
(2015) 11 OHC CK 0016
In the Orissa High Court
Case No : W.P.(C) No. 15161 of 2008

Abhimanyu Nayak and Others

APPELLANT

Vs

Basanta Mohanty and Others

RESPONDENT

Date of Decision : 20-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 17, 80, 80(1), 80(2)
Constitution of India, 1950 — Article 227

Citation : (2015) 11 OHC CK 0016

Hon'ble Judges : Akshaya Kumar Rath, J.

Bench : Single Bench

Advocate : Soumya Mishra, Advocate, for the Appellant; D.P. Mohanty, Advocate, for the Respondent

Final Decision : Dismissed

Judgement

Dr. Akshaya Kumar Rath, J.—In this petition under Article 227 of the Constitution of India, challenge is made to the order dated 22.9.2008 passed by the learned Civil Judge (Jr.Division), Anandapur in C.S. No. 43 of 2006. By the said order, the learned trial court rejected the application of the plaintiffs to amend the plaint under Order 6 Rule 17 C.P.C. to implead the State of Odisha as defendant on the ground inter alia that prior notice under Section 80(1) C.P.C. has not been issued to the State of Odisha.

2. The petitioners as plaintiffs instituted a suit for permanent injunction impleading the opposite parties as defendants in the court of the learned Civil Judge (Jr.Division), Anandapur, which is registered as C.S. No. 43 of 2006. During pendency of the suit, the plaintiffs filed an application for amendment of the plaint. In the proposed amendment No. 1, the plaintiffs sought to incorporate the fact of amalgamation of certain areas of the suit plot in another plot belonging to the Government. In the proposed amendment No. 2, the plaintiffs sought to introduce the new prayer for declaration of right, title and interest in respect of the property, which stood recorded in the name of Government and in

the proposed amendment No. 3, the plaintiffs sought to implead the State of Odisha represented by the Collector, Keonjhar as defendant No. 9. The application for amendment was objected to by the defendants. By order dated 22.9.2008, the learned trial court rejected the application holding that prior notice under Section 80(1) C.P.C. has not been issued to the State of Odisha.

3. Heard Mr. Soumya Mishra, learned Advocate for the petitioners and Mr. D.P. Mohanty, learned Advocate for the opposite parties.

4. Mr. Mishra, learned Advocate for the petitioners submitted that the land appertaining to plot No. 302 under khata No. 7 area Ac.0.23 decimals of mouza of Habaleswar was recorded in the name of Ananta Sahoo in the hal settlement record of right published in the year 1975. He sold the same to the plaintiffs by means of registered sale deed No. 1132 dated 9.7.2002 for a valid consideration and, thereafter delivered possession. The plaintiffs had also purchased the adjoining plot i.e. plot No. 303 and thereafter mutated the land in their names. He submitted that during pendency of the suit, the plaintiffs deputed a private Amin for demarcation of the suit land. It was brought to their notice from the demarcation report that though R.O.R. revealed the names of the plaintiffs in respect of the entire suit land measuring an area Ac.0.23 decimals, in the map the suit land had been wrongly amalgamated in the adjoining plot No. 336, which stands in the name of State Government. Thus, the application for amendment was filed. Criticising the order passed by the learned trial court, he further submitted that the application for amendment qua impletion of State of Odisha as defendant No. 9 could not have been rejected for non-compliance of notice under Section 80(1) C.P.C. as it is available to the plaintiffs to file application for waiver of the notice by resorting to the provision of Section 80(2) C.P.C. at the time of presentation of the amended plaint. He further submitted that in an application for amendment, the Court has to consider as to whether the proposed amendment is required for determining the real questions in controversy between the parties and if the same will change the nature and character of the suit, thereby, prejudicing the interests of the adversary. But then, in the instant case, the learned trial court has taken into consideration the irrelevant factors, which are not germane for consideration of the application for amendment, and as such the learned trial court has acted in exercise of its jurisdiction illegally and with material irregularity. He further submitted that the learned trial court travelled beyond its jurisdiction in considering the merits of the case while adjudicating upon the application for amendment. He further submitted that the cause of action against the State of Odisha arose after institution of suit and as such the application for amendment for adding the State of Odisha as a party to the suit ought to have been allowed. According to him, issuance of notice under Section 80(1) C.P.C. can be considered by the learned trial court at the time of hearing of the suit and on this score, the application for amendment cannot be rejected. He relied on two decisions of this Court in the case of Debakanta Ray Vs. Secretary, Rotary Club--> and Sk. Dofian Hossain Vs. Narayan Keshi and Others, .

5. Per contra, Mr. Mohanty, learned Advocate for the opposite parties supported the impugned order passed by the learned trial court.

6. Section 80(1) C.P.C., which is hub of the issue, is quoted hereunder:--

"80. Notice.--(1) Save as otherwise provided in sub-section (2), no suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two 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, except where it relates to a railway, a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to railway, the General Manager of that railway;

(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;

(c) in the case of a suit against any other State Government, a Secretary to that Government or the Collector of the district;

and, in the case of a public officer, delivered to him or left at his office, 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 or left.

xxx xxx xxx"

7. On a conspectus of the said section, it is evident that service of notice under Section 80(1) C.P.C. is a sine qua non prior to institution of the suit against the Central Government/Railway/State Government. If the suit is of such nature, urgent or immediate relief sought for against the State Government or any public officer in respect of any act purporting to be done by such officer in his official capacity, suit may be instituted, with the leave of the Court, without serving any notice as required by sub section 1. The provision is imperative. It is not every amendment of plaint, which requires prior notice under Section 80(1) C.P.C. Only when new relief is sought for or when the amendment introduces a new cause of action, notice under Section 80(1) is necessary. In the case of amendment which is formal in nature or to elucidate the foundational facts already exist in the plaint, the same does not require any notice under Section 80 CPC.

8. The Calcutta High Court in the case of Manindra Chandra Nandi Vrs. Secretary of State for India, 34 Cal 257 held that where a new cause of action is sought to be introduced in addition to a cause of action specified in the plaint against the Government, notice under Section 80 is a pre-requisite. In The Province of Madras Vs. R.B. Poddar, , an application to amend the plaint by adding a paragraph to the original plaint was allowed by the learned trial court. The

Provincial Government represented by the Collector sought to revise that order on the ground that as the amendment introduced a new cause of action, the same could not be allowed without the imperative pre-requisites of a notice under Section 80 C.P.C. The Court held the proposed amendment had introduced a fresh cause of action, which was outside the scope of the suit as originally framed and was inconsistent with the allegation made earlier, the learned Sub-Judge was not justified in allowing the amendment, as *ex concessis* no previous notice has been served on the Government informing them of the new cause of action. In *Sk. Dofian Hossain (supra)*, the plaintiff filed a suit in representative capacity for a declaration of customary right of the villagers over the suit land. The defendants 1 and 2 countered the plaintiff's claim of customary right and asserted the claim over the same. The learned trial court dismissed the suit. The unsuccessful plaintiffs preferred an appeal before the learned Additional District Judge, Bhadrak. During pendency of the appeal, they filed an application under Order 6 Rule 17 C.P.C. praying for impleadment of State of Odisha as party defendant. The prayer was objected to by the defendants. The learned Additional District Judge allowed the application and remanded the suit to the learned trial court for *de novo* trial. Defendant No. 1 filed an appeal before this Court challenging the order of remand. This Court set aside the order passed by the learned appellate court and remanded the matter back for fresh disposal. Consequent upon the remand, the learned lower appellate court allowed the application and impleaded the State of Odisha as a party defendant. This Court held that the provision being imperative, failure to serve notice complying with the requirement will entail dismissal of the suit. It was further held that service of notice under Section 80(1) C.P.C. is not an empty formality. The object of such notice is to give the concerned Government or public officer an opportunity to reconsider the legal position and settle the claim, if so advised, without leading to any legal battle. The legislative intention behind such provision is that public money and time should not be wasted on unnecessary litigation and the Government or the public officer should be given reasonable opportunity to examine the claim made against them. In *Debakanta Ray (supra)*, the plaintiff instituted a suit for declaration and other consequential reliefs impleading the opposite party as defendant. Two applications were filed under Order 6 Rule 17 C.P.C. for impleadment of State of Orissa as a party to the suit. Both the applications were rejected. It was submitted on behalf of the plaintiff that a copy of the notice under Section 80 of CPC and a memo in support of the receipt had been received by the Collector, Puri. The undisputed fact was that the suit was instituted on 15.4.2008 whereas notice was sent in compliance of Section 80 C.P.C. on 17.6.2008. Thus, notice was sent after institution of the suit. The learned Judge distinguished the ratio laid down in *Sk. Dofian Hossain (supra)* on the premises that the court was perhaps of the view that if the requirements of Section 80 C.P.C. was complied with prior to filing of the amendment of the petition, the State could have been made as a party by filing an appropriate application.

9. In *Bishandayal and Sons Vs. State of Orissa and Others*, , the apex court in paragraph-16 of the report held as follows:--

"16. There can be no dispute to the proposition that a notice under Section 80 can be waived. But the question is whether merely because in the amended written statement such a plea is not taken it amounts to waiver. This contention was argued before the appellate court. Even otherwise, we find that in the suit itself Issue No. 4 had been raised as to whether or not there was a valid and appropriate notice under Section 80 . Such a point having been taken in the original written statement and an issue having been raised, it was not necessary that in the amended written statement such a plea be again taken. On behalf of the respondents, reliance has been placed on the case of *Gangappa Gurupadappa Gugwad v. Rachawwa and others*, wherein it has been held that where the plaintiff's cause of action is against a Government and the plaint does not show that notice under Section 80 was served, it would be duty of the Court to reject the plaint. In this case the original notice was only in respect of a claim under the plaint as it originally stood. That claim was on the basis that there was a concluded contract and that the appellants had already acquired rights in the mill and the lands. As has been fairly conceded those reliefs were not maintainable and were given up before the appellate court. The amended plaint was on an entirely new cause of action. It was based on facts and events which took place after the filing of the original plant. It was a fresh case. Now the claim was for specific performance of the agreement alleged to have been entered into on 29-12-1978. Admittedly no notice under Section 80 CPC was given for this case. As there was an issue pertaining to notice under Section 80 , the trial court should have dealt with this aspect. The trial court failed to do so. It was then pressed before the appellate court. In our view, the finding in the impugned judgment that the suit based on this claim was not maintainable is correct and requires no interference. If a new cause of action is being introduced a fresh notice under Section 80 CPC would be required to be given. The same not having been given, the suit on this cause of action was not maintainable."

10. Initially the State of Odisha was not a party to the suit. By way of proposed amendment, the plaintiffs intended to implead the State of Odisha as a party defendant. It is asserted by the plaintiffs that the cause of action against the State of Odisha arose after institution of the suit. But then the provision under Section 80(1) C.P.C. being imperative in nature, prior notice under Section 80(1) CPC to the State of Odisha is a sine qua non. It is not an empty formality. None compliance of requirements of Section 80 C.P.C. will entail dismissal of the suit. Admittedly before moving the application for impleadment of State of Odisha as a party defendant, no notice under Section 80 C.P.C had been issued to the State of Odisha. No material has been brought to the notice of the Court that the case is of urgent in nature for which notice under Section 80 C.P.C. could not be issued to the State of Odisha. Since the new cause of action is being introduced, notice under Section 80 C.P.C. would be required to be given.

11. The petition, sans any merit, deserves dismissal. Accordingly, the same is dismissed.