
(1974) 02 BOM CK 0026
In the Bombay High Court
Case No : A.F.O.D. No. 102 of 1965

Ebrahimbhai

APPELLANT

Vs

State of Maharashtra and Others

RESPONDENT

Date of Decision : 11-02-1974

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 63, Order 7 Rule 11, 80

Citation : AIR 1975 Bom 13 : (1974) 76 BOMLR 769 : (1974) MhLj 562

Hon'ble Judges : Shah, J; Chandurkar, J

Bench : Division Bench

Advocate : Imdadali, for the Appellant; M.B. Mor, Asst. Govt. Pleader, N. Kamalakar and S.A. Nagore, for the Respondent

Judgement

Chandurkar, J.—This is a plaintiff's appeal challenging the judgment and decree passed by the Joint Civil Judge, Senior Division, Nagpur, rejecting his plaint under Order 7, Rule 11, of the Code of Civil Procedure, on the ground that the suit filed by him was premature. The facts which gave rise to the suit filed by the plaintiff are not in dispute. House No. 446 in Ward No. 18 was sold by the State for the purpose of recovery of arrears of sales tax on 30-11-1963. The revenue recovery certificate for the recovery of Rs.34,998.15 P. was received by the Tahsildar, Sales Tax Recovery, Nagpur on 27-12-1960 from the Sales Tax Department . The plaintiff claims that he purchased house No. 446 on 9-12-1961 from defendants Nos. 4 to 8 by a registered sale deed for a consideration of Rupees 30,000. Original defendant No. 4 Hussainbhai son of Mulla Taherali died during the pendency of the suit on 19-8-1964 and defendants Nos. 4(a) to 4 (e) are his legal representatives. On 23-5-1962 the plaintiff raised an objection that the house purchased by him was nt liable to be attached or sold. This objection was rejected by the Tahsildar, on 8-7-1963. The Tahsildar rejected the objection holding that though house No. 446 in Ward No. 18 had already been attached, there was no sale proclamation in respect of the house and the objection of the objector had no force and it could be decided on merits if and when the sale proclamation was issued. Accordingly the sale proclamation was issued on

26-8-1963 and the plaintiff again filed an objection on 30-8-1963 stating that the property which was proclaimed to be sold was his and he was in possession, and since it was not attached it was not liable to be sold. he also alleged that if at all there was any attachment, the same was not valid being contrary to law. This objection was rejected on 13-9-1963. The sale of the house in dispute came to be held on 30-11-1963 and at the auction the bid for Rs.10,250 by defendant No. 3 Baliram was accepted. baliram deposited the entire purchase price on 2-12-1963. On that date the Tahsildar directed that objections. If any, submitted within 30 days, should be awaited and fixed the case for 2-1-1964. When the case was taken up on 2-1-1964 it was found that no objections were received and the sale was finally confirmed by the Sub-Divisional Officer Nagpur, on 5-2-1964. After the auction sale was held on 30-11-1963 the plaintiff served a notice on 31-12-1963 on defendants Nos. 1 and 2, namely, the State of Maharashtra and the Collector, Nagpur, u/s 80 of the CPC intimating to them his intention to file a suit for declaration of his right to the property in dispute. A similar notice was also served on defendant No. 3. The exact date when this notice was received by either of the first two defendants cannot be ascertained but it is not disputed that the present suit was filed by the plaintiff on 24-2-1964 i.e. before the expiry of the period of two months provided by Section 80 of the Code of Civil Procedure. In the plaint, the plaintiff has averred several facts referred to earlier leading to the rejection of his objection to the sale of the disputed house which he claimed to be his own and his case in the plaint is that no prohibitory order attaching the suit property was ever made as required by the provisions of the M. P. Land Revenue Code and the Rules framed thereunder; and if at all any such prohibitory order was made it was illegal and invalid and it was never affixed on a conspicuous part of the property and on the notice board of the office of the Tahsildar. According to the plaintiff, as the property was nt attached before 9-12-1961 i.e. the date of the sale in his favour, the prohibitory order could not take effect against him as he was a purchaser for value and in good faith without notice of the recovery proceedings against the firm of defendants Nos. 4 to 8, He also alleged that k the Tahsildar did not make any proclamation of sale, and if there was any proclamation it was not in accordance with Rule 15 of the Rules framed under the M. P. Land Revenue Code and was illegal, invalid and inoperative,. The sale is also sought to be set aside on the ground that the Tahsildar did not conduct it in a manner required by law resulting in the house fetching the price of Rs.10,250 though it was really worth Rs.30,000 on the date of the auction. In view of these illegalities the plaintiff claimed that the alleged auction sale and the alleged confirmation in favour of defendant No. 3 did not affect the right, interest and title of the plaintiff in the property in suit, nor did it confer any right, interest and title on defendant No. 3. The plaintiff claimed a declaration that he was the owner in possession of the suit property and defendant No. 3 got no right and title therein and, therefore, the suit property was not liable to attachment and sale and that the alleged attachment, proclamation of sale, public auction and confirmation did not take effect as against the plaintiffs title to the suit property.

2. The plaintiff's claim was contested by defendants Nos. 1 and 2 by their common written statement and by defendant No. 3. All the averments made by the plaintiff were denied. We need not set out the pleas of the defendants in detail because the suit has been decided on the preliminary ground that it was filed prematurely. We need therefore, refer only to the plea taken by defendants Nos. 1 and 2 in paragraph 18 of the written statement in which it was stated that the suit filed on 24-2-1964 was filed before the expiry of two months next after the notice dated 31-12-1963 had been delivered to the defendants and the plaint was, therefore, liable to be rejected under Order 7, Rule 11 of the Code of Civil Procedure.

3. The trial Court had framed several issues on the pleadings of the parties but took up only three of them for decision at the instance of defendants Nos. 1 and 2. The issues were:

"I. Does the plaintiff prove the suit for a mere declaration without consequential relief of possession is maintainable?

II. Does the plaintiff prove that the suit against R. R. P. maintainable?

VII. (a) Does the plaintiff prove that he gave a valid notice u/s 80 of Civil Procedure Code?

(b) If not, is the suit maintainable?"

The trial Court held in favour of the plaintiff on issues Nos. I and II and the correctness of those findings has not been challenged before us on behalf of defendants Nos. 1 and 2. The trial Court, however, took the view that the plaintiff's suit was not maintainable because the provisions of Section 80 of the CPC had not been complied with. It appears that it was contended before the trial Court that there was a waiver of the protection given u/s 80 by the first two defendants. This contention was also rejected by the trial Court, it having found that the mandatory provisions of Section 80 had not been complied with. An order rejecting the plaint under Order 7, Rule 11 of the CPC was passed by the trial Court. The plaintiff has now filed this appeal challenging the decision of the trial Court.

4. The first contention raised on behalf of the plaintiff by Mr. Imdadali was that the present suit being a suit analogous to the suit contemplated by Order 21, Rule 63, of the Code of Civil Procedure, no notice contemplated by Section 80 of the CPC was required to be served and the suit could have been filed without service of such a notice. He relied on certain authorities which seem to have taken the view that where a suit is of the kind contemplated by Order 21, Rule 63 of the Code, the provisions of Sections 80 of the Code are not attracted. The first authority relied upon is the decision in *Muhammad Yusuf v. Province of Madras*, AIR 1943 Mad 341 in which it was observed that a suit under Order 21, Rule 63, is a continuation of the claim proceedings under Order 21, Rule 63 is a continuation of the claim proceedings under Order 21, Rule 58 of the CPC and,

therefore, a notice u/s 80 is not necessary for a suit under Order 21, Rule 63. This decision was later followed in *Ram Sundri alias Sham Sundri Vs. Collector, Ludhiana and Others*, Two other decisions relied upon were *Hiraluxmi Pandit Vs. Income Tax Officer*, and *Hussain Ali Mirza Vs. State of Andhra Pradesh*, . In the Patna case the suit arose out of proceedings u/s 25 of the Bihar and Orissa Public Demands Recovery Act and was filed against the Income Tax Officer for a declaration that the property in suit was the exclusive property of the plaintiff and was not liable to attachment and sale in certificate proceedings against her deceased husband and it was held that as the suit was merely a continuation of the previous claim proceedings u/s 21 of the Bihar and Orissa Public Demands Recovery Act, no notice u/s 30 of the CPC was at all necessary before filing a suit as provided by Section 6 of the Government Demands Act as such a suit was a continuation of the proceedings initiated by the Taluqdar and in the nature of an appeal against the memorandum issued by the Taluqdar or the Order made by him. It is contended by Mr. Imdadali that the suit filed by the plaintiff was one under Rule 13(2) of the Rules in Schedule II of the M.P. Land Revenue, Code, 1954 (hereinafter referred to as the Rules), and since Rule 13(2) of the Rules in Schedule II of the M.P. Land Revenue Code, 1954 (hereinafter referred to as the Rules), and since Rule 13 provided for an objection being taken where the property was attached and sold for the recovery of arrears of land revenue, the suit filed by the plaintiff in the instant case must also be treated as a continuation of the objection proceedings and, therefore it is sold for the purpose of recovery of land revenue. Section 12(5) of the Central Provinces and Berar Sales Tax Act, 1947, provided that any tax or penalty or part thereof left unpaid after the date specified in the said notice shall be recoverable as an arrear of land revenue. It appears that the arrears in the instant case arose at the time when the C. P. and Berar Sales Tax Act was in operation. Rule 12 of the Rules provides for the manner in which attachment of the property of the defaulter is to be effected. It provides that where the property is immovable, the attachment shall be made by an order prohibiting the defaulter from transferring or charging the property in any way, and all persons from taking any benefit from such transfer or charge, and this order has to be proclaimed at some place on or adjacent to such property by beat of drum or other customary mode, and a copy of the order has to be affixed on a conspicuous part of the property and then on the notice board of the office of the Revenue Officer. Rule 12(3) provides that the order shall take effect as against purchasers for value in good faith from the date when a copy of the order is affixed on the property and against all other transferees from the defaulter from the date on which such order is made. Rule 13(1) empowers the Revenue Officer to inquire into any claim set up by a third person to the property attached or proceeded against under the provisions of the M. P. Land Revenue Code and he can either admit or reject the objection. Rule 13(2) provides.

"The person against whom an order is made under sub-rule (1) may, within one year from the date of the order, institute a suit to establish the right which he

claims to the property attached or proceeded against; but subject to the result of such suit, if any, the order shall be conclusive.":

The learned counsel for the appellant relies on the fact that the provisions of Rule 13(2) are analogous to Order 21, Rule 63 of the Code of Civil Procedure, Rule 63 of the Code of Civil Procedure, and thus according to him, the suit filed and thus according to him, the suit filed and thus according to him, the suit filed by the plaintiff was filed within one year and it was merely a continuation of the objection which was rejected for the last time by the Revenue Officer on 13.9.1963.

5-6. There was no doubt some divergence of judicial opinion as to whether in the case of a suit under Order 21, Rule 63, of the Code of Civil Procedure, a notice u/s 80 of the CPC is necessary if the suit is filed against the State or against a public officer. The controversy, has however, been set at rest by the decision of the Supreme Court in *Sawai Singhai Nirmal Chand Vs. Union of India*, where the Supreme Court has pointed out that the scope of the inquiry under Order 21, Rule 58, is very limited, and the scope of the suit under Order 21, Rule 63, is very much different from and wider than that of the investigation under Order 21, Rule 63, is very much different from and wider than that of the investigation under Order 21, Rule 58, because a suit brought under Order 21, Rule 63, is concerned not only with the question of possession but also with the question of title. Referring to the provisions of Section 80 of the Code of Civil Procedure, the Supreme Court pointed out that "the material words used in Section 80 are wide and unambiguous; they are "express, explicit and mandatory," and it would be difficult to except from their operation any proceeding which can be regarded as a suit against the Government." After referring to the decision of the Privy Council, observed that "the Act, albeit a Procedure Code, must be read in accordance with the natural meaning of its word" and that "Section 80 is express, explicit and mandatory, and admits of no implications or exceptions", the Supreme Court observed that these observations apply with equal force in dealing with the question as to whether a suit under Order 21, Rule 63, is outside the purview of Section 80 of the Code. The Supreme Court, therefore, took the view that "the view that suits under Order 21, Rule 63, did not attract the provisions of Section 80 is inconsistent with the plain, categorical and unambiguous words used by it." In view of this decision of the Supreme Court, the decisions of the Madras, Punjab, Patna and Andhra Pradesh High Courts relied upon by the learned counsel for the appellant cannot be of any assistance to him. The averments in the plaint made by the plaintiff and the nature of the reliefs which the plaintiffs has asked in the plaintiff wants the sale held by the Tahsildar to be set aside on the ground that there was no attachment of the property effected and that the attachment, if any, was illegal. As pointed out by the Supreme Court in *Sawai Singhai's* case, while dealing with the question of applicability of Section 80, the question to ask is: is it a suit against the Government or not? and if it is, then Section 80 by the very force of its words must apply. The main reliefs prayed for in the suit by the plaintiff are against the

State, defendant No.1. The suit was, therefore , a suit against the State, and by the very force of the words in Section v, the provisions thereof would be attracted to a suit like the instant case, though the right to file a suit given to the plaintiff was under Rule 13(2) of the Rules. We must, therefore, reject the contention that since the provisions of Rule 13(2) of the Rules are analogous to Order 21. Rule 63 of the Code of Civil Procedure, a notice u/s 80 of the Code was not necessary.

7. It was then contended that the defendants Nos. 1 and 2 must be deemed to have waived the objection on the ground of proper service of notice. It is urged by Mr. Imdadali that the suit contemplated by Rule 13(2) of the Rules had to be filed within the period of one year and accordingly he had filed the suit on 24.2.1964, that is, a little more than five months after his last objection was rejected on 13.9.1963. It is urged that defendants Nos.1 and 2 for the first time filed their written statements on 28.4.1965 i.e. after about ten months after 1965 i.e. after about ten months after they were served. Thus, according to the appellant, defendants Nos. 1 and 2 should not have been allowed to raise the question of premature filing of the suit when it had clearly resulted in prejudice to the plaintiff because otherwise if this objection was taken earlier, he could have either withdrawn the suit or if an order rejecting the plaint under Order 7, Rule 11, was passed earlier, he could have filed a second suit within the period of one year contemplated by Rule 13(2) of the Rules. The argument is based on certain observations in *Hirachand Himatlal Marwadi Vs. Kashinath Thakurji Jadhav*, . Now, the record of the case discloses that when the suit was taken up on 25.4.1964 no appearance was entered on behalf of defendants Nos.1 and 2. Since, however, some other defendants were not served, the hearing was adjourned to 22.6.1964 On 22.6.1964 the District Government Pleaded filed a power on behalf of the State of Maharashtra and that power was accepted. No written statement, however, came to be filed a power on behalf of the State of Maharashtra and that power was accepted. Now written statement, however, came to be filed on behalf of the State and it appears that for the first time an application for grant of time to file a written statement was made and granted on 28.10.1964. When the suit was again taken up on 29.12.1964 it was noticed that defendant No.1 had not filed its written statement. Thereafter, the suit, however, came to be adjourned from time to time because in the meantime defendant No.4 had died and his legal representatives had to be served and they were required to file their written statements. Issues came to be framed in the suit on 27.3.1965 and the case was fixed for arguments on preliminary issues Nos. I and II reproduced above first on 24.4.1965 and then on 27.4.1965. It was then adjourned to 24.6.1965 and on 28.4.1965 an application (Ex.30) came to be made on behalf of defendants Nos.1 and 2 stating that the written statement duly approved had been received by the District Government pleaded on 27.4.1965 i.e. the previous day and the written statement should be accepted. This application was opposed but the trial Court passed an order allowing the application as it took the view that the case had not proceeded beyond the stage

of issues and as evidence had not been recorded no extra expenses were incurred by any party. Thus, it was on 28.4.1965 that for the first time in paragraph 18 of the written statement defendants Nos. 1 and 2 took the plea that the suit was filed before the expiration of two months next after the notice in writing had been delivered to the defendants. It was admitted that the notice u/s 80 was issued to these defendants on 31.12.1963. The plaintiff thereafter amended the plaint on 10.8.1965 and by this amendment it was averred that the suit was a continuation of the proceedings before the Revenue Authorities and, therefore, the notice u/s 80 of the CPC was not required. Alternatively, it was pleaded that defendants Nos. 1 and 2nd caused inordinate delay in taking the objection as regards the notice u/s 80, and since the delay had caused considerable prejudice to the plaintiff, it should be deemed that defendants Nos.1 and 2 had waived their right to notice u/s 80. On these rival contentions issue No.VII was framed by the trial Court.

8. The Material part of Section 80 of the CPC provides:

"No suit shall be instituted against the Government (including the Government of the State of Jammu and Kashmir) or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, Until the expiration of two months next after notice in writing has been delivered to or left at the office of , 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."

(the underlining is ours).

It has been established by a long series of authorities commencing from AIR 1927 176 (Privy Council) that the provisions of Section 80 are to be strictly complied with and that the words of Section 80 are explicit and mandatory and admit of no implications or exceptions. In Beohar Rajendra Sinha v. State of M. P., AIR 1960 SC 1256 the Supreme Court set out the circumstances which should be considered in deciding whether the provisions of Section 80 have been complied with or not. It was observed in paragraph 4:

"The object of the notice u/s 80, Civil Procedure Code, is to give to the Government or the public servant concerned an opportunity to reconsider its or his legal position and if that course k is justified to make amends or settle the claim out of court. The section is not doubt imperative; failure to serve notice complying with the requirements of the statute will entail dismissal of the suit. But the notice must be reasonably construed. Any unimportant error or defect cannot be permitted to be treated as an excuse for defeating a just claim. In considering whether the provisions of the statute are complied with, the Court musty take into account the following matters in each case (1) whether the name, description and k residence of the plaintiff are given so as to enable the authorities to identify the person serving the notice; (2) whether the cause of

action and the relief which the plaintiff claims are not set out with sufficient particularity: (3) whether a notice in writing has been delivered to or left at the office of the appropriate authority mentioned in the section: and (4) whether the suit is instituted after the expiration of two months next after notice has been served, and the plaint contains a statement that such a notice has been so delivered or left".

There is no doubt that even though the provisions of Section 80 are mandatory, the provisions are made for the benefit of the party, namely, the State or the public officer, as the case may be, and in a given case it is open to the party for whose benefit the provision has been made to waive the compliance with the requirements of such a provision. It was pointed out by the Privy Council in *Vellayan Chettiar v. Government of the Province of Madras*, AIR 1947 PC 197 = 74 Ind App 223 that if the authority concerned thinks fit to waive a notice u/s 80 it can do so. Their Lordships observed in paragraph 14:

"..... there appears to their Lord-ships to be no reason why the notice required to be given u/s 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required: if in the particular case he does not require that protection and says so, he can lawfully waive his right".

9. These observations have been cited with approval by the Supreme Court in *Dhirendra Nath Gorai and Subal Chandra Shaw and Others Vs. Sudhir Chandra Ghosh and Others*, . The Supreme Court in that case was dealing with the question whether the requirements of a mandatory provision can be waived and the provision which their Lordships were considering in that case was contained in Section 35 of the Bengal Money Lenders Act, 1940. In paragraph 7 the following passage from "Craies on Statute Law", 6th Edition, page 269, was quoted:

"As a general rule, the conditions imposed by statutes which authorise legal proceedings are treated as being indispensable to given the court jurisdiction. But if it appears that the statutory conditions were inserted by the legislature simply for the security or benefit of the parties to the action themselves and that no public interests are involved, such conditions will not be considered as indispensable, and either party may waive them without affecting the jurisdiction of the Court".

The Supreme Court then observed:

"The Judicial Committee in 74 Ind App 223= AIR 1947 PC 197 pointed out that there was no inconsistency between the propositions that the provisions of Section 80 of the CPC were mandatory and must be enforced by the court and that they might be waived by the authority for whose benefit they were provided. In that case Judicial Committee held that Section 80 of the CPC was explicit and mandatory; but still it held that it would be waived by the authority for whose benefit that was provided".

It was held in that case that even assuming that Section 34 of the Bengal Money Lenders Act was mandatory on a true construction of that section, it was clear that it was intended only for the benefit of the judgment debtor and therefore, he could waive the right conferred on him under that section. Thus, though now it is well settled that in a given case the non-compliance with the requirements of Section 80 with regard to the service of notice could be waived by a party, the question in the instant case is whether the plaintiff is entitled to contend that in view of the delay in filing the written statement, the defendants Nos. 1 and 2 can be said to have waived the requirements of Section 80 of the Code that the suit should not be filed until the expiration of two months next after the notice had been delivered. It appears to us that it is hardly open to the plaintiff in this case to raise any plea of waiver in the light of the provisions of Section 80. It is no doubt true that the defendants Nos. 1 and 2 have filed a written statement long after the period of limitation for the suit under Rule 13(2) of the Rules had expired; but in the written statement itself the objection that the suit had been filed before the expiry of the period of two months has been taken. A waiver is an intentional relinquishment of a known right. It may be express or implicit. It is difficult to see in the instant case where admittedly it is not urged that there was any express waiver how the filing of the written statement late can amount to an implied waiver. Defendants Nos. 1 and 2 had earlier prayed for time to file a written statement. That time was once granted. When the time was for the first time granted on 28-10-1964, the period of one year from 13-9-1963 was already over. The written statement was filed and taken on record on 28-4-1965. When the Court passed an order on a specific application (Ex. 30) that the written statement should be accepted, it meant that the delay in filing the written statement had been condoned by the Court. Where waiver is sought to be relied upon by a party it is for that party to establish the circumstances under which he wants an inference of either express or implied waiver to be drawn. The only circumstances relied upon in the instant case is the late filing of the written statement. It is difficult for us to see how on this mere fact an inference of waiver of the objection can be drawn. It is no doubt true that in *Hirachand Himatlal Marwadi Vs. Kashinath Thakurji Jadhav*, a Division bench of this Court has held that any prejudice to the plaintiff caused by the delay in taking an objection with regard to the notice u/s 80 of the CPC would result in the defendant being deemed to have waived his right to notice. But at the same time the Division bench has made it clear that delay, however long, would not necessarily by itself be a ground for holding that he has waived it. There the objection was not that the suit was filed before the expiry of the period of two months prescribed by Section 80. That was a case in which the objection related to the want of notice itself and the objection was not taken until two years after the issues were first framed, and the Court took the view that by that time the plaintiff's rights under the Specific Relief Act were barred and, therefore, the inference of waiver was drawn. Apart from the fact that the decision in that case turned on its own facts, we may refer to the decision of the Privy Council in *Vellayan Chettiar's case*, AIR 1947 PC 197 in which it was pointed out that even

though a plea of want of notice is not taken earlier, there can be no estoppel against the party from taking the plea at a later stage. The facts in Vellayan Chettiar's case show that the plaintiff in that case had initially filed a suit to which Section 80 of the CPC applied, in a wrong Court, and in the written statement the defendants had not taken any objection to the notice but was content to object to the maintainability of the suit on the ground of want of jurisdiction. Subsequently the suit was instituted in the proper Court, and the defendants k raised a plea that the suit notice was not k in accordance with law and the suit was, therefore, not maintainable. An issue about the waiver of the notice was raised and another issue as to whether the defendants were estopped from contending that no proper notice of suit was given to them was also raised. These issues were decided in favour of the plaintiffs by the trial court, but in appeal the decision was reversed by the High Court. The plaintiffs, therefore, went in appeal to the Privy Council. It was contended before the Privy Council that since in the k written statement filed in the Court in which the suit was originally filed the defendants did not deny the averments of the plaintiffs that the defendants had been given proper notice, they must be taken to have admitted the averments and that the implication of this implied admission was that they waived their right to a proper notice, or, alternatively, that by the implied admission the plaintiffs were induced to act upon the assumption that a proper notice had been given so that the defendants were estopped from denying that fact. Rejecting this contention the Privy Council observed:

"It comes therefore to no more than this, that in a suit which was wrongly brought in the Court of the District Munsif the respondents were content to rely on want of jurisdiction for one reason only when two reasons were available. They were successful in the plea which they raised. Upon the suit being instituted in the Court of the Subordinate Judge - and for this purpose it is immaterial whether the suit is to be regarded as a new suit or the old suit reinstituted in another Court-they at once raised the plea upon which they have ever since relied. Their Lordships wee no reason why they should not do so. The plaintiffs were in error throughout in instituting a suit which Section 80 prohibited. The respondents were under no duty to them to point out their error. They might have been negligent in their own interest in not raising the plea at an earlier stage. But negligence cannot give rise to an estopped unless there is a duty of care". These observations, therefore, indicate that merely because an objection with regard to non-compliance with the provisions of Section 80 has been taken late an inference to waiver cannot be drawn, and in the instant case defendants Nos. 1 and 2 were not duty bound to point out to the plaintiff the fact that his suit has l been filed prior to the expiration of the period of two months contemplated by Section 80 at a stage earlier than the filling of the written statement.

10. The question which essentially arises in this case is not one of waiver in the true sense of the term. The question really is: Court the suit have been instituted on the day it has been so instituted by the Plaintiff? In our view, Section 80

clearly bars a suit being instituted before the expiration of two months next after the notice has been delivered. The bar u/s 80 is against the institution of the suit itself. Section 80 specifies the period after which a suit to which Section 80 applies can be instituted. The words "until the expiration of two months next after notice in writing has been delivered to or left at" are not without significance. The effect of these words in Section 80, therefore, clearly is that unless the period of two months next after the delivery of the notice either to the Government or to the public officer concerned expires, the section prohibits the institution of the suit. Therefore, filing of a suit before the expiration of two months next after the notice has been delivered is prohibited by the mandatory provisions of Section 80 of the Code. There does not seem to be any power or jurisdiction in the Court to entertain such a suit. To that extent, the matter clearly relates to the jurisdiction of the Court to entertain the suit, and in such a case the question of waiver either by the State Government or by the public officer cannot arise. Under Order 7, Rule 11(d) it is obligatory on the Court to reject the plaint where the suit appears from the statement of the plaint to be barred by any law. Thus, in a case where the suit is filed before the expiration of the period of notice contemplated by Section 80, there is no alternative for the Court to reject the plaint under order 7, Rule 11 (d) of the Code of Civil procedure.

11. In the view which we have taken we are supported by the decisions of the Punjab and the Patna High Courts. In *B.L. Chopra Vs. Punjab State and Others*, a Division Bench of the Punjab High Court held that where a notice of suit was given on 18-9-1953 and the suit was instituted on 18-11-1953, the suit was barred by Section 80 of the Code of Civil Procedure. It was observed that the only proper way to look at the matter is to take complete two months next after delivery or service of the notice which can only be excluding the day on which such service or delivery is made. Since in the view of the Division Bench the day on which the notice was served had to be excluded the suit was premature by a day and was liable to be dismissed. In *Lakshmi Narain Vs. The Union of India (UOI) and Another*, the notice was given on 11-5-1953 and the suit was filed on 11-7-1953. It was held that the suit could not have been instituted on 11-7-1953 and that it was premature.

12. The learned counsel for the appellant has brought to our notice a decision of the Kerala High Court in *Nani Amma Nannini Amma Vs. State of Kerala and Others*. The facts in that case show that a revenue sale having been canceled by the Collector the plaintiff issued a notice u/s 80 of the CPC on 29-10-1952 and instituted a suit on 10-11-1952 long before the expiration of two months of service of the notice. The suit remained pending for almost five years, and a question of defect of the institution of the suit having been raised by the State u/s 80 of the Code of Civil Procedure, the Subordinate Judge held that suit unsustainable and dismissed the same without advertent even to the alternative claim to enforce the hypothecation. The learned Single Judge of that Court observed that the section has to be viewed only as indicative of the time for

presentation of a plaint in a suit against Government or a public officer, and he took the view that as the dismissal of a suit on the ground of premature institution will not bar a second suit after maturity to dismiss the present suit so as to compel the plaintiff to file a second suit almost immediately would be a meaningless formality tending only to multiplicity of proceedings, and it was held that there was nothing in Section 80 expressly affecting the jurisdiction of the Court to try suits instituted before the expiry of the period prescribed therein. With respect to the learned Judge, in the view which we have taken that Section 80 prohibits the institution of the suit itself we are not inclined to follow the Kerala view. We might also refer to the observation of the Supreme Court extracted earlier from *Beohar Rajendra Sinha and Others Vs. State of Madhya Pradesh and Others*, in which it was pointed out that in considering whether the provisions of Section 80 have been complied with or not, one of the circumstances which the court have to consider is whether the suit is instituted after the expiration of two months next after notice has been served. Having regard to the imperative words of Section 80, we are of the view that however hard the result may be, the Court does not have jurisdiction to entertain a suit filed before the expiry of the period specified therein. The question of prejudice to the plaintiff is wholly irrelevant in view of the imperative words of Section 80.

13. The result, therefore, is that the appeal fails and is dismissed with costs.

14. Appeal dismissed.