
(1984) 02 PAT CK 0019

In the Patna High Court

Case No : A.F.A.D. No's. 104 and 105 of 1974

Bidhu Bhusan Purcait and Others

APPELLANT

Vs

S.A. Aziz and Others

RESPONDENT

Date of Decision : 22-02-1984

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 17 Rule 2, Order 9 Rule 6(1), 80

Citation : AIR 1985 Patna 165 : (1985) 33 BLJR 777 : (1984) PLJR 486

Hon'ble Judges : Prabha Shanker Mishra, J

Bench : Single Bench

Advocate : B.C. Ghose, S.K. Ghose, S.K. Das and S.N. Das, for the Appellant;

Final Decision : Allowed

Judgement

Prabha Shanker Mishra, J.—These two appeals filed in this Court in the year 1974 are glaring examples of laws delayed, casual and inadvertent errors in the procedure and application of law by the Courts and apathy and reluctance of the respondents Union of India and its officers in speedy disposal of cases by the Courts. P

2. Original plaintiff Bidhu Bhusan Purkait who filed Money Suit No. 203 of 1951 giving rise to Money Appeal No. 21 of 1967 in the Courts below and Second Appeal No. 104 of 1974 before this Court, as also Money Suit No. 154 of 1953 giving rise to Money Appeal No. 20 of 1967 in the Courts below and Second Appeal No. 105 of 1974 before this Court, has died and his heirs, namely, his widow and sons have been substituted as appellants before this Court in his place vide order No. 7, dated 6-7-1976. Money Suit No. 203 of 1951, Money Appeal No. 21 of 1967 were, and Second Appeal No. 104 of 1974 is filed against only one defendant-respondent, namely, S. A. Aziz. Money Suit No. 154 of 1953, Money Appeal No. 20 of 1967 had and Second Appeal No. 105 of 1974 has three defendant-respondents including the Union of India. The two money suits, however, were heard together and disposal of by a common judgment and decree. Similarly the two money appeals were heard together and disposed of by

a common judgment and decree. Although two separate appeals have been filed before this Court, being Second Appeal No. 104 of 1974 and Second Appeal No. 105 of 1974, they have been heard together and are being disposed of by a common judgment.

3. Stating in brief, the original plaintiffs case was, which the appellants seek to continue, that he was an employee of the Government of India in the Telegraph Section of the Posts & Telegraphs Department. He worked in the gazetted rank of telegraph engineer in Wireless Service, Class II, since June, 1946 and worked as S. D. O., Telegraphs, till March, 1948. During this period and thereafter the defendants created and tried to create false evidence against him, lodged false complaints, concocted evidence, made false reports against him and laid false traps to implicate him in false criminal cases on the false allegation of taking bribe and coerced employees of the Telegraph Department to give false evidence and report to the police. They got searches made in the office and premises of the original plaintiff during his absence on duty and made false reports to his departmental superiors. According to him, by these acts and conduct the defendants created prejudice in the minds of the superior officers of the original plaintiff who acting" upon their suggestions degraded and reverted him as Engineering Supervisor on 18-4-1949. This reduction in rank was done violating the mandatory requirements of Article 311 of the Constitution of India and the statutory rules in this behalf, as a result of which he sustained pecuniary loss, loss of position and prestige, worries and mental agony. He valued, however, his suits for damages tentatively at the time of the filing of the suits at R. 1,300/- only, the details whereof have been given in the complaints of the respective suits. Defendant of Money Suit No. 203 of 1951 appeared and filed written statement, but thereafter left the case for good. In Money Suit No. 154 of 1953 the Union of India and other defendants appeared and filed their separate written statements. In the written statements objection was raised as to the maintainability of the suit on the ground that no notice u/s 80 of the CPC was served either upon the defendant of Money Suit No. 203 of 1951 or upon defendants 1 and 2 of Money Suit No. 154 of 1953. They maintained that all their acts were done in the official capacity in discharge of their respective duties. In the absence of a notice u/s 80 of the CPC the suits were not maintainable. They denied to have acted with any malice or to have done anything irregular or illegal. They asserted that they did not create any false document or false evidence, they coerced none. They did nothing false. They concocted nothing. The sole defendant of Money Suit No. 203 of 1951 was/is an employee of the Posts & Telegraphs Department. Defendant Nos. 1 and 2 of Money Suit No. 154 of 1953 were/are employees of the Special Police Establishment of the Home Ministry, Government of India.

4. The original plaintiff appeared, led evidence and also filed a petition upon which the Court ordered calling for certain documents from the Department concerned and the respondents. Defendants, however, produced no evidence and although certain documents were filed, they were not proved or exhibited in the trial of the suits in accordance with law. The trial Court held, however, that

the suit was not maintainable because a notice u/s 80 of the CPC was necessary to the defendants 1 and 2 of Money Suit No. 154 of 1953 and the sole defendant of Money Suit No. 203 of 1951 and since no such notice had been given to them the suits were not maintainable. It adverted to the merits of the case also and held that the plaintiff failed to prove that the defendants maliciously manufactured and concocted false evidence against him and/or misdirected his superior officers to take departmental action against him. The Court of appeal below, after hearing the parties affirmed the judgment of the trial Court. The original plaintiff filed the aforementioned two appeals. As he is dead, his heirs have been substituted in his place and they have pressed the appeals before me.

5. Mr. B. C. Ghose, learned counsel appearing for the appellants, has contended that the Courts below have fallen in error in holding that the suit could not proceed-without a notice u/s 80 of the Code of Civil Procedure. He has pointed out that the notice before the institution of the suit is necessary only if the cause for the action in the Court is one purporting to be done by such public officer in his official capacity, The original plaintiff complained against the defendant of Money Suit No. 203 of 1951 not in respect of any act done by him in colour of his office, but for his intrigues and acts to falsely malign the plaintiff and make him suffer. His allegations against the defendants Nos. 1 and 2 of Money Suit No, 154 of 1953 were also not connected with any work done by them in official capacity. Such being the position the Courts below ought to have held that the suit, without any notice u/s 80 of the CPC served upon them, was maintainable. He has drawn my attention to a Bench decision of this Court in the case of the The State of Bihar and Another Vs. Jiwan Das Arya, in which speaking for the Court Untwalia, J. stated the law in the following words: --

".....There are two parts of the section. One in regard to the institution of the suit against the Government and the other against a public officer. The inhibition contained in the Section as to the institution of suit against the Government is unqualified. No suit can be instituted against the Government or, as a matter of that, against the State or the Union until the expiration of two months next after notice in writing has been given to the proper authority. It matters little whether the suit relates to the past action of the Government or is in relation to the threatened action or injury and the suit is in the nature of a bill quia timet. But if the suit is to be filed against a public officer, notice is mandatory only when it is in respect of any act purporting to be done by such public officer in his official capacity. If the act is not one purporting to be done by the officer in his official capacity, no notice is necessary."

Following the said dictum of law, H. L. Agrawal, J. in the case of Divisional Electrical Engineer, Eastern Railway v. D. N. Dey, 1975 BLJR 394 stated the law in these words : --

"There must be some nexus between the right of the authority passing the order of dismissal, and his control over the service in question. Article 311(1) of the Constitution simply lays down a limitation on the authority who can pass an

order of dismissal, and nothing beyond that. The penalty of removal from service can be imposed only by the appointing authority or any other higher authority. It is the admitted case of the defendant that he (Divisional Electrical Engineer) was not the appointing authority of the plaintiff, nor any such rule was placed before the Courts below or this Court either to show that he was delegated with the powers of the appointing authority to pass the impugned order of removal of the plaintiff from service.

Once it is held that the order of removal of the plaintiff was without any authority, it at once follows that the said order could not be passed by him in course of his official duty as he had no official capacity at all under the rules to pass the impugned order and accordingly while passing the impugned order, he was not acting as a "public officer." It must, therefore, be held that the defendant was not entitled to a notice u/s 80 of the Code."

A similar view was taken by a Bench of this Court presided over by Fazl Ali, J. and Chatterji, J. in the case of Raja Sri Jyoti Prasad Singh Deo Bahadur Vs. Samuel Henry Seddon and Others, It was stated in the said case that if the act done is not one purporting to be done in the official capacity, Section 80 of the CPC shall not be attracted.

6. In short, the law on the subject is settled. There must be nexus between the right or the official capacity of the authority passing the order and the act complained against. In the absence of any such nexus or connection, a person who may be a public officer otherwise" shall not be protected by the provisions u/s 80 of the Code. A public officer is entitled to such a notice if the act complained of is done by him in his official capacity.

7. There is some attempt, as appears from the judgments of the Courts below to show that defendants Nos. 1 and 2 of Money Suit No. 154 of 1953 and the sole defendant of Money Suit No. 203 of 1951 acted only in their official capacity in doing what they did in bringing to the notice of the authorities concerned facts relating to the conduct of the original plaintiff. Nothing, however, has been stated in the judgment of the either of the Courts below to show what actually they did. One can find whether they acted in the official capacity or not, by particularly noticing the specific acts done by them. A cryptic and a general approach that a public officer shall act only in his official capacity is not a proper and valid approach. That there is no proper appreciation of the legal position in this regard by the Courts below, is evident. Finding that the two suits were Incompetent in the absence of a notice u/s 80 of the Code to defendants 1 and 2 of Money Suit No. 154 of 1953 and the sole defendant of Money Suit No. 203 of 1951 is evidently vitiated and; illegal.

8. Mr. Ghose has also contended that the Courts below have committed error of law in deciding the two suits by not following the procedure prescribed under Order 17, Rule 2 of the Code in Money Suit No. 203 of 1951. This argument is based upon the fact that after filing the written statement the sole defendant of

the said money suit did not appear in the proceedings before the trial Court at any stage of hearing. Mr. Ghose appears to be right in this contention also. Since on the date or dates to which the hearing of the suit was adjourned the defendant was not present the trial Court was required to take recourse to the provisions under Order 17 Rule 2 of the Code. It could dispose of the suit, as provided thereunder, in one of the modes directed in that behalf by Order 9 or could make such other order as it deemed fit. The relevant provision of Order 9, on the facts of the instant case, was/is Rule 6(1)(a). No order, however, as required under Order 17, Rule 2 read with Order 9, Rule 6(1)(a) was passed by the trial Court in Money Suit No. 203 of 1951.

9. Mr. Ghosh has next contended that both the Courts below have approached the case on merits in a peculiar manner. Although they have noticed that no evidence was adduced of behalf of the defendants, yet quite a few documents produced by them have been referred to and relied upon to hold against the plaintiff. How and in what manner these documents appeared in the Court is not understandable. No oral evidence was adduced by the defendants. No documents were proved or exhibited on their behalf, yet such documents have found mention in the judgments of the Courts below and relied upon. Mr. Ghose has also pointed out that the plaintiff called for several papers from the Department, but they were not produced. Instead of drawing adverse inference for withholding evidence against the defendant the Courts took unusual view and said -- "We cannot say definitely that the reports were false and motivated against the plaintiffs". Mr. Ghose appears to be right in his contention in this regard. How could the Courts below look into the materials not duly produced in the trial and refer to them without affording opportunity to the plaintiff to rebut them and/or to explain them? How could the Court accept its helplessness in not giving a finding on the reports whether they were false or motivated against the plaintiff or not, if the department concerned did not obey its order and failed to produce the documents called for by the plaintiff? The entire approach in this regard in the judgments of the Courts below is erroneous and against the norms of judicial procedure. The judgments of the Courts below are such that they can only be called perverse.

10. Unfortunate though it is, that the suits filed in the years 1951 and 1953 have to be revived with a direction that they should be disposed of in accordance with law but such perversity of justice can be remedied in no other manner.

11. In the result, the two second appeals are allowed, the judgment and decree of the Court of Additional Subordinate Judge VI, Patna in Money Appeal No. 20 of 1967 and Money Appeal No. 21 of 1967, and the judgment and decree of the Court of Munsif III, Patna in Money Suit No. 203 of 1951 and Money Suit No. 154 of 1953 are hereby set aside. The case is remitted back to the trial Court for a rehearing and disposal of the two suits in accordance with law in the light of the observations made above. Since there is no appearance on behalf of the respondents, there shall be no order as to costs.