
(2014) 04 CHH CK 0052
In the Chhattisgarh High Court
Case No : Second Appeal No. 81/2014

Bhagwan Das and Others

APPELLANT

Vs

Municipal Corporation and Others

RESPONDENT

Date of Decision : 02-04-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 100, 80, 80(1), 80(2) —
Limitation Act, 1963 - Section 15 — Madhya Pradesh Municipal Corporation Act, 1956 -
Section 401, 401(1), 68(1) — Specific Relief Act, 1963 - Section 38 — Uttar Pradesh
Avas Evam Vikas Parishad Adhiniyam, 1965 - Section 88 (2), 88(2)

Citation : (2015) 2 MPHT 62

Hon'ble Judges : Sanjay K. Agrawal, J.

Bench : Single Bench

Advocate : Rajeev Shrivastava, Advocate, for the Appellant; Sharmila Singhai,
for the Respondent

Final Decision : Dismissed

Judgement

Sanjay K. Agrawal, J.?Invoking Section 100 of Code of Civil Procedure against the impugned judgment and decree dated 6-12-2013 passed by Sixth Additional District Judge, Durg in Civil Appeal No. 24-A/2013, affirming the judgment and decree dated 29-11-2002 passed by Second Civil Judge, Class I, Durg in Civil Suit No. 120-A/2002, the plaintiff has filed this second appeal.

[For sake of convenience, the parties would be referred hereinafter as per their status shown in the suit before the Trial Court].

Sans unnecessary details, the facts, which are essential to be stated for the purpose of disposal of the present second appeal are as under:--

1.1. The plaintiffs-Bhagwan Das and Ranchor Bai filed a suit for declaration of title and permanent injunction restraining the Municipal Corporation, Durg and State of Chhattisgarh through Collector, Durg, defendants therein for restraining them from interfering their peaceful possession.

1.2. The Trial Court, by its judgment and decree dated 29-11-2002, after appreciating oral and documentary evidence on record, dismissed the suit of the plaintiffs holding that the plaintiffs have encroached upon 341'-6" feet of the State Government land owned by the Public Works Department and the plaintiffs had constructed over and above 156 sq. ft. against the sanctioned map by Municipal Corporation.

1.3. The First Appellate Court, by its judgment and decree dated 6-12-2013 affirmed the findings recorded by the Trial Court and dismissed the appeal.

2. Mr. Rajeev Shrivastava, learned Counsel appearing for the appellants/plaintiffs would submit that the concurrent findings recorded by two Courts below are perverse and contrary to the record and that gives rise to substantial question of law for determination of this second appeal.

3(1). Mr. Sanjeev Agrawal, learned Panel Lawyer appearing for the State would raise a preliminary objection and submit that plaintiffs' suit was not maintainable as neither leave was sought under Section 80(2) of the Code of Civil Procedure, 1908 (henceforth "CPC"), nor notice under Section 80(1) of the CPC was served before instituting the suit against the State, which is mandatory provision of law, thus, the appeal is liable to be dismissed.

3(2). Ms. Sharmila Singhai, learned Counsel appearing for respondent No. 1-Municipal Corporation on caveat has raised a preliminary objection and would submit that suit as framed and filed against Municipal Corporation is bad in absence of notice of suit served under Section 401(1) of the Municipal Corporation Act, 1956 (henceforth "the Act of 1956").

4. Replying preliminary objection, Mr. Shrivastava, learned Counsel for the appellant would submit that defendants' have waived such objection of non-serving of the notice respectively under Section 80(1) of the CPC, and Section 401(1) of the Act of 1956, as no such objection was raised before the Courts below, therefore, preliminary objection deserves to be overruled.

5. I will first take up two preliminary objections raised on behalf of the Municipal Corporation and State Government one by one. First objection is by the State Government, neither notice under Section 80, CPC was served nor leave was granted under Section 82, CPC to file suit without service of notice.

6. It would be profitable to note, Section 80 of the CPC, which runs thus:--

"80. Notice.--(1) Save as otherwise provided in sub-section (2), no suits shall be instituted against the Government (including the Government of the State of Jammu & 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 a railway, the General Manager of that railway;

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(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 that behalf;

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

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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."

7. According to Section 80(1) of the CPC, 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/served and said provision has been held to be the mandatory provision by the Supreme Court in case of *Bihari Chowdhary and Another Vs. State of Bihar and Others*, . Paragraphs 5 and 6 of the report provides as under:--

"5. The Judicial Committee of the Privy Council had occasion to consider the scope and effect of Section 80, CPC in an almost similar situation in *Bhagchand Dagadusa and others Vs. Secretary of State for India in Council and others*, (1927) 54 Ind. App. 338 : AIR 1927 PC 176 . In that case, though a notice had been issued by the plaintiffs under Section 80, CPC on 26th June 1922, the suit was instituted before the expiry of the period of two months from the said date. It was contended before the Privy Council, relying on some early decisions of before the Privy Council, relying on some early decisions of High Court of Bombay, that because one of the reliefs claimed in the suit was the grant of a perpetual injunction and the claim for the said relief would have become infructuous if the plaintiffs were to wait for the statutory period of two months prescribed in Section 80, CPC before they filed the suit, the rigour of the section should be relaxed by implication of a suitable exception or a qualification in respect of a suit for emergent relief, such as one for injunction. That contention did not find favour with the Privy Council and it was held that Section 80 is express, explicit and mandatory and it admits no implications or exceptions. The Judicial Committee observed:--

"To argue as appellants did, that the plaintiffs had a right urgently calling for a remedy, while Section 80 is mere procedure, is fallacious, for Section 80 imposes a statutory and unqualified obligation upon the Court."

This decision was subsequently followed by the Judicial Committee in Vellayan Vs. Madras Province, (1941) 74 Ind App 223 : AIR 1947 PC 197 . The dictum laid down by the Judicial Committee in Bhagchand Dagadusa Vs. Secretary of State for India, (1927) 54 Ind. App. 338 : AIR 1927 PC 176 , was cited with approval and followed by a Bench of five Judges of this Court in Sawai Singhai Nirmal Chand Vs. Union of India, .

6. It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice under Section 80, CPC is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable."

8. The Supreme Court, in case of Union of India (UOI) and Others Vs. West Coast Paper Mills Ltd. and Another, , has held that service of notice under Section 80 of the CPC is mandatory for instituting suit and held as under:--

"12.....Firstly, the period of two months required by Section 80 of the Code whereunder notice is mandatorily required to be given before filing the civil suit has to be excluded from computing the period of limitation under sub-section (2) of Section 15 of the Limitation Act, 1963."

9. Thus, in the light of the ratio laid down by the Supreme Court in aforesaid cases, it is held that the instant suit as framed and filed without service of notice under Section 80(1), CPC was not maintainable in law.

10. Likewise the preliminary objection raised by Municipal Corporation is based an Section 401(1) of the Act of 1956. Section 401(1) of the Act of 1956 is reproduced for ready reference:--

"401. Notice, limitation and tender of amends in suit against Corporation etc.--
(1) No suit shall be instituted against the Corporation, the Mayor-in-Council, or any Corporation Officer or servant, or any person acting under the direction of the Corporation, the Mayor-in-Council or any Municipal Officer or servant, in respect of any act done or purporting to have been done in pursuance or execution or intended execution of this Act, or in respect of any alleged neglect or default in the execution of this Act or any rule or bye-law made thereunder until the expiration of one month next after notice in writing has been delivered or left at the Chief Corporation Office or at the residence of such officer, servant or person standing with adequate particulars:--

(a) the cause of action;

(b) the name and residence of the intending plaintiff and of his Advocate, Pleader or agent, if any. For purpose of the suit; and

(c) the relief which he claims.

(2) Every such suit shall be commenced within six months next after the accrual

of the cause of action, and the plaint therein shall contain a statement that a notice has been delivered or left as required by sub-section (1).

(3) If the Corporation or any person to whom any notice is given under sub-section (1) has tendered sufficient amends to the plaintiff before the suit is instituted, the suit shall be dismissed.

(4) If the defendant in any such suit is the Commissioner or any other Corporation Officer or servant, payment of any sum or part thereof payable by him or in consequence of the suit may, with the sanction of the Mayor-in-Council, be made from the Municipal Fund."

11. On a reading of the above-quoted provision, it would be apparent that the provision starts with a negative expression that no suit shall be instituted against the Municipal Corporation until the expiry of one month next after notice in writing has been delivered to the Corporation and that the notice should contain particulars regarding cause of action, name and residence of intending plaintiff and his Advocate and the relief which he claims. In the present case, no notice has been served to the Municipal Corporation before instituting instant suit against him.

12. In case of Municipal Corporation Murwara-Katni, Katni Vs. Lalchand Jaiswal, , the Madhya Pradesh High Court has held that it is mandatory to serve notice under Section 401(1) of the Act of 1956 prior to the filing of the suit and there is no provision in the Act in case of emergency and where an injunction is sought, a suit could be filed without serving a notice under Section 401(1) of the Act of 1956. Paragraph 5 of the report states as under:--

"5. Having heard the Counsel for both the parties, this Court is of the view that service of notice under Section 401(1) of "the Act" to the Municipal Corporation, Katni would be mandatory for the reason that the Municipal Corporation derives its authority under the Act. Its constitution is under the Act and it can have no power whatsoever apart from the Act. The delegation of powers to renew licence under "the Rules of 1996" cannot be apart from the powers of Municipal Corporation under the Act. The conferral of power to grant or renewal of licence is covered by Section 68(1) of the Act read with item No. 7 of the Schedule. Therefore, any act or omission on the part of the Municipal Corporation shall be covered by Section 401(1) of the Act. It would be directly applicable and no suit could be filed against the Corporation without serving a notice under Section 401(1) of the Act. It is mandatory to serve notice under Section 401(1) of the Act prior to filing of the suit. There is no provision in the Act that in case of emergency and where an injunction is sought a suit could be filed without serving a notice under Section 401(1) of the Act. There is no provision for taking permission of the Court for relaxation of notice under Section 401(1) of the Act. It appears to this Court that under the Act, no relaxation has been given for a suit instituted under Section 38 of the Specific Relief Act.

In the opinion of this Court, the order granting permission to file the suit without

a legal notice was an ex parte order and the applicants had right to object to it by filing an application under Order 7, Rule 11 of the Code of Civil Procedure. For all these reasons, in the opinion of this Court, the plaint filed by the applicant, was liable to be rejected."

13. In case of Baldev Singh Bhatia Vs. The Commissioner, Nagar Palika Nigam and Others, , the Madhya Pradesh High Court has held that Court had no authority to grant leave to file the suit before expiration of one month as such provision is not envisaged in Section 401 of the Act of 1956.

14. In case of M/s. Mangilal Pagariya Builders and Contractors Vs. Nagar Palika Nigam, , this Court noticing the Municipal Corporation, Murwara, Katni (supra), has held that civil suit cannot be held maintainable in absence of serving of notice under Section 401 of the Act of 1956 and held as under:--

"25. In Baldev Singh Bhatia Vs. The Commissioner, Nagar Palika Nigam and Others, , it has been held that in the language of Section 401 of the Act 1956, there is no provision for grant of leave as has been envisaged under sub-section (2) of Section 80 of CPC. The Court after referring to the provision contained in Section 80, CPC prior to its amendment by CPC (Amendment Act 1976) (Act No. 104 of 1976) observed that under the said provision if a suit is filed before expiry of notice period of two months, it is not maintainable. Reference to the law laid down by the Supreme Court in the matter of Bihari Chowdhary and Another Vs. State of Bihar and Others, has been made to conclude that a suit filed without following the requirement of prior notice under Section 80, CPC is not validly instituted and such suit has to be dismissed as not maintainable, therefore, applying the ratio the M.P. High Court held that if notice has not been issued or the suit has been filed before the expiry of period of notice, the Court had no authority to grant leave to file the suit before expiration of one month as such provision is not envisaged in Section 401 of the Act, 1956."

15. Thus, the service of notice under Section 401(1) of the Act of 1956 is mandatory for institution of the suit and in the instant suit Section 401(1) of the Act of 1956 has not been complied with and suit has been instituted without following Section 401(1) of the Act of 1956.

16. The short question that falls for consideration is whether defendants are entitled to raise such a plea with regard to the maintainability of the suit in the instant second appeal as urged by Mr. Shrivastava.

17. The question as to whether defendants are entitled to raise the plea of non-issuance of the statutory notice to the defendant/State and Municipal Corporation prior to the institution of the suit is no longer res Integra and very recently the Supreme Court in case of U.P. Avas Evam Vikas Parishad and Others Vs. Om Prakash Sharma, , has clearly held that non-issuance of a statutory notice prior to institution of the suit is a legal ground, which can be raised at any point of time, even in the second appeal. Paragraph 33 of the report reads as under:--

"33. To institute a suit against the LLP. Avas Evam Vikas Parishad, the plaintiff was required to issue notice under Section 88 (2) of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965, which is mandatory in law. Undisputedly, no such notice was issued to the first defendant. The plea taken by the plaintiff that the defendants have waived their right in urging their plea that the suit is not maintainable for non-issuance of notice under Section 88(2) to the first defendant for institution of suit by the plaintiff is wholly untenable in law and the finding recorded by the Trial Court that the defendants did not take this plea in its original written submissions is also wholly untenable in law. Also the plea that after the remand order that said plea was taken belatedly by the first defendant, therefore, it has waived its right, is erroneous finding recorded by the Trial Court. The said finding of the Trial Court, which has been accepted by the High Court, also suffers from error in law. The maintainability of the suit on the ground of non-issuance of a statutory notice to the first defendant prior to institution of the suit is a legal ground, which can be raised at any point of time, even in the second appeal; this is well-established principle of law. Therefore, the plaintiff had no right to institute a suit in absence of the notice under Section 88(2) of the Act, which is mandatory in law."

18. In view of the above legal propositions of law laid down in the aforesaid cases, it is held that the defendants are entitled to raise the plea of non-issuance/non-serving of statutory notice under Section 80(1) of the CPC and Section 401(1) of the Act of 1956 at the stage of second appeal. It is further held that suit instituted by the plaintiffs against the State Government and Municipal Corporation in respect of Official Act without issuing/serving statutory notice in terms of Section 80(1) of the CPC and Section 401(1) of the Act of 1956 respectively, suit is not maintainable in law and plaintiffs' plea of waiver of such a plea is unacceptable.

19. Coming to the factual matrix of the case, the Trial Court after due appreciation of oral and documentary evidence on record has clearly recorded a finding that the plaintiffs are encroacher upon the Government land to the extent of 341'-6" sq. ft. and on appeal, the First Appellate Court has accepted the said finding. The concurrent finding of fact recorded by both the Courts below is based on evidence and there is no perversity, no substantial question of law is involved in this second appeal. As such both the Courts below are absolutely justified in dismissing the suit and I hereby affirm the finding so recorded by both the Courts below. For the foregoing reasons, second appeal deserves to be and accordingly dismissed. No order as to costs.