
(2003) 06 AP CK 0012
In the Andhra Pradesh High Court
Case No : C.R.P. No. 2388 of 2002

C. Arjun Rao

APPELLANT

Vs

Dr. T. Ramamohana Rao and Another

RESPONDENT

Date of Decision : 10-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 151, 80
Criminal Procedure Code, 1973 (CrPC) — Section 199

Citation : (2003) 4 ALD 450 : (2004) 1 ALT 358 : (2004) 1 CivCC 464

Hon'ble Judges : V. Eswaraiah, J

Bench : Single Bench

Advocate : Mahmood Ali, for the Appellant; K.V. Chalapathi Rao, for the Respondent

Final Decision : Dismissed

Judgement

V. Eswaraiah, J.—This Civil Revision Petition is filed against the order dated 03/04/2002 in dismissing the petitioner's/ 1st defendant's application filed in I.A. No. 1593/2001 in O.S. No. 654/1993 on the file of the VII Senior Civil Judge, City Civil Court, Hyderabad to reject the plaint for want of notice u/s 80 Code of Civil Procedure. The 1st respondent herein is the plaintiff who filed the said suit for recovery of the damages of Rs. 5,00,000/- against the 1st defendant (petitioner herein) for malicious prosecution of the plaintiff in C.C. No. 1/1990 under different heads along with interest and costs. For the sake of convenience, the parties herein are referred to as they are arrayed in the suit.

2. The brief facts of the case are as follows. The plaint was filed on 10/06/1993. Defendant No. 1 filed written statement on 09/04/1994. It is the case of the plaintiff that he has submitted a plan for construction of his house to the Municipal Corporation of Hyderabad for sanction in the year 1986 but the Municipal Corporation of Hyderabad rejected the same. Then the plaintiff applied to the Government for relaxation of the rules. At the relevant point of time, the 1st defendant who was working as Secretary to the Municipal Administration. As

his application was not processed by the 1st defendant and another person Sri G.V. Ramana Reddy, who was working as Special Architech:Cum:Additional Secretary to Government, Municipal Administration, Secretariat, he had to make applications before the Ministers and the Hon"ble Chief Minister. On 24/02/1987, the petitioner made a representation to the Hon"ble Chief Minister and the said application was endorsed by the Hon"ble Chief Minister on 17/03/1987 and he directed the 1st defendant to put up a note in a week and send the file to him. But the 1st defendant directed Sri G.V. Ramana Reddy to put up a note and on 21/06/1987 by side tracking the issue of the plaintiff's appeal stating that certain allegations have been made against him which are defamatory and accordingly obtained orders in G.O.Ms. No. 653 Municipal Administration dated 15/07/1987 granting permission to himself and his subordinate to prosecute the plaintiff on their behalf for making alleged defamatory allegations without considering whether the allegations of the plaintiff are reasonable and probable. It is stated that the allegations made in his applications are that he is a medical graduate and he is in need of a shelter for his self occupation and, therefore, he wanted to construct a house in the place of his old house but the Municipal Corporation refused to approve the house plan filed on 19/12/1985 and, therefore, he had to approach the Government and accordingly made a representation before the concerned Municipal Administration Minister on 29/09/1986 but there was no reply. It is stated that there was indifferent and callous attitude of bureaucracy forcing him to chase the file from time to time and he had to visit more than 20 times to the office of the 1st respondent. In that context, it is stated that the 1st respondent owns a palatial building at Visakhapatnam while his tenure as District Collector and he was not a member of the Jubilee Hills Housing Society when it was formed and his wife was made a member of the society after he became Special Officer of Municipal Corporation of Hyderabad. He claims that it was under VIP quota. There is no such VIP quota in Housing Society's Bye-laws. He managed to get 1500 Sq.Yds to his wife and constructed another palatial building at Hyderabad. He has possessed several houses leave alone his source of income by abuse of his authority. While possessing a house constructed with the public exchequer having obtained loan from the Government he is enjoying the said premises also. He made allegations against the concerned Ministers and Additional Secretary to the Municipal Administration also. It is stated that the 1st defendant managed to get the orders for the prosecution of the plaintiff u/s 199 Criminal Procedure Code for the alleged offence of the defamation relating to imputation against the 1st defendant namely, C. Arjun Rao, IAS, Secretary to Government, Municipal Administration and Urban Development Department by the aforesaid orders and accordingly Public Prosecutor was made to take steps to prosecute the plaintiff in C.C. No. 1/1987 on the file of the Metropolitan Sessions Judge, Hyderabad which was renumbered as C.C. No. 1/1990 on the file of the II Metropolitan Sessions Judge, Hyderabad. However, it is stated that the plaintiff was acquitted. Thus, it is stated by the plaintiff that the 1st defendant by abusive of his authority as Secretary to Government obtained the sanction orders to prosecute the plaintiff

in the aforesaid orders. It is stated that nobody made any enquiry on the allegations made by the petitioner and no action has been taken against the 1st respondent on the allegations made by the plaintiff in the aforesaid representation. But, on the other hand, the petitioner was prosecuted maliciously. It is stated that an unwarranted criminal charge was brought against the plaintiff for defamation which itself is an injury to the plaintiff's reputation and, therefore, he is entitled to seek damages. It is relevant to extract Paras 11 to 14 of the plaint are follows as follows:

"Para 11: The unwarranted criminal charge brought against the plaintiff for defamation is itself an injury to plaintiff's reputation and is therefore entitled to seek damages. The term "malice" denotes spite or hatred against an individual but it is often difficult to infer spite from the conduct of a person. It is said that the devil does not know the mind of man. Thus, in a suit for a malicious prosecution, the ordinary meaning of "malice" cannot be determined by any subjective standard. So the term "malice" must be considered as "malice animus" thereby denoting that the party is actuated by an improper motive. In the instant case, the illegal sanction was obtained by the first defendant to prosecute the plaintiff not based on honest belief in the guilt of the plaintiff. Further, the first defendant is aware of the innocence of the accused and he knew that the prosecution is groundless and still with malice, prosecuted him and persisted and dragged the criminal proceedings in the matter for over five years. Further it is manifestly clear that the first defendant did not commence the prosecution for vindication of justice, but his sole object to prosecute him is to malign the plaintiff before the public on purely personal considerations in the matter.

Para 12: The prosecution of the plaintiff ended in an acquittal after the first defendant obtained special invalid sanction and prosecuted him. Further, the judgment established that the prosecution lacked reasonable and probable cause and further, the first defendant acted maliciously. The term "reasonable cause" must show that the causes must conform to the standards of a reasonable and prudent man and the term "probable" should show that the causes may result in the proof of the guilt.

Para 13: When the Government of A.P. Housing Municipal Administration and Urban Development Department, in G.O.Ms.39-MA dated 21/01/1982 amended the Zonal Regulations of the Hyderabad Development Area 1981 and made exemptions to be granted for development of any site, sub-division or layout within certain limitations as per Ex.D.2 in the judgment and when the plaintiff sought for exemption within the said limitations only, the first defendant with the active connivance of Special Architect:Cum:Addl.Secretary failed to perform a public duty imposed in statute upon him. Thus, the plaintiff has got a right to represent against him to the Government for failing to perform that duty or for wrongfully performing it. The amendment of Zonal Regulations is done to protect and benefit the public in general and the duty created by the statute is of a

public duty. The plaintiff sustained special damage beyond what he might sustain in common with the rest of the public as a consequence of the first defendant's infringement as the building, which is within the permissible limits, was demolished causing a loss of about 20,000/-. This is direct consequence of the breach by the first defendant since he did not perform his statutory duties and gave sanction. Further the first defendant vindictively harassed and prosecuted him and put him an ignominy. The first defendant is thus liable for both misfeasance and nonfeasance as he neglected to sanction the building improvements to prosecute him in a criminal case.

Para 14: It is not an error of judgment or bona fide exercise of authority to seek an immunity as a public servant, since all his actions were done out of malice and wanton negligence and thus illegal and no protection can be given or sought by him. Thus, there is a remedy for nonperformance of the same is the result of negligence or malicious design and the plaintiff can seek for redressal by suing the first defendant in his individual capacity for acts done or performed as a private individual. The first defendant was a public servant when he acted in the manner complained of cannot effect the character in which is sued. Thus, the 1st defendant cannot be afforded any protection enjoyed by any public servant or Govt official in such matters.

3. Though an amount of Rs. 10,40,000/- was claimed on different heads, he has limited the damages for a sum of Rs. 5,00,000/- alone. A written statement was filed in April, 1994 itself denying all the allegations made in the plaint particularly for the aforesaid paras and the relevant Para Nos. 9 to 12 are as follows:

"Para 9: With regard to paragraph-11, the allegation that unwarranted criminal charge was brought against the plaintiff for defamation or that the same is itself injury to plaintiff's reputation or that the plaintiff is entitled to seek damages is incorrect and is hereby emphatically denied. As submitted above, the plaintiff's application dated 24/02/1987 addressed to the Hon"ble Chief Minister and marking copies thereof to various authorities including the President of India and the Prime Minister of India was neither bona fide nor proper besides being defamatory and this is with an intention to cause damage to this defendant's reputation and lower his prestige in the estimation of others. The said representation was examined by the Government and in consultation with the Law Department and action as per law was taken for filing a criminal complaint against the plaintiff. There was no justification for the plaintiff to make such a defamatory statement and the same had been made to cause injury and damage to the reputation of this defendant, a public servant and to demoralize him in discharge of public duties. The allegation that illegal sanction was obtained by this defendant to prosecute the plaintiff is not based on honest belief in the guilt of the plaintiff or that this defendant was aware of the alleged innocence of the accused or that this defendant knew that the prosecution was groundless is false, in correct and is emphatically denied. The court did hold that case is made out for defamation u/s 499 IPC. The Court further held that while considering the

point of granting the permission to the accused against this defendant that the accused was prompted by selfishness to make such utterances. The allegation that this defendant prolonged the criminal proceedings or that he did not commence the prosecution for vindication of justice but with the sole object to prosecute the plaintiff to be vindictive or to malign the plaintiff before the public purely on personal consideration in the matter is incorrect and is emphatically denied. The rest of the allegation relate to legal interpretations and are therefore not being traversed herein.

Para 10: With regard to the paragraph-12, the allegation that this defendant obtained "special invalid sanction and prosecuted", the plaintiff is incorrect. The further allegation that the judgment established that the prosecution lacked reasonable and probable cause is not a correct interpretation of the judgment. This defendant respectfully submits that there was no reasonable cause or good faith for the plaintiff to make defamatory statements and the Government having examined the same in consultation with the Law Department initiated the filing of complaint against the plaintiff as per law.

Para 11: With regard to paragraph -13, it is denied that this defendant with the active connivance of Special Architect-Cum-Commissioner Additional Secretary, failed to perform a public duty imposed in statute upon him as alleged. The plaintiff could have sought redressal by adopting due process of law if he was aggrieved. There was no justification for the plaintiff to make false and defamatory statements against this defendant. The plaintiff has no right whatsoever for taking any action against this defendant much less on the false allegation that his defendant failed to perform his duty or for wrongfully performing it. It is emphatically denied that the alleged demolition of the building was by this defendant or that the same was a direct consequence of the breach by this defendant. It is emphatically denied that this defendant is liable for misfeasance or nonfeasance or that there is any neglect to sanction building improvements as alleged by the plaintiff. It is emphatically denied that the plaintiff sustained any special damage on account of any act of this defendant.

Para 12: With regard to paragraph 14, it is respectfully submitted that the averments and contentions made therein are incorrect. The plaintiff is seeking to sue this defendant for damages for alleged acts of misfeasance or nonfeasance in the guise of suit for malicious prosecution. Admittedly, this defendant was and is a Government servant and at the relevant time was discharging the functions of Secretary, Health Municipal Administration and Urban Land Development Department, Andhra Pradesh. Any redressal for actions or orders passed by the defendant in his capacity as the Secretary to Government of Andhra Pradesh discharging public duties as a public servant, cannot be sought without requisite notice u/s 80 to the Government and much less against this defendant in an individual or personal capacity for the acts performed by him in his official capacity. The above suit is, therefore, wholly misconceived and is untenable and barred by law. This defendant is not responsible and cannot be sued in his

personal capacity for the acts performed by him as a Statutory Authority and in the discharge of his functions as a public servant. The plaintiff has no cause of action whatsoever to file the above suit against this defendant much less on the dates and for causes alleged in paragraph 16. The valuation is based on surmises and conjectures. None of the sums claimed by the plaintiff are either reasonable or valid. The plaintiff is not entitled to claim any amount from this defendant and much less in his individual capacity."

4. It is stated that the 1st defendant filed I.A. No. 1337/1998 under Order VII, Rule 11 R/W Section 151 CPC to reject the plaint contending that the Criminal Court acquitted the plaintiff invoking Exception 9 of Section 499 IPC and the entire foundation of the case made by the plaintiff rests on the observations made by the II Additional Metropolitan Sessions Judge, City Criminal Courts in C.C. No. 1/1990 in its judgment dated 31/07/1992 and certain findings of the sessions Judge are devoid of any merits whatsoever and the Criminal Court was not competent under law to make such remarks against the 1st defendant and, therefore, he has filed Criminal Revision Case No. 579/1993 on the file of this Court to expunge the adverse remarks and observations made against the 1st defendant in the said C.C. but the said revision petition was dismissed holding that no good grounds are there for reversing the order in the said C.C. But it was observed that the observations made by the Metropolitan Sessions Judge are nothing to do with the extending the benefit to the plaintiff (accused), which are made by the trial Judge, and the said observations made to prevent the plaintiff from proving the same before some other forum. If such contentions are taken before any other forum, the said forum may consider these contentions on merits after recording the evidence and giving opportunity to the revision petitioner. On the aforesaid observations in the Criminal Revision Petition, it is stated that the civil suit filed by the plaintiff claiming the damages for the malicious prosecution is not maintainable and thus it is submitted by the 1st defendant that the said suit filed by the plaintiff claiming the damages for malicious prosecution is false and fictitious and, therefore, the plaint may be rejected under Order VII, Rule 11 CPC to avoid harassment. A counter was filed by the plaintiff in the said application and the learned VII Senior Civil Judge, City Civil Courts, Hyderabad by order dated 15/04/1999 dismissed the said I.A. No. 133/98 in O.S. NO. 644/1999 holding that the order of the High Court in Criminal R.C. No. 579/1993 dated 29/11/1996 cannot be construed in any way diluting the observations of the Criminal Court the factum of the acquittal. Since the suit is ripe for the trial and since no grounds have been made out by the 1st defendant to reject the plaint, the said application was dismissed. The said order has not been challenged and that has become final. Thereafter, the plaintiff was examined in chief on 6/12/1999, 14/12/1999 and he was cross-examined on 19/09/2000, 17/10/2000, 23/10/2000, 16/11/2000, 22/11/2000, 30/11/2000, 07/12/2000, 22/01/2001, 23/02/2001, 19/11/2001 and 27/11/2001. Thus, the evidence of the plaintiff was closed on 27/11/2001. The 1st defendant was called upon to adduce evidence, but he took adjournments on 05/11/2001, 13/12/2001 and

21/12/2001. On 21/12/2001, the trial court passed a conditional order that if the 1st defendant fails to adduce evidence, it will be taken that he has no evidence and posted the case to 04/01/2002. After the adjournment, the 1st defendant filed an application in I.A. No. 1593/2001 in O.S. No. 654/1993 under Order VII, Rule 11 R/W Section 151 CPC to reject the plaint for want of issue of notice contemplated u/s 80 CPC on 22/12/2001. It is stated in the second application filed under Order VII, Rule 11 to reject the plaint that a Criminal Case launched against the plaintiff was ended in acquittal against which a Criminal Revision Case was filed and the said judgments are filed as exhibits. It is further stated that the acts complained by the plaintiff on which the suit claim rests are official acts and, therefore, he had taken a plea in the written statement that the plaintiff did not issue a notice u/s 80 CPC before filing the suit and the requirement of such notice is mandatory under law and failure to do so would automatically call for the rejection of the plaint and, therefore, the plaint may be rejected for want of notice u/s 80 CPC.

5. The plaintiff filed a counter on 07/02/2002 stating that the criminal case launched against him was acquitted and the Criminal Revision filed by the 1st defendant was also dismissed. It is stated that the 1st defendant acted with the malicious, ill-will and desired to wreck his private vengeance against him and by abuse of his official position as Secretary to Government, he himself issued the Government Order sanctioning the prosecution before the Criminal Court for the alleged defamation when the allegations are made against the 1st defendant himself. Such malicious and vindictive acts can never be said to be acts in the discharge of official duties of the 1st defendant. Such indiscriminate abuse of power estoppes the defence pleading of his being public servant. Also such a belated filing of the petition amounts to waiver of the rights of the 1st defendant u/s 80 CPC. It is further stated that the plea raised by the 1st defendant with regard to the maintainability of the suit for want of notice is without any substance. However, considering the pleadings of the parties, the trial court has already framed necessary issue with regard to the maintainability of the suit and the trial is in progress on all issues including the above said issue and at the belated stage when the evidence of the plaintiff is closed and the suit has been undergoing several adjournments for the evidence of the 1st defendant, the 1st defendant came up with such a frivolous petition without any bona fides on his part.

6. The question that arose for consideration on the said petition as to whether at this stage of the suit proceedings, the plaint can be rejected for want of notice u/s 80 CPC and on that question the trial court considered the rival contentions in Paras 18, 19, 20 and 22 and held as follows:

Para 18: I have carefully considered the contentions of both parties, the pleas of both the parties, the evidence so far adduced the points in the decisions relied upon by both the parties, and it is my considered view that the petitioner is not entitled to the relief sought for.

No doubt, an issue relating to the bar under law as to the jurisdiction of the court has to be decided preliminarily, and in certain cases at any stage of the trial of the suit, to prevent the abuse of the process of law. In the case on hand, the respondent instituted the suit against the petitioner herein alleging that the prosecution against him was malicious, which prosecution ended in his acquittal, and the prosecution though was under a Government Order, the said Government Order was the result of the personal vendetta against him for his standing against the illegal and discriminatory acts of the petitioner, which he brought to the notice of the then Chief Minister, inter alia mentioning, how the petitioner had enriched themselves by their acts, and that in the cloth of power, without there being any legal basis, the file to prosecute him was pursued by the petitioner himself, and obtained a G.O. to prosecute the respondent, and thereby after his being purged of the criminal charges instituted on the basis of the said G.O. he sought for damages against the petitioner individually. To this plea no doubt, the petitioner has raised a contention that his acts are bona fide and that there was no misconduct on his part with regard to be file of the respondent, and simply because the respondent was acquitted of the criminal charges it does not give rise to the view or cause of action that, such acts were malafide and for a personal vendetta.

I took notice of their rival contentions the trial of the suit is under way, where the plaintiff's side evidence was closed, and the defendant/petitioner was called upon to give evidence to enter into witness box. Thereby it is neither proper or desirable to give any opinion at this stage of the trial of the suit, where say, the petitioner is called upon to speak on oath to his plea, or say rebut the evidence of respondent, where the allegations made in the plaint against the petitioner have to be considered as personal vendetta using the official position, or that they are part and parcel and bona fide official acts.

It is seen this court (my learned predecessor) has framed an issue to that effect, "whether the suit is maintainable under law? Which must also embody the question of issuance of notice u/s 80 CPC. The petitioner at no stage, in all these long 8 years of the suit proceedings had sought the court, to decide the issue relating to want of notice u/s 80 CPC, on the other hand allowed the trial to go on, where the respondent had adduced his side of evidence and the respondent had cross-examined him quite extensively as to the aspect, whether the acts alleged against the petitioner are mala fide or bona fide or part of his official acts.

Para 19: I am not in agreement with the learned counsel for the petitioner that, it is only after the respondent/plaintiff adduced evidence the petitioner can raise the question of want of notice u/s 80 CPC and that was not done earlier to avoid the plaintiff from leading contrary evidence. It is seen from record that it was not for the first time the petitioner invoked Order 7, Rule 11 CPC. He was already filed a petition in I.A. No. 1337/98 under that provision of law to reject the suit, on the basis of observations of the Hon'ble High Court in the Criminal Revision Petition filed by the petitioner herein against the judgment in C.C. No. 1/1990 to

expunge certain remarks. Thus, at that time also the plea of this petition as to the maintainability of the suit under Order 7, Rule 11 (d) CPC was available to the petitioner. It is the conscious view of this court, that the petitioner has not taken up his right to seek decision on that point as a preliminary issue at the relevant point of time, and allowed the trial to go on. The word "preliminary" in view of this court is prior to taking up the other issues involved. It is seen that the respondent had adduced evidence in all the issues including the issues relating to the nonissuance of Section 80 CPC, where he state 7 -

bjbjUU) 7|7| m"* I . 83/4 7 - bjbjUU) 7|7| m"* I . 83/4 tioner who participated in the trial over these issues without seeking or pressing or representing to decide the said legal bar as a preliminary issue even though he has had the opportunity while he sought for similar relief under the similar provision of law (under Order 7, Rule 11 CPC) may be on some other point, did not choose to raise this point also but when he was called to give evidence on oath he filed this petition to drag on the proceedings whatever be the merits of the case of both the sides.

Para 22: In view of the above discussed aspects, it is held that the point is petitioner's plea has no merits and hence answered against the petitioner."

7. On a perusal of the entire material available on record, I am of the opinion that the question that arises for consideration is a mixed question of law and fact and it has to be decided only after completion of the trial and after giving an opportunity to both the parties while delivering the judgment on all the issues. It is the specific contention of the plaintiff that the 1st defendant waived the issuance of the notice u/s 80 CPC and, therefore, after a lapse of 9 years when the suit was ripe and the evidence of the plaintiff was closed, the 1st defendant, instead of entering into the witness box, innovated the said application on the technical grounds having waived issuance of notice u/s 80 CPC. It is further stated that notice u/s 80 CPC is no doubt for the benefit of the defendant but the same can be waived as the said notice does not go to the root of the jurisdiction in a true sense of the term. In support of the aforesaid contention, the learned counsel appearing for the 1st respondent relied on a judgment of the Apex Court in *Bishandayal & Sons v. State of Orissa* AIR 2001 SC 544 and the relevant Para 15 is as follows:

"The next question for consideration is whether the amended suit was not maintainable for want of notice u/s 80 of the Code of Civil Procedure. In this behalf the applicants have relied upon the cases of *Amar Nath Dogra Vs. Union of India (UOI)*, ; *State of Punjab Vs. Geeta Iron and Brass Works Ltd.*, ; *Ghanshyam Dass and Others Vs. Dominion of India and Others*, and *Vasant Ambadas Pandit Vs. Bombay Municipal Corporation and Others*, . In these cases it has been held that a notice u/s 80 CPC or equivalent notices u/s 527 of the Bombay Municipal Corporation Act are for the benefit of the respondents and the same can be waived as they do not go to the root of jurisdiction in a true sense of the term."

8. Having regard to the facts and circumstances of the case, the trial court rightly held that the said question is not only question of law, but it is mixed question of law and fact and, therefore, the plaint cannot be rejected at this juncture.

9. Under Order VII, Rule 11 (d) CPC, where the suit appears from the statement in the plaint to be barred by any law, no doubt the plaint can be rejected but the question is whether for want of notice u/s 80 CPC the plaint can be rejected under Order VII, Rule 11 (d) as barred by law. If the plaint is barred by law, it has to be rejected. But notice u/s 80 can be waived and, therefore, whether notice u/s 80 CPC has been waived by the 1st defendant is a question of fact and it has to be considered after completion of the regular trial alone. Notice u/s 80 CPC has to be issued in respect of the acts purporting to be done by the public officer in his official capacity. It is the case of the plaintiff that the action of the 1st defendant does not relate to his official acts and, therefore, no notice u/s 80 CPC is required to be issued or delivered to him. It is stated that the suit is filed against C. Arjun Rao (1st defendant) in his individual capacity since C. Arjun Rao as an individual de facto complainant in C.C. No. 1/1990, dragged on the proceedings for a period of five years contemptuously and vindictively and inductively resulting in sufferance of damages valued and claimed in Para 18 of the plaint. It is further stated that the acts of the 1st defendant are outside the scope of his official capacity and they are attributable to his individual capacity. Therefore, no notice is required to be given u/s 80 CPC and, therefore, the court below rightly rejected the contention of the 1st defendant. It is stated that in the instant case, at this juncture, the court cannot examine the issue under Order VII, Rule 11 (d) CPC as to whether the acts of the 1st defendant purporting to be done in his official capacity or individual capacity and such issue has to be decided only during the trial of the suit. Bar of law pleading being notice u/s 80 CPC is a mixed question of fact and law and, therefore, the plaint cannot be rejected under Order VII, Rule 11 (d) CPC particularly when the plaintiff's examination was closed long back and the defendant is successfully avoiding to adduce his evidence. The question involved in the instant case being a mixed question of law and fact, after a trial only it has to be decided as to whether the acts of the 1st defendant were in performance of the official duty or in his individual capacity. However, even the entire action was relatable to his official capacity, the next question that arises as to whether the 1st defendant has waived notice u/s 80 CPC and to consider this question also it is just and necessary to complete the trial. It is stated that no where in the cross-examination of the plaintiff, such defence has been taken for rejection of the plaint for want of issuance of notice u/s 80 and accordingly it is contended that the 1st defendant has waived his right of the notice and, therefore, the plaint cannot be rejected under Order VII Rule 11 (d) CPC. It is further stated by the learned counsel appearing for the plaintiff that the notice u/s 80 CPC is mandatory when the suit relates to the official acts but the said notice u/s 80 CPC is only procedural law and meant for the benefit of the party to whom it is

intended. Therefore, the party for whose benefit Section 80 CPC is intended can waive notice u/s 80 CPC. The object of the notice u/s 80 is to acquaint to the authorities mentioned in section of the facts and the circumstances which are said to necessitate the institution of the threatened suit and to afford them an opportunity to take stock of the situation. It is further contention of the plaintiff that under Order XIV Rule 1 CPC there are two issues i.e. (a) issue of fact and (b) issue of law. Order XIV Rule 2 governs the pronouncement of the judgment on issues. Order XIV Rule 2 (2) provides that where issues both of law and fact arise in the same suit, the Court is of the opinion that the case may be disposed of on an issue of law only, it may try that issue first if that issue relates to the jurisdiction of the Court, or a bar to the suit created by any law for the time being in force and for that purpose may, if it thinks fit, postpone the settlement of other issues. In the present case, the issue was framed whether the suit is maintainable under law i.e., whether the suit is maintainable for nonissuance of the notice u/s 80. Though the petitioner took the plea in the written statement, the said issue shall be tried as a preliminary issue, did not press the Court immediately after the settlement of the issues in May 1994 to try the same as a preliminary issue.

10. As stated supra, the 1st defendant filed I.A. No. 1337/1998 under Order VII Rule 11 (d) to reject the plaint but the similar application was dismissed on 15/04/1999. Thereafter, after closure of the evidence of the plaintiff, the suit underwent several adjournments for adducing evidence by the defendant and when the suit was adjourned finally on 22/12/2001, a conditional order was passed by the trial court that if the 1st defendant fails to adduce evidence, it will be taken that he has no evidence then only the 1st defendant came forward with the instant application to reject the plaint under Order VII, Rule 11 (d) CPC relating to the maintainability of the suit for nonissuance of the notice u/s 80 CPC. The said conduct of the revision petitioner is not bona fide and his conduct clearly shows that he has waived the alleged right of notice u/s 80 CPC and, therefore, he cannot be permitted to take the plea of rejection of the plaint on the ground of nonissuance of notice u/s 80 CPC. Though, there is some force in the said contention, it cannot be said that as to whether the petitioner has waived a notice u/s 80 CPC or not but it has to be decided based on the evidence adduced by both the parties alone and, therefore, the plaint cannot be rejected as rightly held by the trial Court. The question as to whether the plaintiff has committed the said acts in his official capacity or in his individual capacity cannot be decided on the said petition filed by the 1st defendant but the said question can only be examined during the course of the trial.

11. The Apex Court consisting of 3 Judges in the case of SUPREME COOPERATIVE GROUP HOUSING V. M/s. H.S. NAG AND ASSOCIATES (P) LIMITED 1998 (5) Supreme 147 held that the rigour of notice u/s 80 CPC was softened by CPC 1976 Amendment Act in directing, in appropriate case, post suit notice. Therefore, it has to be decided that Section 80 notice is mandatory, it can be waived and the said waiver has to be decided by the conduct of the party after a

regular trial only.

12. It is submitted that by the Act 104/1976 which came into force from 01/02/1977 a provision has been made u/s 80 (2) when an urgent or immediate relief is sought for against a public officer in respect of any act purporting to be done by the public officer in his official capacity, may be instituted, with the leave of the Court. This fortifies the view that the notice u/s 80 CPC only procedural for the protection of the public officer and if such public officer waives of his right of protection, he cannot be granted protection of bar of suit of law as contemplated under Order VII Rule 11 (d) CPC. However, the contention of the plaintiff that the 1st defendant has already waived his right of notice cannot be accepted as the question has not been considered by the trial court and the said contention has to be considered with reference to the evidence adduced by both the parties after a trial alone. Therefore, I am of the opinion that the said issue in question i.e. whether the revision petitioner has waived his right of notice u/s 80 CPC has to be decided after completion of the trial alone but the plaint cannot be rejected as sought for by the 1st defendant under Order VII, Rule 11 (d) CPC.

13. Therefore, I do not see any merits in the Civil Revision Petition and the court below has rightly rejected the said application of the petitioner herein. Accordingly, the Civil Revision Petition is dismissed. There shall be no order as to costs.