

**(1911) 06 CAL CK 0002**

**Calcutta High Court**

**Case No:** None

McInerny, J.F.H.

APPELLANT

Vs

The Secretary of State for India

RESPONDENT

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**Date of Decision:** June 9, 1911

**Acts Referred:**

- Civil Procedure Code, 1908 (CPC) - Order 23 Rule 1, 80

**Citation:** 13 Ind. Cas. 370

**Hon'ble Judges:** Lawrence Jenkins, C.J; Woodroffe, J

**Bench:** Division Bench

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### **Judgement**

Lawrence Jenkins, C.J.

This case comes before us by way of appeal from a decree of Mr. Justice Fletcher who dismissed the plaintiff's suit.

2. On the case being placed before us it was perceived that, apart from the difficulty that there might be in bringing a suit against the Secretary of State for India in Council for a tort, alleged to have been committed by an agent of the Government, there was a further obstacle in the plaintiff's way that the facts as alleged in his plaint could not be Supported by evidence, inasmuch as it had been discovered and was the case that the obstacle in respect of which the plaintiff claimed, was not, as the plaint alleged, on the land of the Crown ; in other words, on a part of the maidan but on a part of the highway which was adjacent to the maidan. Therefore, leave was sought from us to amend th8 plaint so as to bring it into conformity with the facts which the plaintiff believed he could prove, and we required as a condition of this application that the proposed plaint should be drafted and placed before us. That has now been done. The plaint as now proposed by way of amendment differs in an essential degree from the original plaint. The original plaint proceeded upon negligence, whereas the new plaint proceeds upon nuisance in the form of obstruction on the highway, so that it is impossible to say that the cause of action is the same. This brings in the plaintiff's way the difficulty created by Section 80 of the

Code which prescribes that "no suit shall be instituted against the Secretary of State for India in Council...until the expiration of two months next after notice in writing has been delivered to, or left at the office of, a Secretary to the Local Government or the Collector of the district...stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims." The notice which was served as a preliminary to the plaint as originally framed pointed to a suit based on negligence and it stated a cause of action different from that on which the plaintiff would rely in his proposed plaint. It follows, therefore, that it is not open to us to give the plaintiff permission to amend his plaint.

3. In these circumstances, Mr. Chatterjee on behalf of the plaintiff has asked for leave to withdraw the suit under Order XXIII, Rule 1 of the Code of Civil Procedure, and he desires that he should have permission to withdraw from the suit with liberty to institute a fresh suit in respect of the subject-matter of this suit.

4. The defendants give no opposition to this application, though they do not encourage it, and their attitude is, no doubt, referable to the terms of Rule 2 of Order XXIII of the Code. What the effect of that rule may be on the proposed new suit, it will be out of place for me now to discuss. But, in the circumstances, we give the plaintiff permission to withdraw the present suit with liberty to institute a fresh suit in respect of the subject-matter of this suit.

5. We do not interfere with the decision of Mr. Justice Fletcher as to costs, which will stand, and the plaintiff-appellant will pay the costs of this appeal.

Woodroffe, J.

6. Concurred.