PRIVY COUNCIL

Vellayan Chettiar

Vs.

Government of the Province of Madras and another (PC)

P.C.A.No.11 of 1946
(Lord Simonds, Lord Uthwatt and Sir John Beaumont JJ.)

02.07.1947

JUDGMENT

LORD SIMONDS J.

1. This appeal, which is brought from a judgment and decree of the High Court of Judicature at Madras, reversing a decree of the Subordinate Judge of Devakottai, raises a question of some importance upon Section 80, Civil Procedure Code.

2. The suit in which the appeal is brought was instituted by two plaintiffs, Al. Ar. Vellayan Chettiar and Rao Bahadur, D.A.P., R. M. Arunachalam Chettiar against the respondents the Government of the Province of Madras and the Municipal Council of Karaikudi claiming to have set aside the decision of the Appellate Survey Officer in regard to certain land in Karaikudi village by declaring that such land belongs to them with other appropriate relief.

3. Plaintiff 1 died while this appeal was pending and is represented by appellant 3 A1. Ar. Kalairaja.

4. The decision of the Appellate Survey Officer having been given on 19.1.1935, notice was on 30.6.1936, given on behalf of plaintiff 1 only to the Collector of Madura claiming that that decision was erroneous and that the erection of certain structures and certain work done by respondent 2 were unlawful and threatening that unless amends were made within two months a suit would be filed against both respondents.

5. It was not and could not be seriously contended that this notice was given on behalf of anyone except plaintiff 1 though it contained a single reference to proprietors (in the plural) of the village.

6. Section 80, Civil Procedure Code is, so far as is material, as follows : -

> "No suit shall be instituted against the Crown . . . until the expiration of two months next after notice in writing has been delivered to or left at the office of ... (c) in the case of a suit against a Provincial Government, a Secretary to that Government or the Collector of the District, and delivered to him or left at his office, stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims; and the plaint shall contain a statement that such notice has been so delivered or left."

7. Notice having been given on behalf of plaintiff 1 only, on 13.9.1936, both plaintiffs filed a suit in the Court of the District Munsif of Devakottai against both the respondents claiming the relief already stated. In this suit the respondents put in written statements on 3.2.1937, but no exception was taken to the notice. Objection was, however, taken to the jurisdiction of the Munsif in view of the value of the subject-matter of the suit and, after enquiry had been made, this objection prevailed. Accordingly on 30.11.1938, the plaint was returned to the plaintiffs under Order 7, Rule 10, for presentation to the Court of the Subordinate Judge of Devakottai.

8. Nearly ten months later, on 13.9.1939, the plaintiffs presented the plaint in the present suit in the said Court claiming the relief already mentioned. The plaint contained the following averments : -

> "12. - (a) Though plaintiff 1 alone was a party to the survey proceedings inasmuch as plaintiffs 1 and 2 are the landholders and proprietors of the Karaikudi village, this suit is filed by both of them.
> 13 ... notices of suit were given to both the defendants on 30.6.1936, and were served in their offices on 2.7.1936."

Both the respondents filed written statements on 23.3.1940, and each pleaded that "the suit notice alleged is not in accordance with law and the suit is, therefore, not maintainable."

9. On 6.4.1940, a number of issues were settled, only one of which is material to this appeal, viz.: "9. Whether proper notice of suit has been given." On 12.11.1940, two further issues were framed as follows : -

> "9-(a) Whether the defendants have waived their right to a proper notice of suit ?
> 9-(b) Whether defendants are estopped from contending that no proper notice of suit was given to them?"

10. These issues were all decided in favour of the plaintiffs by the learned Subordinate Judge, but upon appeal to the High Court (Sir Lionel Leach C. J. and Shahab-ud-din J.) his decision was on all points reversed. Hence this appeal, which was brought by both plaintiffs, of whom as already stated the first has since died, appellants being substituted in his stead.

11. Their Lordships are of opinion that the judgment of the High Court should be sustained.

12. Upon the first issue the decision of this Board in 54 IA 338,1 appears to be decisive. It was there said that Section 80 is express, explicit and mandatory, and admits of no implications or exceptions. The question there was whether a suit, in which an injunction was claimed, was a "suit" within the section. This Board decided for the reason above briefly stated that it was. 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 AIR 1931 Madras 1752 and on appeal, AIR 1935 Madras 389.3 To hold otherwise would be to admit an implication or exception for which there is no justification.

13. The notice then being defective, the appellants urge that the respondents have "waived their right to a proper notice of the suit" or alternatively are "estopped from contending that no proper notice was given." There appear to be two questions here involved, (1) whether it is competent for the defendant in a suit, to which Section 80 applies, to waive his right to a proper notice and (2) whether, upon the assumption that it is so competent, the respondents in this case waived their right.

14. Upon the first question the respondents have relied upon two cases which came before this Board. In 54 IA 338,1 to which reference has already been made, no question of waiver arose. The observations of Lord Sumner in delivering the opinion of the Board were directed solely to the construction of the section and cannot in their Lordships' opinion be regarded as deciding that it is not competent for the authority, for whose benefit the right to notice is provided, to waive that right. There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the Court and that they may be waived by the

authority for whose benefit they are provided. The second case relied on was 65 IA 182.4 There the sections of the Code under consideration were Sections 86 and 87, which in effect make the consent to the Governor-General in Council a condition of a suit being brought against a Sovereign Prince, and it was held that that condition could not be waived by the Sovereign Prince. But their Lordships would observe that this decision, which related to a consent by a third party, who was not a party to the suit, is not a governing authority where the only person concerned is himself a party to the suit. The condition to which Sections 86 and 87 relate is created not, or not merely, for the benefit of the Sovereign Prince, but to serve an important public purpose. It is for that reason that the consent of the Governor General in Council is required, and for that reason that there can be no waiver of his consent by a Sovereign Prince. On the other hand, there appears to their Lordships to be no reason why the notice required to be given under section 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required: if in the particular case he does not require that protection and says so, he can lawfully waive his right.

15. The second question is whether in the case under appeal the respondents did waive their right, or, alternatively, are estopped from saying that they did not. It is clear at least that they did not do so expressly, and it seems that there is little difference between saying that they impliedly did what they did not do expressly and saying that they cannot be heard to say that they did not do so. The burden lies on the appellants to establish the facts upon which they rely for raising the implication or creating the estoppel, and it is necessary to look at them a little more closely at this stage.

16. In the suit instituted in the Court of the Subordinate Judge, the subject of the present appeal, the respondents in their written statements pleaded want of proper notice. So far as the proceedings in this suit are concerned, the appellants can point to nothing upon which they rely. But they look back to the earlier proceedings and say that in their original plaint in the Court of the District Munsif they averred that they had given proper notice, that the respondents in their Written Statements in that suit did not deny, and must be taken to have admitted, that averment, and that the implication of this implied admission is that they waived their right to a proper notice, or, alternatively, that by the implied-admission the appellants were induced to act upon the assumption that a proper notice had been given, so that the respondents are stopped from denying that fact. It is to be observed that the whole of the conduct upon which the appellants rely took place before ever an effective suit was instituted. It could not be suggested that, until a suit is instituted, the question of proper notice or

the want of it could be raised. It comes therefore to no more than this, that in a suit which was wrongly brought in the Court of the District Munsif the respondents were content to rely on want of jurisdiction for one reason only when two reasons were available. They were successful in the plea which they raised. Upon the suit being instituted in the Court of the Subordinate Judge-and for this purpose it is immaterial whether the suit is to be regarded as a new suit or the old suit re-instituted in another Court-they at once raised the plea upon which they have ever since relied. Their Lordships see no reason why they should not do so. The plaintiffs were in error throughout in instituting a suit which Section 80, prohibited. The respondents were under no duty to them to point out their error. They might have been negligent in their own interest in not raising the plea at an earlier stage. But negligence cannot give rise to an estoppel unless there is a duty of care.

17. Their Lordships are therefore of opinion that the appellants have not established any facts upon which the respondents must be deemed to have waived proper notice or are estopped from asserting want of proper notice. If in the result the appellants find themselves precluded by the Limitation Act from prosecuting any action which might otherwise have been open to them, that is a fortuitous result for which the respondents cannot be held responsible.

18. Upon the whole case their Lordships, though they do not in all respects concur in the reasoning of the High Court, are of opinion that the appeal should be dismissed and they will humbly advise His Majesty accordingly. The appellants must pay the costs of the appeal.

Appeal dismissed.