DIVISIONAL FOREST OFFICER
v.
SIRISENA

COURT OF APPEAL,
WIJETUNGA, J. AND ANANDA COOMARASWAMY, J.
C. A. APPLICATION No. 64/88/LG.,
D. C. TANGALLE No. 8592/M
JANUARY, 19 AND 25, 1989.

Forest Ordinance Sections 30 (1) (d), 31, 32 (1) and 33 (1)– civil Procedure Code s. 46(2) (i) Claim to timber seized by Flying Squad of Forest Department -Confiscation of timber-Appeal from Order to confiscate–Time bar to filing plaint-Plaint barred by positive rule of law.

"Suit against person nomine officii".

The Flying Squad of the Forest Department took into custody from the plaintiff's possession 265 pieces of timber said to be unmarked. By notice dated 18.2.1980 the Divisional Forest Officer notified the plaintiff under s. 31 of the Forest Ordinance that the timber had been taken into custody under s. 30 (1) (*d*) of the Forest Ordinance and required him to present his claim to the timber within one month. The plaintiff lodged his claim on 26.02.1980 and an inquiry was held on 27.3.1980. The Divisional Forest Officer informed the Forester (Flying Squad) with a copy to the plaintiff that the timber was confiscated. On 7.4.1980 (according to plaintiff) he appealed to the Conservator of Forests and he by letter dated 17.4.1980 declined to interfere. On 16.5.1980 he filed the present plaint against the Divisional Forest Officer.

Held :

(1) Under s. 33 (1) of the Forest Ordinance a person whose claim has been rejected under s. 32 may within one month from the date of the rejection institute a suit to recover possession of the timber claimed. Here the suit was filed after the lapse of one month and was therefore barred by a positive rule of law and should have been rejected as provided in s. 46 (2) (i) of the Civil Procedure Code.

(2) Failure of the Court to reject a plaint at the time of presentation where the cause of action is barred by a positive rule of law does not prevent the Court from rejecting the plaint later when the defect is subsequently brought to its notice. Nor is the defendant estopped by the earlier acceptance of the plaint from seeking the rejection of the plaint later.

(3) The Divisional Forest Officer is not a legal person and cannot be sued *nomine officii* but this defect may be overcome by amendment.

Cases referred to :

(1) *Read v. Samsudin 1 NLR 292, 295*
(2) *Soysa v. Soysa 17 NLR 118*

(3) *Avva Umma v. Casinader 24 NLR 199*
(4) *Ratnam v. Dheen 70 NLR 21*
(5) *The Land Commissioner v. Ladamuttu Pillai 62 NLR 1*
(6) *Singho Mahatmaya v. The Land Commissioner 66 NLR 94*

APPEAL from judgment of District Judge of Tangalle.

Salim Mahsoof SSC with *Nizam Kariapper* S. C. for Defendant-Appellant.

N. R. M. Daluwatte P. C. with *Mrs. Charurika Wijesinghe Pradeep Keerathsinghe* and *A. L. M. Heiyanthuduwa* for Plaintiff-Respondent.

Cur. adv. vult.

August 25, 1989.

WIJETUNGA, J.

THE Plaintiff instituted this action purportedly in terms of section 33 of the Forest Ordinance seeking a declaration that he was entitled to possess the timber seized by the Defendant in terms of section 30 (1) (*d*) of the Forest Ordinance and for an order of Court directing the Defendant to deliver possession of the said timber to him.

The Defendant filed answer stating inter alia that the plaint was bad in law, inasmuch as the plaintiff had failed to comply with section 33 of the Forest Ordinance and also as the Defendant had been cited nomine officii.

When the matter was taken up for trial, learned State Counsel appearing on behalf of the Defendant moved for the rejection of the plaint in terms of section 46(2) (i) of the Civil Procedure Code, as the Plaintiff had not instituted the action within one month from the date of rejection of his claim to the timber, after inquiry held in terms of section 32 of the Forest Ordinance.

State Counsel further moved that the Defendant be struck out from the proceedings in terms of section 18 (1) of the Civil Procedure Code, inasmuch as he had been cited nomine officii.

At the conclusion of the submissions, the learned District Judge made his order dated 30.5.1983 holding that :—

(*a*) the copy of the letter issued by the defendant to the plaintiff intimating the confiscation of the timber, after inquiry under section 32 of the Forest Ordinance, was irregular,

(*b*) although it had been contended that the Defendant had be cited nomine officii proxy had been filed of record by the D sional Forest Officer Kariyawasam Jalath Tantiri Dayanann and

(*c*) as his predecessor in office had accepted the plaint, the Co was estopped from rejecting the plaint at this stage

and refused the applications of the Defendant.

It is from this order that the Defendant-Appellant has obtained le:el to appeal to this Court.

The plaint filed on 16.5.1990 avers that on 24.1.1980 officers of Flying squad of the Forest Department took into custody from ... Plaintiff's possession 265 pieces of timber, said to be unmarked. ⊟ . notice dated 18.2.1980, the Divisional Forest Officer, Southern Divisaiv acting under the provisions of Section 31 of the Forest Ordinance, notiito the Plaintiff that the said timber had been taken into custody under provisions of section 30(1) (*d*) of the said Ordinance and required Plaintiff to present to such officer within a period of one month a writ statement of such claim. The Plaintiff claimed the timber by writing da 26.2.1980. Thereafter an inquiry was held on 27.3.1980. The Defeno informed the Forester (Flying Squad) Galle with a copy to the Plaintiff, the timber had been confiscated. The Plaintiff states that he presente appeal on 7.4.1980 to the Conservator of Forests againt that deci and that the Conservator of Forests, by a letter dated 17.4.1980, inform him that no decision contrary to that of the Divisional Forest Offiit Southern Division could be taken. It is thereafter that the Plaintiff had this action on 16.5.1980.

Section 33 (1) of the Forest Ordinance provides that—

"Any person whose claim has been rejected under section 32 within one month from the date of such rejection, institute a su recover possession of the timber claimed by him....."

The procedure to be followed in regard to a claim preferred in res of timber which has been deemed to be the property of the State u section 30 is laid down in section 32.

Section 32 (1) provides that—

"..... the forest officer may, after making such inquiry as he thinks fit, either reject the claim after recording his reasons for so doing, or deliver the timber to the claimant."

The Forest Ordinance does not provide for an appeal from the decision of the Forest Officer regarding a claim preferred in respect of such timber, but makes provision in section 33 (1) for any person whose claim has been so rejected to institute a suit to recover possession of the timber claimed by him *within one month from the date of such rejection.* The Plaintiff's purported appeal to the Conservator of Forests, therefore, has no basis in law.

Learned Senior State Counsel submits that the plaint in this case, not having been filed within one month from the date of such rejection, was barred by a positive rule of law and should have been rejected. He refers to section 46 (2) (i) of the Civil Procedure Code which provides that when the action appears from the statement in the plaint to be barred by any positive rule of law, the plaint shall be rejected.

The plaint in the instant case is dated 16.5.1980. The date of rejection of the Plaintiff's claim being 27.3.1980, the plaint is clearly beyond one month from the date of such rejection. As was mentioned earlier, the Ordinance does not provide for an appeal from the decision of the Forest Officer. Therefore, the Plaintiff's appeal to the Conservator of Forests dated 7.4.1980 is of no force or avail in law. The action has thus not been instituted in conformity with the provisions of section 33 (1) of the Forest Ordinance. What remains to be decided is whether the plaint should, therefore, have been rejected under section 46 (2) (i) of the Civil Procedure Code.

In *Read v. Samsudin,* (1) it has been stated that "if the plaint is defective in some material points, and that appears on the face of the plaint, but by some oversight the Court has omitted to notice the defect, then the Defendant, on discovering the defect, may properly call the attention of the Court to the point, and then it will be the duty of the Court to act as it ought to have done in the first instance, either to reject the plaint or to return it to the Plaintiff for amendment."

In *Soysa v. Soysa* (2) which followed the decision in *Read v. Samsudin,* it has been held that if on the footing of the averments in a plaint the claim made therein is clearly prescribed, the claim is liable to be dismissed without evidence being gone into or consideration of the averments in the answer.

Again in *Avva Umma v. Casinader,* (3) where the plaint did not allege anything on the face of it which gave it jurisdiction and the Court by an oversight omitted to notice the defect and accepted the plaint, and where the attention of the Court was called to the point by the Defendant, it has been held that the Court ought either to reject the plaint, or to return it to the Plaintiff for amendment.

In *Ratnam v. Dheen,* (4) where the action was one which appeared from the statement in the plaint to be barred by a positive rule of law, it has been held that in terms of section 46 (2) (i) of the Civil Procedure Code the plaint should have been rejected. In that case, the Court was dealing with the provisions of the Rent Restriction Act under which the landlord of any premises to which the Act applied was not entitled to institute action or proceedings for the ejectment of a tenant on the ground that rent was in arrears unless he had given three month's notice of termination of the tenancy and unless the tenant had failed to tender to him the arrears. It is this provision which was held to be a positive rule of law by which the action was barred.

Learned President's Counsel for the respondent drew our attention to some of the Indian decisions relating to Order 7 Rule 11(*d*) of the Indian Civil Procedure Code, which lays down that the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law, a provision somewhat similar to section 46 (2) (i) of our Civil Procedure Code.

In A. I. R. 1928 Oudh 493, it has been held that where a suit is not on the face of it barred by any law but proceeds to the stage of arguments, the suit should be dismissed and the plaint should not be rejected under Rule 11.

Again, in A. I. R. 1961 Punjab 278, it has been held that the provisions of Order 7 Rule II (*d*) of the Civil Procedure Code had no application because there was no statement in the plaint from which it could appear that the suit was barred by any law.

The Indian decisions referred to by learned President's Counsel do not affect the instant case, as it appears from the plaint of the present action that the action has been instituted beyond the period of limitation fixed under the Statute.

On a consideration of the authorities cited and applying those principles to the facts of the instant case, I am of the view that this action was barred by a positive rule of law, *viz.* the provisions of section 33 (1) of the Forest Ordinance and the plaint should, therefore, have been rejected.

The other ground on which the Appellant relied was that the Defendant to this action was not a legal person and that the action could, therefore, not have been maintained against the Defendant named in the plaint. As is evident from the plaint, the Defendant has been described as the Divisional Forest Officer, Southern Division, Galle. It is submitted that the Defendant so described is not a statutory functionary who could be sued as a Corporation Sole. In *The Land Commissioner v. Ladamuttu Pillai* (5) it has been held by the Privy Council that the Land Commissioner is not a Corporation Sole. So also, in *Singho Mahatmaya v. The Land Commissioner.* (6) the Supreme Court has held that the Land Commissioner cannot be regarded as a Corporation Sole and, therefore, cannot be sued nomine officii.

As the party to an action should be either a natural or a legal person and as the Divisional Forest Officer, Southern Division, Galle does not fall into either category, it is submitted that the Defendant who had been cited nomine officii as a party to the action should have been struck out under section 18 (1) of the Civil Procedure Code. However, learned Senior State Counsel concedes that it was open to the Court to have returned the plaint for amendment and that the plaint need not necessarily have been rejected at that stage on this ground. While this would be the correct legal position, it is important to bear in mind the provisions of section 456 of the Civil Procedure Code regarding actions by or against the State and of section 461 thereof relating to the period of notice in respect of such actions.

It seems to me that the learned District Judge was in error when he took the view that he was estopped from rejecting the plaint under section 46 (2) (i) of the Civil Procedure Code at that stage as the plaint had been accepted by the Court earlier. As the authorities referred to above clearly

indicate, once the matter is brought to the notice of the Court, it is competent for the Court to make an appropriate order, as when the matter would have come to its notice at the stage when the plaint was entertained.

In regard to the defendant being sued nomine officii, the learned District Judge could have permitted an amendment of the plaint and need not necessarily have rejected the same. But, as the Appellant is entitled to succeed on the first ground, namely, that the action was barred by a positive rule of law, the second ground on which the Appellant relied does not affect the ultimate decision of this case. I would, therefore, set aside the order of the learned District Judge dated 30.5.1983 and make order that the plaint be rejected under section 46 (2) (i) of the Civil Procedure Code.

The appeal is allowed with costs.

ANANDA COOMARASWAMY, J. —I, agree.

Appeal allowed.