

## KERALA HIGH COURT

P.P. Abubacker

Vs

Union of India

Second Appeal No. 509 of 1971

(V.R. Krishna Iyer, J.)

18.08.1971

### JUDGMENT

**V.R. Krishna Iyer, J.**

1. Had there been an Indian Ombudsman, the technical defence raised by the Railway in this suit might well have come under his censorious attention. The plea put forward by the defendant, the Union of India represented by the General Manager, Southern Railway, Madras, in answer to a suit for damages on account of the damaged condition of certain page of lime carried by the Railway, was, inter alia, that the suit was bad for want' of valid notice under Section 80, Civil Procedure Code. If I may anticipate my conclusion at this stage, the contention is not merely untenable but unjust and is calculated only to protract the litigation and to postpone the facing of a trial on the merits and, perhaps, to tire out the private party, the plaintiff, whose resources are certainly very limited. In the present case, a notice had been sent purporting to be under Section 80, Civil Procedure Code, before the action was instituted. The advocate, who issued the notice for the plaintiff, described his client as "Kozhikode Lime Centre, Lime Fruits, Vegetable Merchants and Commission Agents, M.V. Market, Calicut-2." The same advocate later described the plaintiff in the plaint as "Kozhikode Lime Centre by proprietor, P.P. Abubacker". In the plaint it was stated that the Chief Commercial Superintendent, Trichinopoly, had been earlier intimated about the damage to the bags of lime, but no action was taken by him to award compensation. It is also seen that the Chief Commercial Superintendent had directed the plaintiff to produce the "pattiyas" in inspect of the consignments concerned and that the goods had been sold in public auction presumably after notice to the plaintiff. There is also a definite averment in paragraph 8 of the plaint that "the plaintiff had sent a notice to the defendant" claiming damages for the loss sustained by him under Section 80, Civil Procedure Code. The defendant apart from a general denial of everything in the plaint which had not been expressly admitted, adverted to the notice under Section 80 in paragraph 9 of the written statement and averred that "the plaintiff is put to strict proof of service of valid and legal notices under Section 78-B, Indian Railways Act, and Section 80, Civil Procedure Code". It is fairly obvious that the defendant had merely required formal proof of service of the notices and did not challenge the validity thereof or indicate that there was any difference in the identity of the person who sent the notice and the one who brought the suit. Moreover, the earlier exchanges between the plaintiff and the Chief Commercial

Superintendent also clearly lead to the conclusion that the Railway was dealing with a specific entity and had no doubts about the identity of the entity whose goods were alleged to have been damaged and which goods they had auctioned. Aside from this aspect, there is, in law, no plea of denial of the notice under Section 80 or its validity and, therefore, no question relating to the sustainability of the action on account of non-compliance with Section 80 really arises. In a decision in *Abubacker v. Abdul rahiman Beary*<sup>1</sup>, a Division Bench of this Court explained a plea couched in similar words as not amounting to one of denial. There also the defendants had put the plaintiff's to 'strict proof of the right which they claimed and their Lordships observed:

"These statements cannot be taken as a specific denial of the material allegation in the plaint Order 8 of the Code of Civil Procedure requires denial of allegations in the plaint to be specific Where a defendant simply "puts the plaintiff to proof of the several allegations in the plaint, he will be deemed to have admitted the facts alleged in the plaint" (See Mulla's Civil Procedure Code, 12th Edition, page 624). In the absence of a specific denial the appellants cannot be permitted to raise this contention."

It is thus plain that no contention turning on the validity of the notice under Section 80, Civil Procedure Code is available, to be canvassed, going by the rules of pleading. Counsel for the respondent, however, stated that an issue had been framed and that, therefore, the plea was permissible. I do not think that in the absence of pleadings a contention can be considered merely because the court has erroneously framed an issue on a point that had not been covered by the pleadings themselves.

2. Since the point at issue has been argued at some length, I may as well deal with it in the light of the precedents cited before me. When is a discrepancy between the name of the sender of Section 80 notice and the plaintiff deadly in its effect?

3. The notice was sent by the Kozhikode Lime Centre. The suit was filed by the Kozhikode Lime Centre, by proprietor P.P. Abubacker. The defendant had no doubts, going by the written statement about the identity of the party and only demanded proof of service of the notice although it is curious that the recipient of the notice, namely, the Railway, should have asked for proof of service of the notice. But that is the way defences are taken. The contention that there is a difference in the identity between the entity which caused the notice to be sent and the person who instituted the suit is largely built upon a ruling in *S.N. Dutt v. Union of India*<sup>2</sup>, reinforced by a recent ruling of this court in *Nazeema Textiles v. Union of India*<sup>3</sup>, True it is that a superficial study of the two decisions might suggest a fatal defect in the present suit also, but on a closer scrutiny, and informed by the numerous other pronouncements of the Supreme Court, the mists of confusion will melt away and commonsense will come back into its own as the Privy Council and the Supreme Court in a few of their pronouncements on this topic had insisted. The hope of the defendant is inflated by the observations in AIR 1961 SC 1449 because there the notice was sent by 'M/s.

<sup>1</sup>1960 Ker LT 348

<sup>3</sup>1970 Ker LT 290 " AIR 1971 Kerala 192

<sup>2</sup> AIR 1961 SC 1449

S.N. Dutt and Co." and the plaintiff was described in the plaint as "Surrendra Nath Dutta sole proprietor of a business carried on under the name and style of S.N. Dutt and Co." The Court held that while the suit was filed by S.N. Dutt claiming to be the sole proprietor of M/s. S.N. Dutt

and Co., the notices ran in the name of M/s S.N. Dutt and Co., Wanchoo, J., on the facts present in that case, observed:

"The question therefore that immediately arises is whether S.N. Dutt who filed the suit was the person who gave the notices and the answer is obvious that it is not so. It may be that S.N. Dutt is the sole proprietor of M/s. S.N. Dutt and Co. and is carrying on business in that name and style: but that does not mean that these notices were by S.N. Dutt. Any one reading these notices would not necessarily come to the conclusion that M/s. S.N. Dutt and Co. was merely the name and style in which an individual was carrying on business. The prima facie impression from reading the notices would be that M/s. S.N. Dutt and Co. was some kind of partnership firm and notices were being given in the name of that partnership firm. It cannot therefore be said on a comparison of the notices in this case with the plaint that there is identity of the person who issued the notices with the person who brought the suit."

Even assuming that in the present case the notice was sent by Kozhikode Lime Centre, there is nothing to indicate that that name, which is obviously an assumed name or style, is necessarily indicative of a firm. While M/s. S.N. Dutt and Co. savour of a partnership, Kozhikode Lime Centre does not convey that prima facie impression and is perfectly consistent with an assumed name in which an individual was doing business. The fact that in S.N. Dutt's case AIR 1961 SC 1449 a notice had been sent through lawyer and not by the party directly, also is of no moment whatever and the ratio of the ruling is clearly inapplicable to the situation in the present case. In 1970 Ker LT 290 : AIR 1971 Kerala 192 a learned Judge of this Court followed AIR 1961 SC 1449 and took the view that in the case before his Lordship.

"it would appear that the notice was issued on behalf of a firm; but from the suit it would appear that it was instituted by one T.P. Ebrahimkutty as proprietor of the concern." While his Lordship accepted the position that notices under Section 80 should not be scrutinised in a pedantic manner or in a manner completely divorced from commonsense, he reached the conclusion that the identity of the person who issued the notice with the person who brought the suit had not been made out in that case. I must also mention that the learned Judge's attention had, perhaps, not been invited to the decision in *Beohar Rajendra Sinha v. State of Madhya Pradesh*<sup>4</sup>, and another case in the same volume. *State of Uttar Pradesh v. Sheo Prasad*<sup>5</sup>, Nor did his Lordship have the benefit of a study of the telling observations of their Lordships of the Supreme Court in the decision in *Raghunath Das v. Union of India*<sup>6</sup>, I shall briefly consider these rulings so as to decoct the correct law that applies to such situations as arise in the present case. All the rulings on the subject swear by one principle, which in essence applies to all branches of the law, namely, "One must construe Section 80 with some regard to commonsense and to the

<sup>4</sup>(1969) 1 SCWR 803 : AIR 1969 SC 1256

<sup>6</sup>AIR 1969 SC 674

<sup>5</sup>(1969) 1 SCWR 1253 : AIR 1969 NSC 7

object with which it appears to have been passed." The Privy Council had long ago stated that the terms of the Section should not be scrutinised in a pedantic manner or in a manner

completely divorced from commonsense. I may mildly add that in a Welfare State such provisions must be construed in a kindly spirit. The Supreme Court in (1969) 1 SCWR 803 : AIR 1969 SC 1256 had to deal with facts closely akin to ours. The Section 80 notice was sent by Beohar Raghubir Singh, but by the time the suit was instituted a partition in his family had taken place and the divided members of the family instituted the suit. As a fact, Beohar Raghubir Singh did not expressly describe himself as the Kartha in the notice and the plea was raised that there was no identity between the person who sent the notice and those who sued the defendant. Their Lordships, however, overruled the plea and explained the scope and object of Section 80, Civil Procedure Code, illuminatingly, if I may say so with respect: "The object of the notice under Section 80, Civil Procedure Code, is to give to the Government or the public servant concerned an opportunity to reconsider, its or Ms legal position and if that course is justified to make amends or settle the claim out of court. The Section is no doubt imperative: failure to serve notice complying with the requirements of the statute will entail dismissal of the suit But the notice must be reasonably construed, Any un-important error or defect cannot be permitted to be treated as an excuse for defeating a just claim. In considering whether the provisions of the statute are complied with, the Court must take into account the following matters in each case (1) whether the name, description and residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice (2) whether the cause of action and the relief which the plaintiff claims are set out with sufficient particularity, (3) whether the notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section; and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left. In construing the notice the Court cannot ignore the object of the legislature, viz., to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position. If on a reasonable reading of the notice the plaintiff is shown to have given the information which the statute requires him to give, any incidental defects or irregularities should be ignored."

In the later decision in (1969) 1 SCWR 1253 : AIR 1969 NSC 7 the appellants were served with notices under Section 80 by an advocate on behalf, of Sheo Prasad Gian Chand. In the body of the notices it was stated "The name of the claimants is firm Sheo Prasad Gian Chand a joint Hindu family concern which carries on business .....". The view taken by the court was that the notice substantially complied with the requirements of Section 80, Civil Procedure Code , because it gave sufficient information that a suit would be filed on behalf of the joint Hindu family concern. Their Lordships distinguished S.N. Dutt's case AIR 1961 SC 1449 on the ground that the notice there gave the impression that it was on behalf of a firm. The subject has been thoroughly dealt with in a still later decision in AIR 1969 SC 674 where the facts relating to the identity of the party show that the notice purported to emanate from M/s. Raghunath Dass Mulkraj and in the body of the notice in several places the expression 'we' was used. The plaintiff had purported to sign a notice for M/s. Raghunath Dass Mulkraj but had also disclosed therein that he was signing as the proprietor of the concern. Their Lordships, on these facts, observed".

"Whatever doubts that might have been possibly created in the mind of the recipient of that notice, after going through the body of the notice as to the identity of the would-be plaintiff, the same would have been resolved after going through the notice as a whole. In the plaint, the plaintiff definitely stated that he was carrying on his business under the name and style of "Raghunath Das Mulkhraj" meaning thereby that the concern known as "Raghunath Das Mulkhraj" is a proprietary concern and the name given to it is only a trade name. He had also stated in the plaint that he had given a notice under Section 80 of the Civil Procedure Code. In the written statement filed on behalf of the Dominion of India, the validity of the notice issued was not challenged."

Their Lordships further explained Section 80 thus;

"The object of the notice contemplated by that section is to give to the concerned Government and public officers opportunity to reconsider the legal position and to make amends or settle the claim, if so advised without litigation. The legislative intention behind that section in our opinion is that public money and time should not be wasted on unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigations. The purpose of law is advancement of justice. The provisions in Section 80, Civil Procedure Code are not intended to be used as boobytraps against ignorant and illiterate persons. In this case we are concerned with a narrow question. Has the person mentioned in the notice as plaintiff brought the present suit or is he someone else? This question has to be decided by reading the notice as a whole in a reasonable manner."

A study of these decisions leaves no doubt in my mind that the court should not be oblivious to the benignant object of Section 80, Civil Procedure Code which is to give government and public officers an opportunity to reconsider the legal position and to make amends or settle the claim, if so advised, without litigation. The idea is not to arm Government and public servants with secret weapons but to behave in a straightforward way and settle up disputes where litigation could be avoided.

4. .A court when studying a notice In relation to the plaint should not go into meticulous and finicky details to discover some discrepancy to defeat the suit, but should take a broad and liberal view and find out whether as a fact the State has been, or is reasonably likely to have been, misled about the identity of the entity who wanted to make a claim in the suit. The State should not be surprised into a suit as it will involve public officers in waste of time and government in avoidable expense, and that is the reason for the provision of an antecedent notice under Section 80. The court may decline the defendant's invitation to exaggerate every deviation between the notice and the plaint, sacrificing substance or striving to ferret out differences about identity. Viewing the facts of the present case in the light of the pronouncements of the Supreme Court and the broad and beneficial object of Section 80, Civil Procedure Code, I am satisfied that no confusion of identity has been caused in the defendant and the present plea has served only to

lengthen the litigation. It has landed the State in avoidable (wastage of) time and money - precisely the opposite of what Section 80 was meant for. I hold the view that a technical abjection which diverts the normal course of a trial is like a forensic hijack which should be frowned upon when raised without substantial grounds on the merits, more so when the State puts forward such a plea.

5. The State, under our Constitution, undertakes economic activities in a vast and widening public sector and inevitably gets involved in disputes with private individuals. But it must be remembered that the State is no ordinary party trying to win a case against one of its own citizens by hook or by crook; for, the State's interest is to meet honest claims, vindicate a substantial defence and never to score a technical point or overreach a weaker party to avoid a just liability or secure an unfair advantage, simply because legal devices provide such an opportunity. The State is a virtuous litigant and looks with unconcern on immoral forensic successes so that if on the merits the case is weak, government shows a willingness to settle the dispute regardless of prestige and other lesser motivations which move private parties to fight in court. The lay-out on litigation costs and executive time by the State and its agencies is so staggering these days because of the large amount of litigation in which it is involved that a positive and wholesome policy of cutting back on the volume of law suits by the twin methods of not being tempted into forensic show-downs where a reasonable adjustment is feasible and ever offering to extinguish a pending proceeding on just terms, giving the legal mentors of government some initiative and authority in this behalf. I am not indulging in any judicial homily but only echoing the dynamic national policy on State litigation evolved at a Conference of Law Ministers of India way back in 1957. This second appeal strikes me as an instance of disregard of that policy.

6. I allow the second appeal and direct the trial court to proceed with the suit on the real controversy in the case. The court-fee paid in this appeal will be refunded in view of the resultant remand. I hope the Railway, through its legal advisers, will have a second look at the merits of the matter and, if justified, put an end to this already old litigation by a fair settlement. In that hope I direct the parties to bear their costs.

7. A copy of this judgment will be sent to the Central Government and to the General Manager, Southern Railway (through the advocate for the party).

Appeal allowed.