

1961

March 27.

S. N. DUTT

v.

UNION OF INDIA

(P. B. GAJENDRAGADKAR and K. N. WANCHOO, JJ.)

Suit against Government—Notice—Defect as to name of plaintiff—Effect of—Code of Civil Procedure, 1908 (Act 5 of 1908), s. 80.

The appellant was the sole proprietor of a business styled S. N. Dutt & Co. He gave a notice under s. 80 of the Code of Civil Procedure to the respondent in the name of "S. N. Dutt & Co.". After the requisite period he filed a suit against the respondent describing the plaintiff as: "Surendra Nath Dutt sole proprietor of a business carried on under the name and style of S. N. Dutt & Co." The suit was dismissed on the ground that the notice was defective as it was issued by S. N. Dutt & Co. and not the plaintiff. The appellant contended that the notice was valid as S. N. Dutt & Co. was merely the name and style in which S. N. Dutt carried on business and that no suit could have been filed in the name of S. N. Dutt & Co. as it was not a firm.

Held, that the notice was defective and that the suit had been rightly dismissed. The person who issued the notice was not the same as the person who filed the suit. Since S. N. Dutt & Co. could not file the suit in that name it could not give a valid and legal notice in that name. A valid notice could have been given only in the name of S. N. Dutt. A defect in the notice as to the name of the plaintiff has to be viewed strictly.

Bhagchand Dagadusa v. Secretary of State for India in Council, (1927) L.R. 54 I.A. 338, *Al. Ar. Vellayan Chettiar v. Government of the Province of Madras*, (1947) L.R. 74 I.A. 223 and *Government of the Province of Bombay v. Pestonji Ardeshir Wadia*, (1949) L.R. 76 I.A. 85, referred to.

Dhian Singh Sobha Singh v. The Union of India, [1958] S.C.R. 781 and *The State of Madras v. C. P. Agencies*, A.I.R. [1960] S.C. 1309, distinguished.

Kamta Prasad v. Union of India, (1957) 55 A.L.J. 299 and *Secretary of State v. Sagarmal Marwari*, A.I.R. 1941 Pat. 517, disapproved.

CIVIL APPELLATE JURISDICTION: Civil Appeal No. 191 of 1958.

Appeal by special leave from the judgment and decree dated February 13, 1956, of the High Court of Judicature at Calcutta in First Appeal No. 191 of 1949.

B. Sen and Sadhu Singh, for the appellant.

Vidyadhar Mahajan and T. M. Sen, for the respondent.

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1961. March 27. The Judgment of the Court was delivered by

Wanchoo J.

WANCHOO, J.—This is an appeal by special leave against the judgment of the Calcutta High Court. The brief facts necessary for present purposes are these: The appellant, S. N. Dutt, is the sole proprietor of the business known as “S. N. Dutt & Co.” and carried on this business under that name and style at Krishnagore in the district of Nadia in 1944. On May 17, 1944, S. N. Dutt & Co. obtained an order from the military authorities for the supply of 10,000 baskets of mangoes to be delivered at Sealdah Railway Station, every day from May 24, 1944, for ten days at the rate of 1,000 baskets per day. The military authorities made arrangements with the Bengal and Assam Railway for the supply of 30 covered wagons at Jiaganj Railway Station at the rate of three wagons per day commencing from May 22, 1944 for this purpose, and this was communicated to the appellant on May 19, 1944. On May 18, 1944, the Divisional Superintendent, Sealdah informed the Station Master at Jiaganj that contractor S. N. Dutt would book and load 30 wagons of mangoes at Jiaganj at the rate of three wagons per day from May 22, 1944 and directed him to accept the booking and allot wagons for the said purpose. The appellant thereupon placed indents with the Station Master Jiaganj for the supply of the said wagons and began to bring to the Jiaganj Railway Station baskets of mangoes from May 21, 1944. It appears however that wagons were not supplied regularly, with the result that whatever consignments reached Sealdah were spoilt and were rejected by the military authorities. On May 30, 1944, the military authorities informed the contractor that the contract had been cancelled on account of the unsatisfactory nature of the supplies. The result of this was that 5004 further baskets of mangoes could not be despatched, though they had been stacked at the railway station at Jiaganj. In consequence the mangoes were spoilt

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and had to be thrown away. The appellant claimed that he had sustained a heavy loss due to the misconduct, gross negligence and carelessness on the part of the Bengal and Assam Railway administration. Consequently he submitted a claim for damages for over Rs. 84,000 to the Chief Commercial Manager and the General Manager of the Railway. Subsequently on November 4, 1944, he gave two notices under s. 80 of the Code of Civil Procedure to the Secretary to the Governor-General of India in Council representing the Bengal and Assam Railway and followed it up by instituting the suit on July 21, 1945 claiming over Rs. 84,000 as damages.

The suit was resisted by the Governor-General in Council, now represented by the Union of India. Among other defences with which we are not concerned in the present appeal, it was contended on behalf of the Union of India (respondent) that the appellant was not entitled to maintain the suit as the two notices under s. 80 of the Code of Civil Procedure were not valid and sufficient, but were defective.

When the matter came to trial before the Subordinate Judge, he held in favour of the appellant on the question whether there was negligence or misconduct on the part of the Railway administration; but he dismissed the suit on the ground that the two notices under s. 80 were defective inasmuch they had been issued by S. N. Dutt and Co. and not on behalf of the appellant. There was then an appeal by S. N. Dutt before the High Court. The High Court agreed with the Subordinate Judge that the notices under s. 80 were defective and the suit was rightly dismissed. Further on the merits, the High Court did not agree with the Subordinate Judge that any misconduct or negligence had been proved which would entitle the appellant to any damages except in the matter of one small consignment. The appeal therefore failed. Thereupon the appellant applied for a certificate to appeal to this Court which was refused. He then came to this Court by petition for special leave which was granted; and that is how the matter has come up before us.

The main point therefore that arises in this appeal is whether the notices in question were in conformity with s. 80 of the Code of Civil Procedure; if they were not, the suit would fail on the ground of non-compliance with that provision. Section 80 *inter alia* lays down that "no suit shall be instituted against the Central Government, until the expiration of two months next after notice in writing has been delivered to, or left at the office of the Secretary to that Government, 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". The defect in the present case is in regard to the name, it being not disputed that there is no other defect in the notice; and the question that arises is whether the defect in name makes the notices ineffective and therefore the suit becomes not maintainable in view of the bar of s. 80.

As far back as 1927, the Privy Council in *Bhagchand Dagadusa v. Secretary of State for India in Council* (1) had to consider the true application of s. 80 and held that s. 80 was explicit and mandatory and admitted of no implications or exceptions and had to be strictly complied with and was applicable to all forms of action and all kinds of relief. In particular, with reference to the name, the Privy Council had to consider the matter in *Al. Ar. Vellayan Chettiar v. Government of the Province of Madras* (2). In that case the suit was brought by two plaintiffs but the notice was given by only one of them. The Privy Council held that this could not be done and observed that "section 80, according to its plain meaning, requires that there should be identity of the person who issues the notice with the person who brings the suit".

Finally, in *Government of the Province of Bombay v. Pestonji Ardeshir Wadia* (3) the Privy Council had again to consider the scope of s. 80. In that case the notice had been given by two trustees. Before however the suit could be brought, one of the trustees

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(1) (1927) L.R. 54 I.A. 338.

(2) (1947) L.R. 74 I.A. 223.

(3) (1949) L.R. 76 I.A. 85.

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died and was replaced by two other trustees. The suit was brought by the three trustees, only one of whom had given the notice while two had not. The Privy Council again reiterated that the provisions of s. 80 were imperative and must be strictly complied with. It went on to say that "there is no provision in the Code enabling the trustees to sue in the name of the trust, as members of a firm may sue in the name of the firm. In the case of a trust, the plaintiffs are bound to be the trustees and not the trust and where no notice has been served under s. 80, specifying the names and addresses of all the trustees, the provisions of the section have not been complied with and the suit is incompetent."

Learned counsel for the appellant, however, relies on *Dhian Singh Sobha Singh and another v. The Union of India* (1), where the following observations occur:—

"The Privy Council no doubt laid down in *Bhag-Chand Dogadusa v. Secretary of State* (L.R. 54 I.A. 338) that the terms of this section should be strictly complied with. That does not however mean that the terms of the notice should be scrutinized in a pedantic manner or in a manner completely divorced from common sense. As was stated by Pollock C. B. in *Jones v. Nicholls* (154 E. R. 149, 150), 'We must import a little common sense into notices of this kind'. Beaumont C. J., also observed in *Chandulal Vedilal v. Government of Bombay* (I.L.R. 1943 Bom. 128): One must construe section 80 with some regard to common sense and to the object with which it appears to have been passed."

The next case to which reference was made is *The State of Madras v. C. P. Agencies* (2). The question in that case was whether the cause of action had been stated as required by s. 80, and this Court held that the cause of action had been stated in the notice. This Court also observed that it was not necessary in that case to consider the two decisions of the Privy Council (to which reference has already been made by us) requiring the identity of the person who issues a notice with the person who brings the suit.

(1) [1958] S.C.R. 781, 795.

(2) A.I.R. (1960) S.C. 1309.

It is urged that these observations show that the strictness which the Privy Council emphasised in these cases has not been accepted by this Court. It must however be remembered that the defect with which this Court was dealing in these cases was in the matter of cause of action and relief, and this Court pointed out that it was necessary to use a little common sense in such circumstances. Where the matter (for example) concerns the relief or the cause of action, it may be necessary to use common sense to find out whether s. 80 has been complied with. But where it is a question of the name of the plaintiff, there is in our opinion little scope for the use of common sense, for either the name of the person suing is there in the notice or it is not. No amount of common sense will put the name of the plaintiff there, if it is not there.

Let us therefore examine the notices and the plaint in this case to see whether the suit is by the same person who gave the notices, for it cannot be gainsaid that the identity of the person who issues the notice with the person who brings the suit must be there, before it can be said that s. 80 has been complied with. Now the relevant part of the two notices was in these terms:—

“Under instructions from my client Messrs. S. N. Dutt and Co. of Krishnagar, I beg to give you notice that my said client will bring a suit for damages in the court of the Subordinate Judge of Nadia at Krishnagar against the B & A Railway Administration”.

In the plaint, the description of the plaintiff was in these terms:—

“Surrendra Nath Dutta sole proprietor of a business carried on under the name and style of S. N. Dutt & Co. of Krishnagar, P. S. Krishnagar, District Nadia”.

It will be immediately obvious that the notices were in the name of Messrs. S. N. Dutt and Co., while the suit was filed by S. N. Dutt claiming to be the sole proprietor of Messrs. S. N. Dutt and Co. It is urged on behalf of the appellant that the reason why the

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suit was filed in the name of S. N. Dutt as sole proprietor of Messrs. S. N. Dutt and Co. was that no suit could have been filed in the name of Messrs. S. N. Dutt and Co., as that was not a firm; that was merely the name and style in which an individual, namely S. N. Dutt, was carrying on the business. 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 Messrs. 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 Messrs. 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 Messrs. 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. Besides if Messrs. S. N. Dutt and Co., not being a partnership firm, could not file a suit in that name and style on behalf of its members, we cannot see how Messrs. S. N. Dutt and Co. could give a valid and legal notice in that name and style on behalf of an individual, S. N. Dutt. As was pointed out by the Privy Council in *Pestonji Ardeshir Wadia's case* (1), the case of members of a firm stood on a different footing, for the members of a firm might sue in the name of the firm; but in the present case Messrs. S. N. Dutt and Co. is not a firm; it is merely the name and style in which an individual (namely, S. N. Dutt) is carrying on business and though the individual may in certain circumstances be sued in that name and style, he would have no right to sue in that name. Therefore, where an individual carries on business in some name and style the notice has to be given by the individual in his own name, for the suit can only be filed in the name

(1) (1949) L.R. 76 I.A. 85.

of the individual. The present suit is analogous to the case of trustees where the suit cannot be filed in the name of the trust; it can only be filed in the name of the trustees and the notice therefore has also to be given in the name of all the trustees who have to file a suit. Therefore comparing the notices given in this suit with the plaint, and remembering that Messrs. S. N. Dutt and Co. is not a partnership firm but merely a name and style in which an individual trades, the conclusion is inescapable that the person giving the notices is not the same as the person suing.

It was urged on behalf of the appellant that the Railway Administration knew the position that Messrs. S. N. Dutt and Co. was merely the name and style in which an individual (namely, S. N. Dutt) was trading. But even this in our opinion is not correct as a fact, for, as pointed out by the High Court, there are documents on the record which show that S. N. Dutt gave himself out as a partner of Messrs. S. N. Dutt and Co., thus suggesting that S. N. Dutt and Co. was a firm. That was the reason why a plea was raised on behalf of the Union of India that the suit was barred under s. 69 of the Partnership Act as the firm was not a registered firm.

In this connection learned counsel for the appellant referred us to certain cases in which in similar circumstances the notice was considered to be valid under s. 80. These cases are: *Kamta Prasad v. Union of India* (1) and *Secretary of State v. Sagarmal Marwari* (2). In view of what we have said above, we cannot agree with the view taken in these cases and must hold that they were wrongly decided.

In this view of the matter, there is no force in this appeal and it is hereby dismissed with costs.

Appeal dismissed.

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(1) (1957) 55 A.L.J. 299.

(2) A.I.R. 1941 Pat. 517.