

(2004) 07 BOM CK 0030

In the Bombay High Court

Case No : Second Appeal No's. 173, 195 and 197 of 1991

Deputy Commissioner of Sales Tax and Others

APPELLANT

Vs

Narendrakumar Devendrakumar Purohit and Others

RESPONDENT

Date of Decision : 12-07-2004

Acts Referred:

Bombay Sales Tax Act, 1959 — Section 54

Civil Procedure Code, 1908 (CPC) — Section 100, 80, 9

Citation : (2005) 3 ALLMR 99 : (2005) 1 BomCR 848

Hon'ble Judges : Mohta Anoop V., J

Bench : Single Bench

Advocate : B.H. Dangre, A.G.P. in S.A. Nos. 173, 195 and 197/1991, for the Appellant; Mahesh Gupta and Pankaj Gupta, in S.A. Nos. 173 and 195/1991 for Respondent Nos. 1, 2-A to 2-J and in S.A. No. 197/1991, for the Respondent

Final Decision : Dismissed

Judgement

Mohta Anoop V., J.—These second appeal's have been filed by the original appellants/defendants Nos. 1 to 4, and thereby, challenged the judgment and decree dated 20th February, 1990, passed in the Regular Appeal No. 10 of 1983, by the Additional Judge Buldana, which arose out of the common judgment and decree passed in R.C.S. Nos. 132 to 135 of 1980, dated 16th October, 1985, passed by Civil Judge, S.D. Buldana and thereby, directed the appellant herein to deliver the vacant possession of the suit property to the respective respondents (original plaintiffs).

2. All these second appeals have been filed by the appellant, are based on common judgment and decree dated 19-10-1985, passed in suits in question. The common and basic facts and law are also common. The appellants, had filed common defence in all the matters. Therefore, common issues had been framed in all the above suits. All these appeals were admitted on the points mentioned in the respective memo of appeal. There were no question of law framed, while admitting the second appeals,

3. Heard the learned A.G.P. Mrs. Dangre, appearing for the appellant and Mr. M.S. Gupta appearing for the contesting respondents and respective legal representatives.

4. Based on the grounds as reflected in memo of appeals and as submitted following questions of law are framed, as required u/s 100(3) of Code of Civil Procedure.

Those questions of laws are as under;

i. Whether the suit is maintainable in view of the specific bar u/s 54 of the Sales Tax Act and Section 11 of the Revenue Jurisdiction Act?

ii. Whether there can be implied waiver or implied leave or permission for dispensation of the statutory notice, as contemplated u/s 80 of Code of Civil Procedure?

iii. Whether the concurrent findings of self acquired and or exclusive ownership of the properties and the order of delivery of vacant possession in favour of respective respondents (original plaintiff), can be interfered with in the second appeal in absence of perversity or illegality?

FACTS:

5. The undisputed common set of facts as reflected in the Second Appeal No. 173/1991, arising out of R.C.S. No. 132 of 1980 are as under:

The Tahsildar, Sales Tax officer, Akola by order dated 8th July, 1977 attached the respective suit properties and other house hold property of the respective plaintiffs, respondents herein, pursuant to the alleged recovery notices against the sale tax dues. The respondents (original plaintiff) along with other, in their respective suits objected the said action by invoking the provisions of Section 2318 of Maharashtra Land revenue Code (for short Code), on the ground that self acquired properties involved are exclusively owned by them. The respective respondents, accordingly, resisted the said attachment, as those sales tax dues recovery were not against the respondents. Those sales tax recovery were only against, original defendant No. 5 Devendra and/ or his firm. The plaintiffs herein had no concerned with the said business of defendant No. 5. The respective respondents therefore, resisted the said actions by filing suits for declaration and possession of the properties in question, as actions of appellants was illegal and wrongful. The respective respondents in the respective suits were dispossessed from the suit properties. Therefore, separate suits were filed.

6. The appellants, original defendants, however, by written statement Exh. 57 resisted the said suits and prayers. The case of ownership of respective respondents was opposed and preliminary objection about the maintainability of said including notice u/s 80 of the CPC were raised. Therefore prayed that the suit be dismissed with costs. No evidence was lead by the appellants.

FINDING & REASONINGS OF THE COURT'S BELOW

7. The trial Court after considering the pleadings, as well as, the evidence led by the parties, framed the issues and after due scrutiny of oral, as well as, documentary evidence led by the parties came to the conclusion that the suit property owned by respective respondents were not liable to pay the sale tax dues which were against the original defendant No. 5 i. e. Devendrakumar son of Hariram Purohit, The order of attachment of suit house, dated 20th April, 1980 therefore, was declared as void and illegal.

8. The appellants took forcible possession of suit house on 5-6-1980 or such other date. The respondents prayer for declaration and injunction therefore was granted. The objection of defendants about the maintainability of the suit for want of notice u/s 80 of C.P.C. And bar of Sections 73 and 54 of Bombay Sales Tax Act, and Section 11 of the Revenue Jurisdiction Act was negated. The property in question was auctioned however, in view of Apex Court's decision in AIR 1962 S.C. 823, that, the sale of such property by such public auction is not permissible within the meaning of Section 167 of the Act, as the said property was purchased by Government on nominal bid of Rs. 1 /- only, therefore, said sales were also declared void. After considering all these, Regular Civil Suit Nos. 131 of 135 of 1980 were decreed as prayed and appellants herein, were directed to deliver the vacant possession of the suit properties. It was further declared that the appellants had no right to effect the recovery of Sales Tax Act against the respondents (original plaintiffs) and or against their respective properties.

9. This common judgment and decree has been challenged by the appellants by various first appeals, those are Regular Civil Appeals Nos. 10 of 1986, 46/1986, 15/1986. The said appeals were again resisted by the respective respondents-original plaintiffs. The Appellate Court had also, after considering the material, as well as provisions of law as read and referred by the respective parties, held that the judgment and decree passed by the Lower Court was legal and correct and accordingly maintained the same.

The appellant therefore, being aggrieved and affected by the same, preferred these second appeals. REASONINGS.

10. The learned Advocate appearing for the respective respondents and or original plaintiffs relied on following cases in support of her submissions, these cases are as under :

2001 (Supp) Bom.C.R. 252 : 2002(2) Mh.L.J. 181 , Chandrashekhar P. Rathi v. State of Maharashtra, Ramrao Jankiram Kadam Vs. State of Bombay, , T.V. Parangodan Vs. District Collector, Trichur and Others, , Inder Singh Vs. State of H.P. and Others, , AIR 1958 A.P. 147 , Yendapalli Venkataraju (Died) and Anr. v. Yendapalli Yedukondalu alias Venkateswarlu and Ors., S. Anup Singh S. Amrik Singh Vs. Sardarni Harbans Kaur, .

11. In Chandrashekhar Purshotam Rathi's case (supra) it is observed:

"Non-passing of any order on the application for leave is not a refusal or a

deemed refusal of leave. The other side also may say that since the Court proceeded further with the temporary injunction application and also disposed of the suit on merits, the application Exh. 5 for the grant of leave was deemed to have been allowed."

The observations in para 24 of *Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI)*, are reproduced as below :

"It is relevant to note that neither was this point taken by the respondent in the written statement which it filed in answer to the appellant's claim nor was any issue framed in that behalf by the trial Court and this may justify the inference that the objection u/s 80 had been waived."

12. In the present case also, although the pleadings of the defendants in their written statements indicates that as alleged, the defendants were under a wrong impression that the leave to institute the suit without notice was already granted, they did not plead that there was no urgency. The notice u/s 80, CPC could not have been dispensed with. It was open for them to raise this objection in the written statement. The lower Appellate Court *sou motu* dealt with that aspect and passed the order remanding the case, as already stated above.

13. Though as per Section 80(2), Civil Procedure Code, the leave is normally granted at the time of the institution of suit, there is also a further stage when the parties are heard. The proviso to sub-section (2) of Section 80, CPC reads:

"Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1)."

13-A. Thus an opportunity of being heard is provided to the parties even after the institution of the suit and if the Court is satisfied after the hearing the parties, that there is urgency, the plaint can be returned for the compliance of the requirement of sub-section (1), i.e., for issuance of notice. Thus, in the present case even though the defendants were under the mistaken impression that the leave was granted, the plea of absence of urgency and want of notice could have been raised by them when they had appeared after the service of show cause notice, upon them on the temporary injunction application. Therefore, failure on their part to raise the objection in above respect clearly suggests that they had impliedly waived the notice. It can therefore, further be said that there was a deemed waiver on the part of the defendants.

14. In addition to the above submissions, the learned Counsel for the plaintiff-appellant also resorted to the provisions of Section 99, Civil Procedure Code, which states:

"No decree shall be reversed or subsequently varied, nor shall case be remanded in appeal on account of any mis-joinder of parties or causes of action or any error, defect or irregularity in any proceedings in the suit not affecting the merits of the case or the jurisdiction of the Court."

In T.V. Parangodan's case (supra) in reference to Section 80 sub-clause (2) of C.P.C., it is observed as under:

"No such application or affidavit is contemplated in Section 80(2) which do not specify how the leave is to be sought for or given. In such cases, the mode or form of request or grant are not material. What is material is only the substance, whether there was a proper request and whether it was considered and granted. Request with grounds, if any, must be there and there need only be indications as to whether it is allowed or not, even though a reasoned order may be good and an application is also appreciable."

14-A. For "Leave of the High Court" required u/s 378(3) of the Code of Criminal Procedure, State of Madhya Pradesh Vs. Dewadas and Others, said that no separate application is necessary and a prayer to that effect in the memorandum of appeal is sufficient. Section 5 of the Limitation Act only mentions "Satisfies the Court". Nadubhagom N.S. Karayogam v. Gopalan Nair, 1979 Ker.L.T. 166, said that no formal application is necessary.

15. That decision was followed in Ranadevan Vs. The State, . Section 20 of the CPC also contemplates leave of Court and Rule 19 of the Civil Rules of practice says that a prayer made in the plaint accompanied by an affidavit stating the address of parties is sufficient to obtain leave. Even without a specific provisions necessity for an application may some times be there depending upon facts and nature of leave or sanction. Statutory provisions and their interpretations are intended to advance the cause of justice and not its denial or technical grounds. Courts are concerned more with the substances than form.

"What is required in this case is the satisfaction of the Court on the matters dealt with in Section 80(2) and action on its basis. Request for leave could be in any form provided it is capable of conveying the prayer and the grounds to the Court and the opposite party enabling effective objection and considered decision. That is satisfied in this case. Leave also must be taken as granted. Appeal had to be decided on merits."

In the Inder Singh's case (supra), it is observed asunder:

"The requirements to be satisfied are; (1) that the proposed suit is against the Government or any Public Officer; (ii) that it challenges any act purporting to be done by such Public Officer in his official capacity; and (iii) that the matter is so urgent that the plaintiff cannot be expected to wait for a period of two months after the service of notice under sub-section (1) of Section 80. The test is, therefore, one of urgency of the matter and if the Court is satisfied that the matter is so urgent that it cannot brook delay, the Court must grant leave to the litigant under sub-section (2) of Section 80 of the Code of Institute a suit forthwith. It is of almost importance to see that the legal rights of a party are not satisfied at the alter of technicalities. Once the requirements of sub-section (2) of Section 80 are satisfied, the Court must ordinarily grant leave to the party to institute a suit without requiring it to comply with the provisions of sub-section

(1) thereof. There is nothing in sub-section (2) of Section 80 to suggest that at the stage of granting leave to institute a suit without service of notice as required by sub-section (1) the Court is required to consider whether the suit is prima facie maintainable or that the Court has jurisdiction to entertain such a suit. There are matters which the Court may consider while granting relief to the litigant, interim or otherwise, after plaintiff has been permitted to file a suit having regard to the urgency of the matter. If the Court is of the opinion that no urgent or immediate relief is necessary, it may return the plaintiff for presentation to it after complying with the requirements of sub-section (1) of the Section 80. If the Court pronounce upon the merits of the impugned order or on the question of jurisdiction, as in the instant case there would be no point in returning the plaint for presentation to it after complying with the requirements of sub-section (1) of Section 80."

15. In the present case initially there was preliminary objection raised by the appellant about the statutory notice u/s 80 of Code of Procedure. After considering this objection, and after hearing both the parties, in term order/ injunction which was granted was continued. The appellant thereafter had filed the written statements. I have gone through written statements and there is no specific averment or objection raised about the maintainability of the suit or the dismissal of the suit on the ground of statutory notice u/s 80 of C.P.C. As contended to be raised for the first time in these second appeals now. Both the courts after considering the merits of the matter rejected the said contention and objection.

16. One additional factor which cannot be over looked is that admittedly, an application to dispense with the statutory notice u/s 80 of C.P.C. Was also filed along with the suit, with an injunction application. After considering, all these averments and urgency, the learned Judge had granted the interim order. There was no specific rejection or order of return of plaint for want of said notice.

17. The provisions of Section 80(2) as observed above, by Our Court, further endorsed that, if no case is made out and no urgency or for such other reason, the Court in a given case, can return the plaint with direction to file after statutory compliance. Therefore, the fact that the interim order or injunction application was considered and there was no specific order of rejection of the application filed by the respondents concerned plaintiffs, it cannot be said that leave was not granted or statutory notice was not dispensed with. In my view apart from the observations as referred above, at this stage, there is no reason to return the plaint on this technical ground. This is a case where Court had after considering the merits of the matter, passed an interim order and as plaint itself was not returned for proper presentation, in view of this matter, there is sufficient compliance of the statutory requirement, and this amounts to granting implied leave and implied dispensation of the statutory notice. Mere formality of not passing any specific order on the record by the Court, the purpose and object of such application as well as nothing follow the procedure and power of

dispensation with, such statutory requirement and or grant of leave, as contemplated u/s 80 of CPC itself sufficient to justify the contention of the appellants. In my view therefore, there is, ample power to the Court to grant leave or in dispensation with such statutory notice and in facts and circumstances implied leave and or implied dispensation of statutory notice is possible. In the present case according to me therefore, there was implied permission and or implied leave and statutory notice accordingly dispensed with. No fault can be found on this issue and specially when this issue also decided concurrently by both the courts below.

18. In so far as, a purchase by the Government, at a revenue sale, for a predetermined normal price of Rs. 1 of the property of defaulter, as declared in Ramrao Jankiram Kadam Vs. State of Bombay, , such a sale is void and therefore, ineffective. In view of the settled provisions, nothing further was argued and pressed, therefore, it was accordingly decreed to deliver vacation possession of the said suit premises as such sale through such auction, itself was illegal and bad in law.

19. The another submission based on Section 54 of the Bombay Sales Tax Act, was canvassed. We have gone through the provisions of the Act, and in the present case, there was no challenge to any assessment order by the Sales Tax Officer, there was no liability of Sales Tax against respective plaintiffs/respondents. The recovery notice issued by the appellants officers and attachment of the property on the said basis was beyond jurisdiction and authority. There was an ample evidence on record read with the concurrent findings, that respective respondents (plaintiffs) were not liable for the sale tax dues of original defendant No. 5.

20. The present suit filed u/s 9 of the CPC challenging the legality and jurisdiction action of the concerned authorities therefore, cannot be said to be barred by provisions of Sections 7, 73, 54 of the Act. There was no challenge to any assessment order passed by the Sale Tax Authority against any assessee. Respondents/plaintiffs were not assessee or dealer under the Act and there were no assessment order passed by the authorities against these plaintiffs/respondents. In view of this, I am of the view that, in such circumstances, bar of Sections 54, 73 of the Sales Tax Act is not applicable.

21. The learned trial Court referred and relied on Ramrao Jankiram Kadam Vs. State of Bombay, . On the same principle and foundation based on the said Supreme Court judgment itself and, the issue in respect of maintainability of suit in view of Section 11 of the Revenue Jurisdiction Act was also negated by both the courts. In my view also the original plaintiffs suit's u/s 9 of the C.P.C., in the facts and circumstances of the case, were maintainable. The concerned authorities, if act beyond the authority and power, the affected person, if case is made out, can approach to the appropriate forum including Civil Court for appropriate urgent interim relief.

22. In view of the concurrent findings, given by both the courts, it is very clear that the action and or issuance of recovery notice of the attachment of the property to the plaintiffs of sale tax recovery was illegal and without jurisdiction. Therefore, I also endorse the view that the plaintiffs, respondents suit in question was tenable and not barred as contended by the appellant.

23. The concurrent findings of both the courts below in all related matters are crystalised as under, as based on the record and evidence. The reasonings and findings are reasonable, fair, just and proper :-

(i) that the suit properties was exclusively belongs to the respondent, plaintiffs, being self acquired property.

(ii) There were no statutory liability to be paid by plaintiffs/respondents, which were only due against the original defendant No. 5; Devendra Purohit.

(iii) the attachment of the suit house and or respective properties were void and illegal.

(iv) The appellants, original defendants took forcible possession of the respective properties.

(v) the auction of all suit properties was void and illegal.

Therefore, the plaintiffs, were entitled for possession of the suit property. The findings given by the courts below are based on the authorities cited and referred and those authorities are referred below.

24. The general principles of existence of the nuclear of joint family property and its presumption, pre-requisite to constitute joint family, self acquired property under exclusive title or ownership, as laid down in the following cases were applied and based on that both the courts below concurrently declared that the property in questions were self acquired and exclusive properties of the respective respondents, or its joint family, and appellants have no right to recovery any sale tax against them and or against that property, directed to restore the possession back to the respective parties. Those authorities are AIR 1937 Bom. 446, Babubhai Girdharlal v. Ujanlal Hargovandas, AIR 1963 S.C. 287, Ramrao Kadam v. State of Bombay, 1942 Cal. 553, Amritlal Sen v. Surath Lal Sen AIR 1958 A.P. 147 , Yendapalli Venkataraju v. Yendapalli Yedukondatu, S. Anup Singh S. Amrik Singh Vs. Sardarni Harbans Kaur, , Mahomed Siddique Yousuf v. Official Assignee of Calcutta .

25. The appellants, did not led any evidence in the matter. The exhaustive reasonings given by the courts below appears to be just, proper and within the frame work of the record as well as, of the law. No perversity or any illegality has been pointed out. Therefore, in view of this, I am answering the issues as framed in all the second appeals under :

(i) The suit is maintainable. Implied waiver or consent is permissible.

(ii) There was implied waiver/consent to dispense with the statutory notice u/s 80 of the Act.

(iii) The concurrent findings of exclusive ownership of the property of restoration of possession, and no liability of sale tax dues against the respondents, needs no interference in the second appeal.

26. In view of this, the second appeals are dismissed, no order as to costs.