APPELLATE CIVIL

Before Kapur and Soni JJ.

DWARKA DAS,—PLAINTIFF-APPELLANT

versus

(1) THE UNION OF INDIA, (2) BASHESHER NATH AND THREE OTHERS,—*Defendants-Respondents*

Regular First Appeal No. 63 of 1951

1952

September 30th

Code of Civil Procedure (Act V of 1908)—Sections 11 and 80—Res judicata—*Co-defendants—Adjudication in previous suit where plaintiff was one of the defendants, whether operates as* res judicata—*Conditions requisite for* res judicata *between co-defendants stated— Notice under section 80, addressed to the Secretary, Railway Board—Whether valid notice.*

Held, that an adjudication in a previous suit operates as *res judicata* between co-defendants if the following conditions are satisfied:—

(i) There must be conflict of interest between the defendants concerned,

(ii) it must be necessary to decide the conflict in order to give the relief which the plaintiff claimed,

(iii) the question between the defendants must have been finally decided, and

(iv) the co-defendants were necessary or proper parties in the former suit.

It is immaterial that the defendants in the previous suit could not file an appeal against the adjudication in the previous suit as the suit of the plaintiff had been dismissed.

Held further, that the notice under section 80, Civil Procedure Code, was invalid as it had not been addressed to the Secretary to the Government of India and was, therefore, not in accordance with the terms of that section. The Secretary to the Railway Board to whom the notice was addressed is not a Secretary to the Central Government. The notice being invalid the defect is in the institution of the suit itself and, therefore, there is no properly instituted suit.

Case law reviewed.

Munni Bibi v. *Tirloki Nath* (*1*), *Cottingham* v. *Earl of Shrewsbury* (2), *Maung Sein Done* v. *Ma Pan Nyun* (3), *Kedar Nath Goenka* v. *Ram Narain Lal* (*4*), relied on; *Chandu Lal Aggarwalla* v. *Khalilur Rehman* (*5*), distinguished; *Bhag Chand Dagadusa* v. *Secretary of State for India in Council* (*6*), *Vellayan Chettiar* v. *The Government of the Province of Madras* (*7*), *Government of the Province of Bombay* v. *Pestonji Ardeshire Wadia* (*8*), *Sandhya Trading Co.* v. *Governor-General* (*9*), *Hori Ram Singh's Case* (*10*), *Basdeo Aggarwalla* v. *Emperor* (*11*), relied on; *Union of India* v. *Murlidhar* (*12*), *A. Sankunni Menon* v. *The South India Railway* (*13*), *Chekka subrahmanyam* v. *The Union of India* (*14*), *The Governor-General of India in Council* v. *G. Krishna Sheney* (*15*), *Bholaram* v. *Governor-General in Council* (*16*), distinguished; *Devi Ditta Mal* v. *Secretary of State* (*17*), *V. Weeds* v. *Mehar Ali* (*18*), *The Agent of the South Indian Railway Co.* v. *Vengu Pettar* (*19*), *Ram Gopal* v. *The Bombay Baroda and Central India Railway Co.* (*20*), *Secretary of State* v. *Charanjit Lal* (*21*), held not applicable.

First Appeal from the decree of Shri Prahlad Singh Bindra, Senior Sub-Judge, Jullundur, dated the 30th December, 1950, dismissing the suit with costs.

SHAMAIR CHAND, Y. P. GANDHI and P.C. JAIN, for Appellant.

K. S. THAPAR, N. L. WADHERA, P. L. BAHL, K. L. GOSIAN and D. N. AWASTHY for BHAGIRATH DASS, for Respondents.

JUDGMENT

Kapur, J.

KAPUR, J. In this plaintiff's appeal against the judgment and decree of Mr Prahlad Singh Bindra, Senior Subordinate Judge. Jullundur,

(1) I.L.R. 53 All. 103
(2) 67 E.R. 530=(1843) 3 Hare 627
(3) I.L.R. 10 Rang. 322
(4) I.L.R. 14 Pat. 611
(5) A.I.R. 1950 Pat. 17
(6) I.L.R. 51 Bom. 725 (P.C.)
(7) A.I.R. 1947 P.C. 197
(8) A.I.R. 1949 P.C. 143
(9) A.I.R. 1950 Cal. 426
(10) 1939 F.C.R. 159
(11) A.I.R. 1945 F.C. 16.
(12) A.I.R. 1952 Assam 141
(13) (1951) I.M.L.J. 463
(14) (1950) 2 M.L.J. 656
(15) (1950) 2 M.L J. 506
(16) A.I.R. 1949 Pat. 416
(17) I.L.R. 7 Lah. 238
(18) 3. I.C. 479
(19) 12 I.C. 169
(20) 13 I.C. 297
(21) A.I.R. 1924 Lah. 594

dated the 30th December 1950, the points canvassed for our decision are one of *res judicata* and the other of the validity of notice under section 80, Civil Procedure Code, which are really the only two points decided by the trial Court.

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In order to understand how the question of *res judicata* arises it may be necessary to give the facts of the case in some detail. On the 20th April 1943, the firm Dayal Das-Dharam Paul of Dhilwan are alleged to have consigned 200 bags of wheat weighing 500 maunds to Surat. the consignee being Basheshar Nath-Ram Kishan of Dhilwan. This was by means of invoice No. 40 and Railway Receipt No. 498293, and the goods are alleged to have been sent by a wagon No. 27325. On the 29th April 1943, the goods were sold by the consignee to Dwarka Das, plaintiff, in the following manner. It was represented to him that the Railway Receipt was lost. An indemnity bond was then executed in favour of Dwarka Das by Basheshar Nath-Ram Kishan who were the consignees from Dayal Das-Dharam Paul, the sale price being Rs. 7,500. This indemnity bond was attested by the Station Master of Dhilwan. Another indemnity bond was executed by Dwarka Das, Dayal Das-Dharam Paul and Basheshar Nath-Ram Kishan on the same day in favour of the Railway (N. W. Railway). Dwarka Das, the plaintiff, then went to Surat and produced the indemnity bond but was refused delivery, because in the meanwhile the goods were being claimed by the firm Pranjiwan Das-Jinhabhai of Surat.

This new claimant claimed to have obtained title to these goods by means of the endorsement of the Railway Receipt, which the other claimant the present plaintiff, was claiming to have been lost, in the following manner. Basheshar Nath-Ram Kishan endorsed the Railway Receipt in favour of Behari Lal who in turn endorsed it in favour of Roshan Lal-Hans Raj who then sent it to the Imperial Bank of Surat for collection of money

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and from whom it was obtained by the firm Pranjiwan Das-Jinhabhai. Thus the firm Pranjiwan Das-Jinhabhai was putting forward a claim against the Railway on the basis of the original receipt which they had in their possession endorsed to them from various persons, and Dwarka Das was claiming the same goods on the basis of an indemnity bond which was executed in his favour by the original consignees, that is, the firm Basheshar Nath-Ram Kishan of Dhilwan.

On the 21st April 1943, these very same goods were consigned by Om Parkash-Parshotam Das of Dhilwan to self at Kalyan. The wagon in which these goods were despatched was the same, that is No. 27325, although it is not clear whether the invoice number and the Railway Receipt were the same or not. It was claimed by the plaintiff before us that they were the same. Nathu Ram-Dewan Chand took delivery of these goods at Kalyan, on the G.I.P. Railway on the 13th May 1943.

Dwarka Das sent a notice to the Railway claiming the goods or the price of the goods. This notice is not on the record. To this the Railway replied that the firm Pranjiwan Das-Jinhabhai were also laying claim to the same goods and had produced a Railway Receipt, and they asked Dwarka Das to get his title decided in a Court of proper jurisdiction. Dwarka Das thereupon brought a suit for a declaration of title in the Court of a Subordinate Judge at Kapurthala, on the 10th June 1943, which was decreed on the 14th July 1943. The parties to this suit were Dwarka Das, plaintiff, Basheshar Nath-Ram Kishan and Pranjiwan Das-Jinhabhai.

Firm Pranjiwan Das-Jinhabhai, brought a suit in the Surat Court, on the 30th July 1943. In this case the Governor-General and the two Railways were party defendants besides Dwarka Das (the present plaintiff), the original consignee

Basheshar Nath-Ram Kishan, the persons who had endorsed the Railway Receipt in favour of the firm Pranjiwan Das-Jinhabhai and several others including the Imperial Bank of India, and it is not necessary to mention them. It is necessary to give the allegations of the plaintiff firm Pranjiwan Das-Jinhabhai at this stage. After giving the history of how the firm got possession of the Railway Receipt the plaintiff alleged that defendant No. 3 (the present plaintiff) had been made a party because he had given an indemnity bond to take delivery of the suit consignment stating therein that the Railway Receipt was lost, which statement was false because the Railway Receipt was with the plaintiff and that the suit goods had been booked from Dhilwan and were to be delivered at Surat. In the relief clause the plaintiff claimed recovery of the price of the goods with interest, and, if it was found that defendant No. 3, that is the present plaintiff, had any right to recover the goods or its value, then a decree against the Imperial Bank and certain other persons and in that event costs of defendants 3, 4, 5 and 6 be awarded against other defendants and such other further relief which the Court thought the plaintiff was entitled to.

Defendant No. 3 (the present plaintiff) filed a long written statement which is printed at page 92 of the paper book, pleading that the goods were sold to him properly, that the Railway Receipt while it was in possession of the original consignors got lost before it could be given to the original consignees and that he was the owner of the goods and had good title to them. He denied that the plaintiff in that case had got any title to the goods. He also pleaded that a vexatious and false suit had been brought against him and he was entitled to compensatory costs.

The North-Western Railway and the B. B. & C. I. Railway, also filed their written statements. The former pleaded that the goods were not actually tendered for booking by the

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consignors at Dhilwan and the Railway Receipt was a fictitious document. The plea of the latter was to the same effect that no goods had been received, that defendant No. 3 was claiming ownership of the goods and had also obtained a decree from the Court of the Subordinate Judge at Kapurthala and at any rate the B. B. & C. I. Railway were not liable.

The issues are printed at pages 96 and 97 of the paper book, and the relevant issues were:—

(1) Does defendant No. 1 prove that no goods in suit were actually tendered for booking by the consignors at Dhilwan and does he prove that the said Railway Receipt was issued erroneously by the booking staff of Dhilwan Station ?

(4) Does defendant No. 1 prove that the plaintiffs are not the owner of the goods ?

(6) Does defendant No. 3 prove that suit was validly filed by him in the Court of the Sub-Judge, Kapurthala State ? If yes, had that Court proper jurisdiction over the plaintiff ? Is this suit barred by *res judicata* ?

(17) Is the suit against defendant No. 3 false or vexatious?

The learned Judge in that case gave a lengthy judgment in which he discussed at great length the various contentions which were raised before him and gave his findings on each point. He found that it had been proved that no goods were actually tendered for booking at Dhilwan and that the Railway Receipt on which the claim of the plaintiff and defendant No. 3 was based was issu-

Station. He also found that the plaintiffs were not owners of the goods, the decision of the suit at Kapurthala was not *res judicata* and the suit against defendant No. 3 was neither false nor vexatious. In the course of his judgment he remarked that the then plaintiffs had relied on the evidence which was led by defendant No. 3 (the present plaintiff) to show that the goods were actually booked at Dhilwan, the evidence consisting of the Station Master, Dhilwan, the Assistant Station Master, Dhilwan, the Goods Clerk, Dhilwan, and Dewan Chand. All these persons had been prosecuted by the Railway for various offences. Besides these, the witnesses were defendant No. 3 and his brother Mugat Ram who claimed to be the actual consignor of these alleged goods on behalf of the firm Dayal Das-Dharam Paul. This Mugat Ram deposed that he was acting as contractor for Dayal Das-Dharam Paul, who had a permit from Kapurthala State. The learned Judge thought that he was an accomplice along with the Railway servants. The Judge also found that the Railway Receipt purported to have been made for goods to be sent to Surat whereas the consignment note was made for Kalyan, and on the following day the word "Kalyan" had been erased and substituted by the name "Surat". He inferred from the evidence that the Railway Receipt was fictitious and the goods were never actually booked. At page 110, the learned Judge held that defendant No. 3 was disputing the title of the plaintiff and was also making a claim against the Railway for which he had already filed the suit (out of which the present appeal has arisen). In regard to the relief he said at page 113:—

> "On behalf of defendant No. 3 costs of commission are also claimed, but defendant No. 3 is equally a claimant on fictitious receipt and he is equally expected to suffer the costs for losing a case non-proving the receipt".

Dwarka Das brought the present suit for the recovery of Rs. 14,316-14-3 for non-delivery of the

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goods, for the price of the wheat, interest, expenses of the suit filed at Kapurthala and miscellaneous expenses. There were several defendants and the real contesting defendants are the Union of India and defendants Nos. 4 and 5 Nathu Ram and Dewan Chand. One of the pleas taken was that the suit was barred by *res judicata*, and the learned Judge gave effect to this plea and the plaintiff has come up in appeal to this Court.

Mr. Shamair Chand for the appellant submits that no *res judicata* is constituted in this case, because there was no conflict between the defendants *inter se* and in order to give relief to the plaintiff it was not necessary to decide any question between the defendants and that as the present plaintiff could not have appealed against the previous decree no final adjudication within section 11, Civil Procedure Code, had been made to bar the present suit.

The question of *res judicata* as between co-defendants has been the subject-matter of decision in several cases by their Lordships of the Privy Council. In *Munni Bibi* v. *Tirloki Nath* (1), it was held that section 11 of the Code of Civil Procedure is not exhaustive of the subject of *res judicata* and that English decisions could be referred to for the general principles applicable thereto. In this case M and K were rival claimants to a house. M alleged that the house belonged to her deceased father Amar Nath and her claim was as his daughter. K alleged that the house belonged to her mother and, therefore, she was entitled to inheritance, it being *stridhan* property. A creditor of Amar Nath sued M and K to establish his right to sell the house as property of Amar Nath. It was found by the Court that the house belonged to Amar Nath and decreed the creditor's suit. K's son paid off the creditor and took possession of the house. Later on M brought a suit to recover possession of the house from K's son and K pleaded that the question of title as between her and M was *res judicata* by virtue of the decision in the previous suit.

(1) I.L.R. 53 All. 103

Their Lordships held that the conditions of *res judicata* were established because there was a conflict of interest between M and K for it was only if the house belonged to Amar Nath that the plaintiff could succeed and this question had been decided in the plaintiff's favour in the previous suit. Their Lordships quoted with approval the observations of Wigram, V. C., in *Cottingham* v. *Earl of Shrewsbury* (1)—

> "If a plaintiff cannot get at his right without trying and deciding a case between co-defendants the Court will try and decide that case, and the co-defendants will be bound. But, if the relief given to the plaintiff does not require or involve a decision of any case between co-defendants, the co-defendants will not be bound as between each other by any proceeding which may be necessary only to the decree the plaintiff obtains."

In the same case reported in 15 L.J. Eq. 441 at page 443 the rule is stated as follows :—

> "I take the rule of the Court, with regard to a decree being binding between co-defendants, to be simply this : that whenever a plaintiff cannot take the decree he asks without the Court deciding the right between co-defendants, and if the decision of the right between co-defendants is involved in the decision of the plaintiff's right the decree made in favour of the plaintiff is binding between co-defendants."

In the judgment of the Privy Council the quotation is taken from 67 E.R. 530, and Sir George Lowndes, said at p. 111 :—

> "It is, in their Lordships' opinion, in accord with the provisions of section 11 of the

(1) 67 E.R. 530 at p. 535

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Civil Procedure Code, and they adopt it as the correct criterion in cases where it is sought to apply the rule of *res judicata* as between co-defendants. In such a case, therefore, three conditions are requisite: (1) There must be a conflict of interest between the defendants concerned; (2) it must be necessary to decide this conflict in order to give the plaintiff the relief he claims; and (3) the question between the defendants must have been finally decided."

In *Maung Sein Done* v. *Ma Pan Nyun* (1), the same rule was laid down. There a Chinaman, who had come to reside in Burma, married a Buddhist Burmese lady. He had two sons and two daughters by this wife. On his death the property was managed by his widow, on whose death an administration suit was brought by one of the daughters claiming administration of her mother's estate and contending that under Burmese Buddhist law she was entitled to a one-fourth share therein. The defendants were her other sister and the two brothers. The suit was dismissed on the ground that Chinese customary law applied under which sons alone were entitled. Appeal was taken by the plaintiff to the High Court, but the decree was affirmed. Later on the other sister, who was defendant in the previous suit, claimed the same relief, and the principles of *res judicata* were held to apply. Mr. Dunne, K. C., who appeared for the appellant, submitted that the suit was barred by *res judicata* because of the previous decision and relied upon *Munni Bibi* v. *Tirloki Nath* (2). Mr. Pennell for the respondent distinguished *Munni Bibi's* case and said that the principle of *res judicata* would not apply, because in *Munni Bibi's* case a decree had been made in the previous suit whereas in the case now before their Lordships the suit was dismissed. "The principle as laid down by the

(1) I.L.R. 10 Rang. 322
(2) I.L.R. 53 All. 103

Board as to *res judicata* between co-defendants does not apply where no relief was granted. The terms of the judgment in *Cottingham* v. *Earl of Shrewsbury* (1), which was applied by the Board exclude the case where no relief was granted." Their Lordships in their judgment referred to *Munni Bibi's case* (2), and to the observations of Wigram, V. C., and said at pp. 333 and 334:—

> "The matter which was adjudged was that the succession to Mr. Myit's estate was governed by Chinese customary law, and that her daughters, therefore, were not entitled to any share therein. The language actually used in the appellate Court was as follows: 'I would hold that the Chinese customary law, should be applied to her estate. Under that law her sons, and not her daughters, would inherit, and, therefore, appellant's suit was rightly dismissed.' That is, in terms, a finding that neither Mr. Sein nor Ma Pan Nyun was entitled to any share in the estate of Ma Myit.
>
> It was urged that the doctrine of *res judicata* could not apply as between co-defendants to a previous suit, if no relief had been granted to the plaintiff in that suit. Their Lordships are aware of no principle or authority which justifies this contention. In Ma Sein's suit there had necessarily to be an adjudication upon the issues involved before the suit could have been dismissed. It was not any less an adjudication because its consequence was the dismissal of the suit, than it would have been if its tenor had been the other way.
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> The issues involved in the present suit of Ma Pan Nyun are identical with the

(1) 67 E.R. 530
(2) I.L.R. 53 All. 103

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issues in the earlier suit; and their Lordships are of opinion that in regard to these issues (1) there was in the earlier suit a conflict of interest between Ma Pan Nyun and her brothers; (2) this conflict would necessarily have had to be decided in order to give Ma Sein the relief which she claimed; and (3) the question between Ma Pan Nyun and her brothers (viz., whether she was entitled to any share in her mother's estate) was finally decided."

It will be noticed that the argument for the respondent distinguishing *Munni Bibi's case* (1), on the ground that the previous suit had been decreed and that the principle of *res judicata* between co-defendants does not apply where no relief is granted in the previous suit was not accepted by their Lordships.

The next Privy Council case to which a reference has been made is *Kedar Nath Goenka* v. *Ram Narain Lal* (2). The facts of this case were rather complicated but briefly stated they were—B lent money to S, a Mahant, for expenses to defend a suit brought against him by M who claimed the office and the properties of the Mutt, on the execution by S of an agreement giving him a lien on the properties of the Mutt. In 1903 B brought a suit against S and M on the agreements which were found to be unconscionable, but a simple money decree was passed against S for the actual amounts which were found to have been lent to him. In execution of his decree B brought S's share in the properties of the Mutt to sale in 1908. There were several auction-purchasers including B. The sale was eventually confirmed in 1913. M was then the sole Mahant and in possession of the properties of the Mutt. In 1918, two of the auction-purchasers instituted Suits against B and M for a declaration that the sale was invalid on the ground that the judgment-debtor had no saleable interest in the properties.

(1) I.L.R. 53 All. 103
(2) I.L.R. 14 Pat 611

This suit was dismissed. In 1925, Kidar Nath, the son of the original creditor and auction-purchaser, brought a suit against M for possession of the properties purchased by his father in the auction sale and made Ram Narain Lal who had purchased these properties from the Mahant in execution of the decree a party defendant. It was held that the validity of the sale having been decided as a necessary issue between the co-defendants B and M in the suit of 1918, it was *res judicata* between B's representative and M in the present suit in which they were arrayed as plaintiff and defendant. The rule laid down in *Munni Bibi's* (1) case and *Maung Sein Done's* (2) case was followed. At p. 622 Sir John Wallis, said:—

> "In their Lordships' opinion, as already stated, it was necessary in those suits to decide the dispute between them as to the validity of the Court sale for the purpose of giving the plaintiffs appropriate relief, and, therefore, this case is governed by the rule as to *res judicata* between co-defendants in *Cottingham* v. *The Earl of Shrewsbury*, (3), which has recently been applied by this Board, in *Munni Bibi* v. *Tirloki Nath* (1), and *Maung Sein Done* v. *Ma Pan Nyun* (2)."

Mr. Shamair Chand for the appellant relied on a judgment of their Lordships of the Privy Council in *Chandu Lal Aggarwal* v. *Khalilur Rahaman* (4), but I cannot see how this helps his case, because their Lordships laid down the conditions for the application of the doctrine of *res judicata* to be the same as they were in the previous Privy Council cases and decided the case on facts on the basis of which it was held that *res judicata* would not apply. I am unable to draw

(1) I.L.R. 53 All. 103
(2) I.L.R. 10 Rang. 322
(3) (1843) 3 Hare. 627
(4) A.I.R. 1950 P C. 17

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any assistance from this judgment in determining the matter one way or the other.

The question then arises whether the rule laid down in these Privy Council cases applies to the facts of the present case. In the suit which was brought at Surat the present plaintiff and the Railway Administration were arrayed on the same side as the co-defendants. The claim of the plaintiff in that case was that he was the holder of the Railway Receipt and was, therefore, entitled to receive the goods under that Railway Receipt and that he had a better title to that of the present plaintiff who was defendant No. 3 there. There was undoubtedly a dispute between the Railway and the present plaintiff on the question whether the goods which defendant No. 3 was then claiming had actually been sent by the Railway and whether the Railway Receipt was a genuine document. In other words the Railway Administration was disputing the claim of the present plaintiff. For the plaintiff in that case to succeed it was necessary to first determine whether defendant No. 3, the present plaintiff, had any justifiable claim against the Railway. It so happened that the plaintiff in that case was also claiming on the basis of the same Railway Receipt, but that in principle should make no difference. There was a tripartite conflict. The Railway was saying that the goods were never tendered to them and the Receipt, which was given to them, was a fictitious document and that is what was decided by the Court at Surat. It cannot be said that there was no conflict between the Railway and defendant No. 3 in that case, nor that the plaintiff in that case could succeed without that conflict being decided. The finding of the learned Judge in that Court was that the claim of defendant No. 3 was on a fictitious Railway Receipt and, therefore, he was not entitled to get any costs. The rule laid down in the Privy Council cases, therefore, in my opinion does apply to the facts of this case.

The question is then raised that the previous suit had been dismissed as against the present

plaintiff and as he could not appeal the doctrine of *res judicata* will not apply. In the Rangoon case, *Maung Sein Done* v. *Ma Pan Nyun*, (1), the previous suit had been dismissed and one of the arguments raised by Mr. Pennell was that the decree in the previons suit was one of dismissal and the principle of *res judicata* between co-defendants does not apply where no relief was granted. Repelling this contention Lord Russell said at p. 333—

> "Their Lordships are aware of no principle or authority which justifies this contention."

In the Patna case, *Kedar Nath Goenka* v. *Ram Narain Lal* (2) also the previous suit had been dismissed, but their Lordships did not hold that the dismissal of the previous suit against a co-defendant was any ground for not applying the doctrine of *res judicata* to the case.

I am, therefore, of the opinion that the learned Judge has rightly held that the present suit is barred by *res judicata*.

The next question which was decided against the appellant was that the notice given by him under section 80 of the Civil Procedure Code was not a proper notice. The notice under section 80 was addressed to the Governor-General in Council of India, through the Secretary, Railway Board, Government of India, New Delhi. Copies of this were sent to the General Manager, N. W. Railway, Lahore, and the General Manager, B. B. & C. I. Railway, Bombay. The acknowledgment from the first addressee is at p. 73 and those from the other two are at pp. 72 and 73 of the paper book. The objection taken in the trial Court on behalf of the defendants was that this notice did not comply with the provisions of the section in the Civil Procedure Code. The notice was given on the 18th February, 1944, when the words of section 80 were as follows:—

> "80. No suit shall be instituted against the Crown, until the expiration of two

(1) I.L.R. 10 Rang. 322
(2) I.L.R. 14 Pat. 611

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months next after notice in writing has been delivered to or left at the office of—

(a) in the case of a suit against the Central Government a Secretary to that Government ;

* * * * *

In *Bhagchand Dagadusa* v. *Secretary of State for India in Council* (1), it was held that the section is explicit and mandatory and admits of no implications or exceptions. At p. 303 of Mulla's Civil Procedure Code the law has been stated to be—

> "The language of this section is imperative and absolutely debars a Court from entertaining a suit instituted without compliance with its provisions."

At pp. 744 and 745 in *Bhagchand's case* (1), Viscount Sumner observed—

> "Section 80 is but a part of a Procedure Code, passed to provide the regulations and machinery, by means of which the Courts may do justice between the parties. A construction which may lead to injustice is one which ought not to be adopted, since it would be repugnant to the whole tenor and purpose of the Act."

This section came for review again by their Lordships of the Privy Council in *Velloyan Chettiar* v. *The Government of the Province of Madras* (2), where Lord Simonds delivering the judgment of the Board, said at p. 199 as under—

> "Upon the first issue the decision of this Board in *Bhagchand Dagadusa* v. *Secretary of State* (3), appears to be decisive. It was there said that section 80

(1) I.L.R. 51 Bom. 725 (P.C.)
(2) A.I.R. 1947 P.C. 197
(3) 54 I.A. 388

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 *Venkata Rangiah Appa Rao* v. *Secretary of State* (1), and on appeal, *Venkata Rangiah Appa Rao* v. *Secretary of State* (2). To hold otherwise would be to admit an implication or exception for which there is no justification."

In *Government of the Province of Bombay* v. *Pestonji Ardeshir Wadia* (3), their Lordships again examined the scope of this section, where the observations in Bhagchand's case (4) were reiterated, and Sir Madhavan Nair said at p. 146—

"Their Lordships fully concur with the above view. The provisions of section 80 of the Code are imperative and should be strictly complied with before it can be said that a notice valid in law has been served on the Government."

(1) A I.R. 1931 Mad. 175
(2) A.I.R. 1935 Mad. 399
(3) A.I.R. 1949 P.C. 143
(4) I.L.R. 51 Bom. 725 (P.C.)

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In *Sandhya Trading Co.* v. *Governor-General* (1), the notice instead of being sent to the General Manager, as it is now required by the amended section 80, was sent to the Secretary, Railway Board, Delhi. Harries, C. J., delivering the judgment of the Court, said—

> "It will be seen that the notice must be delivered to or left at the office of the General Manager of the Railway, namely, the East Indian Railway. Admittedly that was not done. Sen, J., in an earlier case, *Dominion of India* v. *Sree Dedraj Bajoria* (2), decided * * that where a notice under section 80 is addressed not to the General Manager of a railway but to some other body it is not a good notice * * *. There can be no doubt that the provisions of section 80, Civil Procedure Code, must be strictly complied with."

In two cases decided by the Federal Court, although they were under different statutes, a similar interpretation was put by that Court. In *Hori Ram Singh's case* (3), *where section* 270 (1) of the Government of India Act was under consideration, Sulaiman, J., said at p. 179—

> "Section 270 (1) directs that no proceedings, civil or criminal, shall be instituted, etc. The prohibition is against the institution itself and its applicability must, therefore, be judged in the first instance at the earliest stage of institution."

Similarly in *Basdeo Aggarwalla* v. *Emperor* (4), where the words of the statute were that "no prosecution for any contravention of the provisions of

(1) A.I.R. 1950 Cal. 426
(2) Civil Revn. 856 of 1949
(3) 1939 F.C.R. 159
(4) A.I.R. 1945 F.C. 16

this Order shall be instituted without the previous sanction of the Provincial Government", Spens, C. J., said at p. 18—

> "In our judgment the words of clause 16 of this Order are plain and imperative, and it is essential that the provisions should be observed with complete strictness and where prosecutions have been initiated without the requisite sanction, that they should be regarded as completely null and void * * *."

Thus if the notice is not in accordance with the terms of section 80 of the Civil Procedure Code, the defect is in the institution itself and, therefore, there is no properly instituted suit.

Mr. Shamair Chand on the other hand referred to several cases and submitted that the defect was one of form and not of substance. The notice, according to him, was sent to the Governor-General through the Secretary to the Railway Board and that was a sufficient compliance with the provisions of the Act. With this I am unable to agree, unless it is shown that the Secretary to the Railway Board is a Secretary to the Central Government, which has not been shown, and as far as I am aware he is not a Secretary to the Central Government. The first case he referred to is *Union of India* v. *Muralidhar* (1), but there the notice was sent to the President of the Railway Board who is by designation the Chief Commissioner of Railways and is the Secretary to the Government of India in the Railway Department. That notice was, therefore, held to be a notice properly given under section 80.

The next case relied upon is a single Bench judgment of the Madras High Court, *A. Sankunni*

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Menon v. *The South Indian Railway* (1). There the notice was sent to the Secretary for Railways, which was held to be a sufficient compliance with section 80. Reliance was then placed on another judgment of the Madras High Court given by the same learned Judge in *Chekka Subrahmanyan* v. *The Union of India* (2), the notice there was sent to the Secretary, Governor-General of India in Council, Department of Railways, New Delhi, which was held to be a good notice under section 80. In still another case of the same Court, *The Governor-General of India in Council* v. *G. Krishna Sheney*, (3), notice was sent to the Secretary of State, but it was treated by the Government as a notice to the Governor-General in Council, but that was a case under section 77 of the Indian Railways Act and is not of much assistance in this case. In that section there is nothing corresponding to section 80 in regard to the institution of suits. All that it provides for is that a person is not entitled to compensation, etc.

Another case relied upon is *Bholaram* v. *Governor-General in Council* (4). There the notice was sent to the Secretary to Government which was held to be sufficient for the purposes of the statute.

The other cases that have been relied upon are all under section 77 of the Railways Act and are, in my opinion, of no assistance in deciding the matter now before us. They are a Full Bench judgment of the Lahore High Court, *Devi Ditta Mal* v. *Secretary of State* (5), *V. Weeds* v. *Mehar Ali* (6), *The Agent of the South Indian Railway Co.* v. *Vengu Pattar* (7), *Ram Gopal* v. *The Agent Bombay Baroda and Central India Railway Co.* (8), and *Secretary of State* v. *Charanjit Lal* (9),

(1) (1951) 1 M.L.J 463
(2) (1950) 2 M.L.J. 656
(3) (1950) 2 M.L.J. 506
(4) A.I.R. 1949 Pat. 416
(5) I.L.R. 7 Lah. 238
(6) 3 I.C. 479
(7) 12 I.C. 169
(8) 13 I C. 297
(9) A.I.R. 1924 Lah. 594

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Mr. Shamair Chand particularly relied on a passage at p. 247 of I.L.R. 7 Lah. 238 in the judgment of Le Rossignol, J., where the learned Judge, said—

> "Law has no affinity with the magic art and there is no peculiar virtue in any given method of serving notice; the essence is that notice shall be duly served."

Whatever that passage may have meant in that particular context, it can have no application to the facts of this case where the statute applies to the initial stage of the institution itself and prohibits it unless there is a compliance with the strict provisions of the section. Even there the words used by the learned Judge were "shall be duly served" and "duly" means "in accordance with law".

I am, therefore, of the opinion that these cases do not help the appellant in any manner.

I would, therefore, dismiss this appeal with costs throughout.

SONI, J. I agree. Soni J.