

Calcutta High Court

Jaharlal Pagalia vs Union Of India (Uoi) on 20 May, 1958

Equivalent citations: AIR 1959 Cal 273

Author: A Ray

Bench: A Ray

ORDER A.N. Ray, J.

1. This is an application for amendment of the plaint. The amendment sought for is proposed paragraph 12(A) namely, that due notice under Section 80 was duly served on the defendant over two months prior to the institution of the suit. The suit was instituted on 26-4-1958. The summons is dated 3-5-1958. Two points were urged against the proposed amendment. First, that the application is a belated one, second, that the application introduces a new cause of action.

2. I shall first deal with the question whether the amendment sought for is one which introduces a new cause of action. In other words, the question is whether notice under Section 80 of the Code of Civil Procedure is a part of the plaintiff's cause of action. If it is a part of the plaintiff's cause of action the defendant contends that the application should be refused because first, the cause of action is barred by limitation and secondly, leave under Clause 12 of the Letters Patent is, necessary therefor and the same cannot be granted at this stage to enable the plaintiff to add a fresh cause of action.

3. The phrase cause of action has not been defined in any statute but the meaning of it has been judicially considered. In *Mt. Chand Koer v. Partab Singh*, 15 Ind App 156 (PC), Lord Watson observed:

"The cause of action has no relation whatever to the defence which may be set up, nor does it depend upon the character of the relief prayed for by the plaintiff. It refers entirely to the grounds set out in the plaint as the cause of action or in other words to the media upon which the plaintiff asks to arrive at a conclusion in his favour."

4. In *Muhammad Hafiz v. Muhammad Zakariya*, 49 Ind App 9 at p. 15: (AIR 1922 PC 23 at p. 26), Lord Buckmaster observed that "the cause of action is the cause of action which gives occasion for and forms the foundation of the suit." Their Lordships of the Judicial Committee in that case considered Order 2 Rule 2 of the Code of Civil Procedure which says that "every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action." Their Lordships also referred to an earlier decision of the Board in *Raja of Pittapur v. Venkata Mahipati Surya*, 12 Ind App 116 (PC) where it was held that the cause of action means the cause of action for which the suit is brought.

5. Cause of action has been held in *Cooke v. Gill* (1873) 8 C. P. 107 to mean every fact which is material to be proved. Lord Esher, M. R. in *Read v. Brown* 1888-22 QBD 128 stated the meaning of cause of action as every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the Court. Cause of action was held not to comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved. In *Engineering Supplies Ltd. v. Dhandhaniah and Co.*, Rankin, C. J. observed that cause of

action means the entire set of facts that gives rise to an enforceable claim or in the words of Fry L. J.

"everything which if not proved gives tile defendant an immediate right to judgment, every fact which is material to be proved to entitle the plaintiff to succeed, every fact which the defendant could have a right to traverse."

6. Thus cause of action has one meaning in relation to the basis of a claim and another in relation to the jurisdiction of Court. The former is the restricted and the latter is the wider meaning of cause of action. In the restricted sense it includes facts constituting the infringement of the right and is thus the cause which is the foundation of the suit. In the wider sense it includes facts constituting the right itself. The expression cause of action for the purpose of jurisdiction of the Court was held by Das J. (now Chief Justice of India) in *Madanlal Jalan v. Madan Lal*, 49 Cal WN 357: (AIR 1949 Cal 495) to be. an expression of wider import. To illustrate, the plaintiff could attract jurisdiction of the Court by pleading assignment of a promissory note within the jurisdiction of the court as a part of the cause of action. . In the restricted sense the non-payment of the promissory note is the cause of action. In the wider sense cause of action will include the plaintiff's title and right acquired by the assignment of the promissory note, at a place within the jurisdiction of the Court. It is necessary for the plaintiff to prove assignment and therefore it is a part of the cause of action.

7. The question is whether notice under Section 80 of the Code of Civil Procedure is a part of the plaintiffs cause of action. In the case of *Dominion of India v. fagadishprosad Pannalal a firm*, 84 Cal LJ 175: (AIR 1949 Cal 622), a question arose whether notices under Section 77 of the Railways Act and Section 80 of the Code were a part of the cause of action under Section 18 of the Small Cause Courts Act. At page 179 (of Cal LJ): (at p. 624 of AIR) Harries, C. J. held that part of the cause of action against the Governor-General is the service of the notice under Section 77 of the Railways Act and Section 80 of the Code. As I read the decision it is an authority for the proposition it decides, namely, that the service of notice can be a part of the plaintiffs cause of action for jurisdiction of Court.

8. In the case of *Dunlop Rubber Co. India Ltd. v. Governor General-in-Council*. ILR 1950-2 Cal 551 at pp. 557-558, Sinha J. held that notice under Section 80 of the Code is a part of cause of action in the suit. The reasoning given by Sinha, J. was that according to the meaning of the phrase of cause of action given by Rankin C. J. in the plaintiff was obliged to prove as a fact that notice was given in compliance with the provision of Section 80 of the Code and therefore the notice was a part of cause of action.

9. In the case of *Raj Kumnr Shaw v. Dominion of India*, , Bachawat, J. relying on the cases of 84 Cal LJ 175: (AIR 1949 Cal 622) and ILR (1950) 2 Cal 551 held that notice under Section 80 of the Code is a part of cause of action for the purpose of jurisdiction. Bachawat J. referred to the cases of *Nilima Sarkar v. Governor General-in-Council*, 86 Cal L. J. 98 and *Bansi v. Governor General-in-Council*, (FB) & held that those cases were distinguishable. The case of *Nilima Sarkar*. 86 Cal LJ 98 was distinguished on the ground that that was a decision on the meaning of cause of action as used in Article 10 of the Indian Independence (Rights, Properties and Liabilities) Order, 1947 and as such the Court held that caues of action there did not include a notice under Section 80 of the Code.

Bachawat J. also pointed out that in the case of Nilima Sarkar, 86 Cal LJ 98, the Court expressly stated that it was unnecessary to decide whether for the purpose of jurisdiction notice under Section 80 of the Code might be regarded as part of the cause of action. The case of (FB) was distinguished on the ground that that was a decision relating to the question whether notice under Section 77 of the Indian Railways Act could be treated to be any part of the cause of action for the purpose of jurisdiction and Bachawat J. observed that since notice under Section 77 was not a condition precedent to the institution of the suit it could not form a part of the cause of action. Notice under Section 80 of the Code being a condition precedent to the institution of the suit was held by Bachawat J. to be part of the cause of action.

10. In the case of Nalini Ranjan Guha v. Union of India, 93 Cal LJ 373, Bachawat J. held that the issue and posting of the notice under Section 80 of the Code are pieces of evidence necessary for proving the service of the notice but are not part of the cause of action. Bachawat J. however held that the service of the notice is a part of the cause of action.

11. Bose J. in the case reported in Hindusthan Housing and Land Development Trust Ltd. v. State of West Bengal, 59 Cal WN 405 held that service of notice under Section 80 of the Code is a part of the cause of action.

12. In the Bench decision of 86 Cal LJ 98, Harries C. J. expressed the view that the observation in the case of Jagadkhpasad Pannalal, 84 Cal LJ 175: (AIR 1949 Cal 622) that service of notice was a part of the cause of action was one made without argument and therefore did not carry weight. It is true that Harries, C. J. considered the meaning of cause of action under Article 10 of the Indian Independence (Rights, Properties and Liabilities) Order but at p. 104 of the report observed as follows :

"Section 80 of the Code expressly provides that the cause of action must be stated in the notice. If the delivery of the notice was part of the cause of action then how could the whole cause of action be stated in the notice because it would have to be stated before the notice was sent."

This observation of Harries C. J. with regard to Section 80 in my view is a clear authority for the proposition that the cause of action is complete before the notice under Section 80 can go. As I read the decision whether the cause of action is one for the purpose of jurisdiction of the Court or the cause of action is one in relation to the basis of a claim in suit or the causa of action is one with regard to Article 10 of the Indian Independence Order a notice under Section 80 has to be delivered stating the cause of action. Therefore, the cause of action in suits which require notice under Section 80 cannot be extended to include any fact after the cause of action has been stated in the notice to be delivered. If anything has not been stated in the notice it will not form part of the cause of action.

13. In the case of Bansi v. Governor General-in-Council which is a Full Bench decision the Court considered the question whether service of notice under Section 77 of the Indian Railways Act was a part of the cause of action. Their Lordships held that service of notice under Section 77 was not a part of the cause of action inasmuch as service of such a notice was not a condition precedent to the right to institute a suit. G.N. Das J. looked at the question from the point of view of the plea of

absence as well as waiver of notice under Section 80 to decide whether the notice under Section 77 of the Railway Act could be a part of cause of action. Their Lordships further held that a notice under Section 77 of the Railways Act was not a part of the cause of action because it might be waived by the defendant in the suit, and not prior to the institution of the suit. Furthermore, the absence of a notice was a plea to be raised in the written statement and therefore the notice could not be regarded as part of the cause of action. Similar observations apply proprio vigore to a notice under Section 80 of the Code of Civil Procedure. A notice under Section 80 can be waived in the suit and the absence of a notice under Section 80 can be a plea taken in the written statement. Therefore, the notice under Section 80 cannot be a part of the cause of action. In the case of (FB), Harries, C. J. expressly observed that the Bench decision in Jagadish Prosad Pannalal, 84 Cal LJ 175 : (AIR 1949 Cal 622) was erroneous. It is true that the decision in Banshi's case was one which related to Section 77 of the Railways Act but the observations of Harries, C. J. to my mind, make it clear that his Lordship held that the earlier decision was wrong in this respect that neither the notice nor the service thereof was a part of the cause of action.

14. Mukharji, J. in the decision of Anath Bandhu Deb v. Dominion of India, , has held that Section 80 requires to state the cause of action and the plaint is to contain a statement that notice has been delivered or left. The service of notice may form a part of the cause of action for the purpose of jurisdiction. Mukharji, J. also expressed the view that since the cause of action was required to be stated in the notice under Section 80 the cause of action must have been complete prior to the issue or delivery of the notice.

15. In an earlier decision of this Court reported in Bholaram Chowdhury v. Administrator General, 8 Cal WN 913, Woodroffe J. held that the portion in Section 80 of the Code that the plaint shall contain a statement that such notice has been left or delivered is separable from the earlier portion which deals with the delivery of the notice two months before the suit. If the notice has not been given the suit is liable to be dismissed. The suit may be proceeded with if notice has been given, but the fact of delivery of notice has not been pleaded, if, subsequently, the plaint is amended by pleading that fact. That was a case where an amendment was allowed to state in the plaint that notice had been delivered.

16. The Bombay High Court in a decision reported in Bata Shoe Co., Ltd. v. Union of India, held that a notice under Section 80 is no doubt an essential preliminary step for the valid institution of a suit; but that would not make such a notice part of the cause of action for the suit itself. If it is borne in mind that such a notice is required to state amongst other facts the cause of action on which the suit would be based and the relief intended to be claimed it would be clear that the notice follows the cause of action and it merely paves the way for the institution of the suit itself.

17. The Madras High Court decision reported in Azizuddin and Co. v. Union of India, (S) considered the cases of the Calcutta High Court and came to a conclusion similar to the one reached by the Bombay High Court that notice under Section 80 though no doubt an essential preliminary step for the valid institution of a suit would not make such notice essential for the cause of action for the suit itself.

18. In conclusion I should like to refer to the observations of Mr. Justice Mahajan in the decision of State of Seraikella v. Union of India :

"It seems to me that what is enacted in Section 80: is the first step for litigation between the parties when the cause of action is complete. Section 80 in effect provides that an advance copy of the plaint should be served on the defendant and no suit should be instituted in court until the expiry of two months after such service. Section 80 does not define the rights of the parties or confer any rights on the parties. It only provides a mode of procedure for getting the relief in respect of a cause of action. It is a part of the machinery for obtaining legal rights, i.e. machinery as distinguished from its products, vide Poyser v. Minors (1881) 50 LJ Ex. 555."

19. The decision of Mr. Justice Mahajan was a dissenting one but the point to which I have referred was dealt with by his Lordship alone. Section 80 of the Code was not applicable to suits instituted in the Federal Court and therefore the observations were to some extent obiter. But the observations of Mr, Justice Mahajan are entitled to weight and respect. It is clear from his Lordship's observations that notice under Section 80 is not a part of the cause of action.

20. It appears to me that in the majority of decisions it has been held that notice under Section 80 is not a part of the cause of action but the service of notice has been held in some decisions to be a part of the cause of action for purposes of jurisdiction. The phrase 'cause of action' has been used both in Section 80 of the Code and in Clause 12 of the Letters Patent. I have already stated that the phrase 'cause of action' means something different when applied to jurisdiction from what it means when applied to the basis of the claim in suit. In the instant case the plaintiff has not pleaded either issue or service of notice under Section 80 of the Code as a part of the plaintiff's cause of action. Therefore the plaintiff has not attracted for purpose of jurisdiction the service of notice as a part of the cause of action. In my view it follows that the proposed amendment is no part of the cause of action.

21. Suppose the plaintiff had pleaded notice or the issue of the notice as a part of the cause of action. Looked at both from the point of view of cause of action in the suit and cause of action for purposes of jurisdiction the answer would be the same. The cause of action has to be stated in the notice under Section 80. To borrow again the words of Harries C. J. how could the notice itself be a part of the cause of action when the notice has to state the cause of action. Mukharji, J. has held that the language of Section 80 of the Code Makes it clear that the issue of the notice is no part of cause of action. Bachawat J. has also taken that view. So far the authorities appear to me to be uniform that neither the notice nor its issue is a part of the cause of action and that is so whether it is cause of action in the suit or cause of action for purposes of jurisdiction.

22. Some decisions of our Court have held that for purposes of jurisdiction cause of action may include service of notice. With respect to their Lordships, I do not see how service of notice can be a part of the cause of action for purposes of jurisdiction when the cause of action has already been complete prior to the delivery of the notice under Section 80. To my mind Section 80 postulates that the cause of action is complete but before the suit can be instituted the notice has to be delivered. In other words, Section 80 is a bar to the institution of a suit or, from another point of view, notice under Section 80 is a step in aid of institution of the suit. To hold that service of the notice under

Section 80 can be a part of the cause of action for purposes of jurisdiction would be to lose sight of the radical distinction between cause of action and right of suit. Section 80 merely puts a legislative bar to the institution of a suit when the cause of action is complete. It is by compliance with Section 80 that the suit can be instituted.

23. The facts constituting the cause of action must precede the suit. A notice under Section 80 of the Code has to specify the cause of action. All that is required under Section 80 after its issue and service is a statement in the plaint that the notice has been delivered. It is a matter of procedure as to what the plaint shall contain. Under Order 7, Rule 1 (e) the facts constituting the cause of action and when it arose are to be stated. The statement in the plaint that notice under Section 80 has been delivered is therefore something apart from the cause of action. To treat such notice, its issue or its service as a part of the cause of action would be to enlarge the content of Section 80 itself. If the cause of action is antecedent to the suit and if cause of action is also antecedent to the notice under Section 80, I am of opinion, that neither the issue nor the service of the notice can form part of the cause of action, either in its restricted or in its extended sense.

24. A statement in the plaint that notice has been delivered does not in any manner introduce a cause of action nor does it change the cause of action, inasmuch as cause of action has ripened before the notice has been delivered.

25. For the aforesaid reasons I hold that the plaintiff is entitled to an amendment as asked for. There is some ground for contending that the application is a belated one. The delay, however, has not occasioned any harm to the other side.

26. There will be no order in terms of prayers (a) and (b). The plaintiff applicant is to pay the defendant costs of this application, costs of the additional written statement and costs of additional discovery, if any, Certificate for counsel. Additional written statement to be filed within a fortnight, discovery fortnight thereafter. Suit will appear in the daily list one month hence.