGMENTTAG-ORDER

V. Ratnam, J.

The plaintiffs in O.S. No. 608 of 1976,, Sub-Court, Coimbatore, are the petitioners in this civil revision petition, which is directed against the order of the Court below dismissing an application filed by the petitioners in I.A. No. 99 of 1979 under Order 1, Rule 10(2), Civil Procedure Code, praying to strike out the name of the 2nd petitioner from the array of parties and to allow the 1st petitioner to continue the suit as the sole plaintiff. The circumstances under which the suit in O.S. No. 608 of 1976, Sub-Court, Coimbatore, was instituted by the petitioners may be stated thus: On 7th July, 1973, the 1st petitioner entrusted to the 1st respondent-railway, 160 cases of tea for carriage from Deem Deema Town in Assam to Coimbatore and a railway receipt No. 12)317025 was also obtained by the 1st petitioner from the 1st respondent. The 1st respondent, according to-the 1st petitioner, accepted the goods and agreed to carry the same for reward at railway! risk and to deliver the goods to the 2nd petitioner at Coimbatore Town. There was a misdespatch of the goods by the railway to Kidderpore Docks in Calcutta within the jurisdiction of the 5th respondent and the consignment was unloaded at Brooklya Siding, Calcutta, where delivery was obtained on coming to know of the same. At the time of effecting delivery, there was a shortage of 48 Kgs.,. and 4,433 Kgs. were stained by

water and in a damaged condition and this was duly noted-in the railway delivery book at the time of delivery. Thereafter, according to the petitioners, the damaged goods were sold and a sum of Rs. 21,926.59 was realised and a loss of Rs. 8,043.59 was sustained" which according to the petitioners is recoverable from the respondents. The petitioners stated that by letter, dated 10th December, 1973, they preferred their claim u/s 78-B of the Indian Railways Act and also served a notice, dated 12th December, 1973 u/s 80, Civil Procedure Code. In response to this, the 7th respondent replied stating that the claim had been referred to the 5th respondent and the 5th respondent took up the stand that the consignment had been duly delivered. In spite of numerous letters, according to the petitioners, the loss sustained by them had not been made good and therefore, the suit was instituted for the recovery of the sum of Rs. 8,043.59.

2. In the written statement filed on behalf of respondents 5 and 7, the suit claim has been repudiated. In paragraph 6 of the written statement filed by 7th respondent herein, an objection was taken with reference to the validity of the notice u/s 78-B of the Indian Railways Act as well as u/s 80, Civil Procedure Code.

3. In I.A. No. 99 of 1979, the petitioners filed an application under Order 1, Rule 10(2), Civil Procedure Code, praying that the name of the 2nd petitioner may be struck out from the array of parties on the ground that the 2nd petitioner had been impleaded as a co-plaintiff in its capacity as a consignee, that in view of the objection raised with reference to the defects in the notice u/s 80, Civil Procedure Code, an application was filed in I.A. No. 1677 of 1977 to transpose the 2nd petitioner as a defendant which was dismissed and that since the 2nd petitioner had no proprietary title to the goods, it was not a necessary party and its rank as a co-plaintiff in the suit was improper and should therefore be struck off from the array of parties. That application was resisted by the 5th respondent herein and others on the ground that rights have accrued to the respondents which cannot be easily allowed to be wiped out by striking the 2nd petitioner from the array of parties, that the decision in I.A. No. 1677 of 1977 will bar the petitioners from agitating the same matter over again in a different form and that the petition deserves to be dismissed.

4. The learned Second Additional Subordinate Judge, Coimbatore, who enquired into this application found that Section 80, Civil Procedure Code, notice in the instant case was issued only by the 1st petitioner and that therefore, the plaint filed suffers from a serious defect. In addition, it was also held that if the 2nd petitioner is struck off from the suit, serious hardship would be caused to the respondents and that having regard to the dismissal of the earlier application for transposition of the 2nd petitioner as a co-defendant, the application lacked bona fides. On these conclusions, the petition was dismissed. It is the correctness of this Order that is challenged by the petitioners.

5. Before this Court, it is common ground that though the plaint in paragraph 11 proceeded on the footing that Section 80, Civil Procedure Code, notice was given on behalf of both the petitioners, it is only the 1st petitioner who issued such a notice and not

the 2nd petitioner. The main contention of the learned Counsel for the petitioners is that what is sought to be agitated in the suit is not a joint right of petitioners 1 and 2, but the individual right of the first petitioner to claim damages as a consignor and therefore, the 1st petitioner alone can be permitted to proceed with the suit, even though on behalf of the 2nd petitioner no notice u/s 80, CPC had been given. On the other hand, the learned Counsel appearing for the railways contends that the stand taken by the petitioners in paragraphs 4, 10 and 11 of the plaint proceeds on the footing that the claim is common to both, that Section 80, Civil Procedure Code, notice had been issued by both the petitioners and that stand is inconsistent with the stand taken in the affidavit filed in support of an application in I.A. No. 99 of 1979, wherein the 1st petitioner claims to have taken a power of attorney from the 2nd petitioner for lodging the claim and also for issuing a notice u/s 80, Civil Procedure Code. It is the further contention of the learned Counsel that what is contemplated u/s 80, Civil Procedure Code, is an identity of the person who issues the notice with the one who ultimately instituted the suit and that in the instant case, owing to the failure of the 2nd petitioner to issue a notice u/s 80, Civil Procedure Code, even the 1st petitioner cannot maintain the suit, though the 1st petitioner might have issued a notice u/s 80, Civil Procedure Code, and that under those circumstances, the entire suit is defective and therefore, the 2nd petitioner cannot be struck off from the array of parties. It is no doubt true that the claim in the plaint proceeded on the footing that the 1st petitioner is the consignor, that the 2nd petitioner is the consignee and that both the petitioners had issued notices u/s 78-B of the Indian Railways Act and Section 80, Civil Procedure Code. But, as stated earlier it is no longer in dispute that the 2nd petitioner did not issue any notice under Section 80, Civil Procedure Code. The suit in the present case had been instituted on 4th September, 1976, prior to the coming into force of the amendments effected by Act CIV of 1976, to the provisions of the Civil Procedure Code, and therefore, the matter has to be dealt with on the provisions of Section 80, Civil Procedure Code, as it originally stood. The question that has therefore to be considered is whether the suit as laid can be permitted to be continued by the 1st petitioner alone after striking the name of the 2nd petitioner. It has been pointed out by the Privy Council in AIR 1927 176 (Privy Council), that Section 80, Civil Procedure Code, is explicit and mandatory and it admits of no implications or exceptions. But the very question whether a suit brought by two plaintiffs is maintainable when the notice, required u/s 80, Civil Procedure Code, was given by only one had come up for consideration. In [Sree Raja Venkata Rangiah Appa Rao Bahadur and Another Vs. The Secretary of State for India in Council and Others](#), the plaintiffs brought three suits against the Secretary of State for India in Council who figured as the 1st defendant and some other defendants in possession with a view to establish the plaintiffs' right to resume the inam lands and for a declaration that the Secretary of State for India in Council did not have any right to enfranchise these inams and also for recovery of possession ejecting the other defendants therefrom. In that case, the relief was sought for on behalf of both the plaintiffs and the suit was also framed in such a manner as to make it one in which the reliefs mentioned therein were sought for on behalf of both the plaintiffs. The 1st plaintiff alone had issued a notice on 22nd July, 1921, u/s 80, Civil Procedure Code, and the

question arose whether the suit brought by two plaintiffs is maintainable when the notice required by Section 80, Civil Procedure Code, was given by only one plaintiff. The Courts below rejected the plaints under Order 7, Rule 11, Civil Procedure Code, on the ground that notice u/s 80, Civil Procedure Code, was not given to the Secretary of State for India in Council. Sundaram Chetty, J., after adverting to the decision of the Privy Council in AIR 1927 176 (Privy Council) , held that the giving of notice about the suit claim by only one plaintiff would not be a strict compliance with the mandatory provisions of Section 80, Civil Procedure Code, when the suit is actually filed by two plaintiffs. Observed the learned Judge at page 176 thus:

If the requisites of Section 80 should be literally complied with, I must say that the giving of notice about the suit claim by one plaintiff would not be a strict compliance with the mandatory provisions of Section 80, when the suit is actually filed by two plaintiffs, though one of them happens to be the person that gave the notice. There should be identity of the person who issued the notice with the person that brings the suit. In this view, it has been held that a suit brought by a legal representative of a deceased man and a suit brought by a transferee would offend against Section 80, Civil Procedure Code, if the notice required by that section was given by the deceased man or by the transferor: vide, [Mahadev Dattatraya Rajarshi Vs. Secretary of State for India](#) . As the dictum of the Privy Council indicates that it is no longer left to the discretion of the Court to held in favour of the maintainability of a suit in spite of non-compliance with some of the requisites of the section, I have to find against the maintainability of the present suits on the ground that the notice as required by Section 80, Civil Procedure Code, was not given.

Ultimately, the learned Judge relied on the provisions of Order 7, Rule 11, Civil Procedure Code, and held that the non-compliance with the requisites of Section 80, Civil Procedure Code, can be taken as a ground covered by Clause (d) of Rule 11 and in that view, upheld the order of the Court below rejecting the plaints. On appeal therefrom in [\(Sree Rajah\) Venkata Rengiah Appa Rao Bahadur and Others Vs. Secy. of State and Others](#) , a Division Bench consisting of Beasley CJ., and Cornish, J., affirmed the view taken by Sundaram Chetty, J. Beasley, CJ., after referring to the observations of the Privy Council in AIR 1927 176 (Privy Council) , observed thus:

I am of the opinion that the observations to which reference had already been made are applicable to everything and every condition contained in that section and that the section means that, where there are more plaintiffs than one claiming relief, those plaintiffs are required to give the notice provided for in that section. I agree with the view taken by Sundaram Chetty, J., that, there has not been in this case a strict compliance with the mandatory provisions of Section 80, Civil Procedure Code, the suit having been filed by two plaintiffs and only one of them having given the statutory notice. That, in my view, disposes of the first argument placed before us.

The second contention put before us is that, although with regard to plaintiff 2 here has been a non-compliance by him with Section 80, Civil Procedure Code, in that he has not

given the statutory notice, nevertheless plaintiff I who has complied with the requisites of Section 80 can proceed with the suit. Sundaram Chetty, J., held that Section 80 not having been complied with, plaintiff I's relief could not be severed from that of plaintiff 2; in other words, the whole suit was bad and that the plaint must be rejected. He relied upon Bhaguhana Puri v. Jyothis Swarupa ILR(1907) All. 325, and upon Order 7, Rule 11(4), Civil Procedure Code, which says that

The plaint shall be rejected in the following cases(d) where the suit appears from the statement in the plaint to be barred by any law.

That provision rejects the whole plaint and not any particular part of the plaint. I agree with the view taken by Sundaram, J., upon this part of the case also.

It would thus be apparent that where a claim is made by two plaintiffs and the claim is not severable, the failure on the part of one plaintiff to give a notice u/s 80, Civil Procedure Code, would entail the rejection of the plaint as a whole and the plaint cannot be entertained in part with reference to the plaintiff who had given the notice u/s 80, Civil Procedure Code, and rejected in part with reference to the other plaintiff who had not issued the notice under, Section 80, Civil Procedure Code. The same principle has been reiterated by the Privy Council in Vellayan Chettiar and Ors. v. The Government of the Province of Madras and Anr. (1947) 2 M.L.J. 208 : 60 L.W. 630 : L.R. 74 IndAp 223 : ILR (1948) Mad. 214 : AIR 1947 P.C. 197. There also the suit was instituted by two plaintiffs Al. Ar. Vellayan Chettiar and Rao Bahadur, D.A.P.R.M. Arunachalam Chettiar against the Government of the Province of Madras and the Municipal Council of Karaikudi praying to set aside the decision of the Appellate Survey Officer with reference to certain lands in Karaikudi village by declaring that the lands belong to the plaintiffs. Only the 1st plaintiff had given notice to the Collector of Madura on 30th June, 1936, to the effect that the decision of the Appellate Survey Officer was erroneous. A defence was raised that the suit notice is not in accordance with law and therefore, the suit is not maintainable. The issues relating to the validity of the notice as well as the waiver thereof were all decided in favour of the plaintiffs by the trial Court, but, on appeal to the High Court that decision was reversed. Upholding the judgment of the High Court, the Privy Council referred to AIR 1927 176 (Privy Council) , and observed thus:

In the present case the question is whether, a notice having been given on behalf of one plaintiff stating his cause of action, his name, description and place of residence and the relief which he claims, a suit can then be instituted by him and another. It is clear to their Lordships that it cannot. The section according to its plain meaning requires that there should be in the language of the High Court of Madras identity of the person who issues the notice with the person who brings the suit. See [\(Sree Rajah\) Venkata Rengiah Appa Rao Bahadur and Others Vs. Secy. of State and Others](#), . To hold otherwise would be to admit an implication or exception for which there is no justification.

Again in *Government of the Province of Bombay v. Pestonji Ardeshir Wadia and Ors.* (1949) 2 M.L.J. 161 : 62 L.W. 44 : L.R. 76 I.A. 85 : AIR 1949 P.C. 143 the Privy Council had to consider the competency of a suit laid against the Government by certain plaintiffs, out of whom two had not issued any notice to the Government u/s 80, Civil Procedure Code. A contention was raised that as no notice was given on behalf of plaintiffs 2 and 3 in that suit, the suit was not maintainable. Though this was not accepted by the trial Court, the High Court held contra. The Privy Council approved of the view taken by the High Court in the following terms:

The provisions of Section 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government. In the present case, it is not contended that any notice on behalf of plaintiffs 2 and 3 was served on the Government before the filing of the suit. Their Lordships have not been shown any provisions in the Code enabling the trustees to sue in the name of the trust. For these reasons the suit against the Government must be held to be incompetent and the appeal fails.

In [S.N. Dutt Vs. Union of India \(UOI\)](#), the Supreme Court was considering the question whether there would be sufficient compliance with Section 80, Civil Procedure Code, when a notice was given, by M/S Dutt and Company and the suit was filed by S.N. Dutt as the sole proprietor of a business carried on under the name and style of S.N. Dutt and Company. It was pointed out by the Supreme Court that such a notice would not be sufficient compliance with Section 80, Civil Procedure Code. In doing so, the Supreme Court referred to the decisions of the Privy Council mentioned earlier and pointed out that there must be identity of the person who issues the notice with the person who brings the suit and that in its absence, it cannot be said that Section 80, Civil Procedure Code, has been complied with. In [Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others](#), Mitter, J., pointed out the course to be adopted in cases where the plaintiff's cause of action is against a Government and the plaint does not disclose that a notice u/s 80, Civil Procedure Code, was served in terms of that section in the following words:

No doubt it would be open to a Court not to decide all the issues which may arise on the pleadings before it, if it finds that the plaint on the face of it is barred by any law. If for instance the plaintiff's cause of action is against a Government and the plaint does not show that notice u/s 80 of the Code of Civil Procedure, claiming relief was served in terms of the said section, it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the plaintiff from presenting a fresh plaint in respect of same cause of action.

In the present case, a reading of paragraphs 4 to 11 of the plaint discloses that the claim for recovery of damages is made on behalf of both the petitioners on a cause of action common to both. The notice issued u/s 80, Civil Procedure Code, is only on behalf of the

first petitioner and there is thus no identity between" the person who issued the notice u/s 80, Civil Procedure Code, and! the persons who instituted the suit This case would, therefore, squarely fall within the ratio of the decision of Sundaram Chetty, J, in [Sree Raja Venkata Rangiah Appa Rao Bahadur and Another Vs. The Secretary of State for India in Council and Others](#), approved of by the Division Bench in Venkata Rangiah Appa Rao Bahadur and Ors. v. Secretary of State and Ors. (1933) 41 L.W. 591 : AIR 1935 Mad. 369, and the Supreme Court in [Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others](#), Having regard to the nature of the claim made in the plaint on behalf of both the petitioners, it cannot be severed to permit the 1st petitioner alone to proceed with the trial of the suit in the absence of the 2nd petitioner. The result would be that owing to the failure of the second petitioner to issue a notice in accordance with Section 80, Civil Procedure Code, the entire suit cannot be proceeded with and the duty of the Court in such cases, as pointed out by the Supreme Court, would be to reject the plaint recording an order to that effect with reasons for the order. Under these circumstances, the order of the Court below rejecting the application filed by the petitioners is maintained. The Court below is further directed to pass an order under Order 7, Rule 12, Civil Procedure Code, rejecting the plaint in accordance with the provisions of Order 7, Rule 13, Civil Procedure Code. The petitioners will be entitled to present a fresh plaint on the same cause of action. This is needless to point out that in the peculiar circumstances of this case, the petitioners will be entitled to avail, themselves of the benefits of Section 14 of the Limitation Act, as the suit instituted in the instant case could not be proceeded with and disposed of, until the statutory conditions laid down had been satisfied or fulfilled as pointed out by the Supreme Court in [India Electric Works Ltd. Vs. James Mantosh and Another](#), The civil revision petition is, therefore, dismissed; but there will be no order as to costs.