
(2015) 09 GAU CK 0015
In the Gauhati High Court
Case No : RSA No. 28 of 2006

Kamal Ch. Nath

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 18-09-2015

Acts Referred:

Bengal Public Demands Recovery Act, 1913 — Section 10, 3(6), 34, 34(3)(b)(iii), 51
Civil Procedure Code, 1908 (CPC) — Section 80

Citation : (2015) 5 GLT 175

Hon'ble Judges : Suman Shyam, J.

Bench : Single Bench

Advocate : A.D. Choudhury, for the Appellant; G. Sarma, GA, for the Respondent

Final Decision : Allowed

Judgement

Suman Shyam, J.—The instant second appeal has been preferred by the plaintiff as appellant assailing the concurrent judgment and decree dated 14.12.2005 passed by the learned Civil Judge (Sr. Div.), Nagaon in Title Appeal No. 34/2004 affirming the judgment and decree dated 23.06.2004 passed by the learned Civil Judge (Jr. Div.) No. 1., Nagaon in Title Suit No. 09/2001 dismissing the suit filed by the plaintiff. The brief facts of the case, as projected in the plaint, is that the plaintiff is a contractor registered under the department of PWD (Building), Assam. He was awarded the contractual work for constructing the office building of the Superintendent of Taxes and the Doctors quarters at Mahadeosal, Nagaon vide work order dated 11.08.2008 pursuant where to, a contract agreement dated 11.08.1988 was also signed by and between the parties paving the way for execution of the work. The plaintiff had duly commenced the work and the construction of the doctors quarter had also been completed. However, due to non-cooperation of the defendant No. 2, the construction work of the office of the Superintendent of Taxes remained incomplete. Thereafter, the defendant No. 3 had issued a requisition for recovery of a sum of Rs. 3,34,119/- from the plaintiff claiming the said amount to be due and recoverable from him on account of the

fact that stock materials worth Rs. 2,51,143/- allotted to the plaintiff had not been returned by him to the department. On receipt of the requisition, the defendant No. 4 had signed a certificate under the provision of Section 6 of the Bengal Public Demands Recovery Act, 1913 (hereinafter referred to as Act of 1913) and issued a notice upon the plaintiff. On receipt of the notice issued by the defendant No. 4 Bakijai Officer, the plaintiff had entered appearance and requested for furnishing him the full particulars of the alleged due so as to enable him to defend his interest in the matter. The defendant had also filed a petition dated 24.02.2000 denying the liability to pay the certificate amount. However, notwithstanding the aforesaid request made by the plaintiff, neither the materials were furnished to him nor was the liability of the plaintiff determined by the respondent No. 4 as per the requirement of Section 10 of Act of 1913. On the contrary, the plaintiff was asked to pay an amount of Rs. 1,11,373/- as first instalment on 16.10.2000.

2. Being aggrieved by the said order passed by the respondent No. 4, the plaintiff had preferred an appeal under Section 51 of the Act of 1913 before the learned Addl. Deputy Commissioner, Nagaon. Said appeal was also rejected by the Addl. Deputy Commissioner by order dated 05-01-2001 without any proper determination. As such, the plaintiff was compelled to institute Title Suit No. 09/2001 in the court of Civil Judge (Jr. Div) No. 1, Nagaon under Section 34 of the Act of 1913 inter-alia praying for cancellation of the certificate of recovery issued by the respondent No. 4.

3. On receipt of summons, the defendant No. 1 to 4 had entered appearance and filed their joint written statement, inter alia, questioning the maintainability of the suit on the ground of want of cause of action; the suit being barred by limitation as well as the same being not maintainable due to non-joinder and mis-joinder of necessary parties. In their written statement, the contesting defendants have also questioned the maintainability of the suit on the ground of non-service of the mandatory notice under Section 80 of the Civil Procedure Code before instituting the suit.

4. On the basis of the pleadings contained in the plaint as well as the written statement, learned Trial Court had framed the following issues:

"1. Is there any cause of action for the suit?

2. Whether the suit is barred by law of limitation?

3. Whether the dues in question is recoverable under Bengal Public Demand Recovery Act?

4. Whether the suit is bad for want of notice U/S 80 CPC?

5. Whether the plaintiff is entitled to decree as prayed for.

6. To what relief or reliefs if any the plaintiff is entitled."

5. The plaintiff side had examined one witness, being plaintiff himself, as PW-1.

The defendants, however, did not adduce any evidence. The learned Trial Court, on appraisal of the evidence on record and after hearing the parties, had decided the issue No. 3 and 4 against the plaintiff and in favour of defendants holding that the amount demanded under the certificate of recovery was recoverable under the Act of 1913 and that the suit filed by the plaintiff was not maintainable due to non-service of notice under Section 80 of CPC. Consequently, the learned Trial Court had dismissed the suit filed by the plaintiff by the judgment and decree dated 23.06.2004.

6. Being aggrieved by the judgment and decree dated 23.06.2004, the plaintiff as appellant had preferred Title Appeal No. 34/2004 before the court of learned Civil Judge (Sr. Div.), Nagaon. After hearing the parties the title appeal filed by the plaintiff/appellant was also dismissed by the lower Appellate Court on 14.12.2005.

7. Being aggrieved by the concurrent judgment and decree passed by the learned Lower Appellate Court, the plaintiff has preferred the instant second appeal which was admitted to formal hearing by this Court on 24.08.2009 by framing the following two substantial questions of law:

"1. Whether any money payable to any Officer of the Govt. can be recovered under the provisions of the Bengal Public Demand Recovery Act, 1913 in absence of there being any specific clause that the "Money Shall be recoverable as Public Demand" in the written agreement?

2. Whether the findings of the learned Courts Below that the money in question is recoverable under provision of Bengal Public Demand Recovery Act, 1913 is perverse, in absence of the there being any specific Clause in "Ext. 5. Agreement" for recovery much less to the effect that "the money payable shall be recoverable as a Public Demand"?"

8. I have heard Mr. A.D. Choudhury, learned counsel for the appellant and also heard Mr. G Sarma, learned Government Advocate, Assam representing the respondents.

9. By referring to a judgment and decision of this Court in the case of Md. Anwarulla v. Assam Board of Revenue & Ors. reported in (1988) 2 GLR 424, Mr. Choudhury submits that even assuming that the amount claimed was recoverable by the Defendant Nos. 1, 2 and 3 from the plaintiff under the contract agreement yet, the same cannot be termed as Public Demand within the meaning of the Act of 1913. Referring to the provisions of Section 3(6) read with paragraph 9 of the schedule-1 of the Act of 1913, Mr. Choudhury submitted that there is no registered written instrument recording the agreement of the plaintiff permitting recovery of the amount in question as a public demand and hence, the provisions of the Act of 1913 will not be attracted in the present case at all.

10. He, further submits that the plaintiff had appeared before the defendant No. 4 after receipt of notice under Section 7 of the Act and, thereafter, filed an

objection denying his liability but the defendant No. 4 did not decided such objection as per requirement of Section 10 of the Act of 1913. Even the appeal filed by the appellant/plaintiff under Section 51 of the Act of 1913 was rejected by the Addl. Deputy Commissioner, Nagaon in a most perfunctory manner without addressing the core issue raised by the appellant/plaintiff denying his liability to pay the amount Even the learned court below failed to appreciate the law in the correct perspective while deciding the issue Nos. 3 and 4 against the plaintiff by Ming to appreciate that there was no public demand in the eye of law that was capable of recovery by issuing a certificate under Section 6 of the Act of 1913.

11. Per contra, Mr. G. Sarma, learned Government Advocate appearing on behalf of the respondent No. 1 to 4 submits that as per Clause 15 of the agreement dated 11.8.1988 entered by and between the parties the PWD was entitled to recovery the monies and dues from the contractor, that was liable to be paid to the Government on account of breach of terms of the contract. Therefore, the instrument as referred to under paragraph 9 of the first schedule-1 was in existence permitting the defendant/respondent to recover the said amount under the provision of Act of 1913 treating the same as public demand. Since, the plaintiff had failed to return the stock material back to the department hence, the Bakijai proceeding was maintainable in the eye of law.

12. Mr. Sarma further submits that suit filed by the plaintiff besides being barred by limitation is also not maintainable due to non-service of prior notice under Section 80 CPC. In such view of the matter the plaintiffs suit was not maintainable in the eye of law and hence, there is no illegality or infirmity in the judgment and decree under appeal.

13. I have considered the rival submission made by and on behalf of the parties and have also perused the materials on record. The core question of law that requires to be answered in this appeal is as to whether the amount claimed under the impugned certificate can be recovered from the plaintiff as a Public Demand within the meaning of the Act of 1913.

14. Section 3(6) of the Act of 1913 defines the public demand, which is quoted herein below for ready reference:

"3.(6) "Public demand" means any arrear or money mentioned or referred to in Schedule -I and includes any interest which may, by law, be chargeable thereon up to the date on which a certificate is signed under Part II;"

15. Schedule- 1 of the Act of 1913 includes the various kinds of public demands within the meaning of the Act The paragraph 9 of the said schedule, which is relevant for the purpose of the present case, provides as follows:

"9. Any money payable to [an officer of the Government] or any local authority, in respect of which the person liable to pay the same has agreed, by a written instrument, duly registered, that it shall be recoverable as a public demand."

16. From the conjoint reading of the provision of Section 3(6) together with paragraph 9 of the first schedule, it is apparent that for any amount to be recoverable as public demand as per paragraph 9 of the schedule-1 is that (i) the person liable to pay must unequivocally agree that the amount in question would be recoverable from him as public demand (ii) such agreement must be in the form of a written instrument, and (iii) such instrument must be duly registered.

17. In the case of Md. Anwarulla (Supra) this Court while considering the question as to what would constitute a public demand as per paragraph 9 of the schedule-1 of the Act of 1913, has observed as follows:

"3. There is no material before us at all to show that the requirements of para 9 are satisfied in the present case inasmuch as (1) there is no written instrument; (2) duly registered and stating (3) that the money payable shall be recoverable as a public demand. In fact, there is no written agreement at all between the parties. This being the position, we are satisfied that the amount in question, even if the same has remained payable to the Superintending Engineer, Public Works Department, cannot be regarded as a "public demand" as defined in the Act."

18. In the instant case there is a written agreement between the parties permitting recovery of such amount as may be found due and payable on account of breach of contract by the contractor. However, a perusal of Clause 15 of the said agreement goes to show that in the event of breach of conditions contained in the contract agreement, the contractor shall, in addition to throwing himself open to action for contravention of the terms of the license or permit and/or for criminal breach of trust, be liable to the Government for all monies, advantages or profits resulting or which in the usual course would have resulted to him by reason of such breach. Clause 15 does not record any agreement or undertaking on the part of the plaintiff/appellant permitting recovery of any amount from him as public demand.

19. Clause 15 of the contract agreement, no doubt, permits the Government to recover any amount from the contractor as may be found due under the law on account of breach of any terms and conditions of the contract. But such amount would be recoverable only if the liability of the contractor to pay the same is determined by a process established by law. Therefore, clause 15 of the agreement dated 11.08.1988 cannot be construed to be an admission of any liability nor can the same be treated as an agreement on the part of the plaintiff permitting recovery of any unspecified amount from him as a public demand within the meaning of schedule-1 of the Act of 1913. Moreover, the agreement dated 11.08.1988 is also not a registered instrument as per the requirement of schedule-1. As such, I am of the considered opinion that clause 15 of the agreement dated 11.08.1988 does not meet the requirement of paragraph 9 of the Schedule-1 of Act of 1913. Consequently, the Certificate of Recovery issued on the basis of clause 15 is held to be bad in the eye of law. The substantial questions of law framed by this court, therefore, stands answered in favour of

the appellant/plaintiff.

20. Although no substantial question of law was framed by this Court at the time of admission of the appeal on the issue of non-service of notice under Section 80 CPC prior to institution of the title suit by the plaintiff, yet, with the leave of the Court, the parties have addressed this Court on the aforesaid aspect as well. It is the case of the respondents that the suit itself was not maintainable since the plaintiff had failed to serve a notice under the provision of Section 80 CPC.

21. In a decision rendered in the case of Raghunath Das Vs. Union of India (UOI) and Another, , the Hon"ble Apex Court, while considering the object of the notice under Section 80 CPC, has held that the legislative intention behind such section is that public money and time should not be wasted on any unnecessary litigation and the Government and the public officers should be given a reasonable opportunity to examine the claim made against them lest they should be drawn into avoidable litigation. The purpose of law is advancement of justice and, therefore, provision of Section 80 CPC are not intended to be used as booby-trap against the ignorant and illiterate persons.

22. In the case of Ghanshyam Dass and Others Vs. Dominion of India and Others, the Hon"ble Apex Court had observed as follows:

"12. In the ultimate analysis, the question as to whether a notice under Section 80 of the Code is valid or not is a question of judicial construction. The Privy Council and this Court have applied the rule of strict compliance in dealing with the question of identity of the person who issues the notice with the person who brings the suit This Court has however adopted the rule of substantial compliance in dealing with the requirement that there must be identity between the cause of action and the reliefs claimed in the notice as well as in the plaint As already stated, me Court has held that notice under this section should be held to be sufficient if it substantially fulfils its object of informing the parties concerned of the nature of the suit to be filed. On this principle, it has been held that though the terms of the section have to be strictly complied with, that does not mean that the notice should be scrutinised in a pedantic manner divorced from common sense. The point to be considered is whether notice gives sufficient information as to the nature of the claim such as would enable the recipient to avert me litigation."

23. In the instant case what is apparent from the record is that the plaintiff and the defendants had been locked in a legal proceeding trader Section 51 of the Act of 1913 prior to institution of the suit wherein the plaintiff while categorically denying his liability to pay the certificate amount had also questioned the maintainability of the proceeding itself on the plea that there was no amount recoverable from him by way of public demand. The said proceedings culminated into the filing of the Title Suit by the plaintiff for cancellation of the certificate. Earlier, the plaintiff/appellant had also denied his liability before the Bakijai Officer. The learned Addl. Deputy Commissioner, Nagaon had disposed of the

appeal filed by the appellant/plaintiff under Section 51 of the Act, by order dated 05.01.2001 wherein it has been categorically observed as follows:

"But the C.D. vide his petition dated 14/XI/2K has sought to deny his liability on the ground that this liability does not come under the preview of the public demand of the B.P.D.R. Act, this cannot be entertained now. Neither he has filed any petition accompanied by documents for alteration/modification of the certificate."

24. The service of prior notice under Section 80 CPC is mandatory under the law so as to maintain a suit against the Government or a public officer. However, whether or not the provisions of Section 80 CPC has been duly complied with in a given case will depend on the facts and circumstances of that case. In the present case, it is apparent from the record that defendants were all along aware of the identity of the plaintiff, the cause of action and the nature of grievance of the plaintiff in the matter as well as the relief sought for by the plaintiff. Despite being aware of the grievance of the plaintiff/appellant, the respondent No. 1 had rejected the stand of the plaintiff and rather contested the claim on the aforesaid count. It is, therefore, evident that the defendants had sufficient notice of the case of the plaintiff well in excess of the statutory period mentioned in Section 80 CPC and hence, there has been substantive compliance of the requirement of Section 80 CPC in the facts and circumstances of the present case.

25. There is yet another aspect of the matter which needs to be mentioned herein. The title suit we are concerned with had been admittedly instituted by the plaintiff under Section 34 of the Act 1913 seeking cancellation of the Certificate of Recovery issued by the Bakijai Officer whereby the decision rendered by the Additional Deputy Commissioner, Nagaon rejecting the appeal filed by the plaintiff under Section 51 of the Act of 1913 had also been assailed. The enjoinder of Section 34(3)(b)(iii) of the Act 1913 debars any challenge to an order passed Section 51 of the Act unless the suit is instituted within a period of thirty days from the decision in the appeal. As such, by necessary implications, Section 34 of the Act of 1913 clearly envisages a continuity of the proceedings commenced under Section 51 of the Act, culminating into a suit filed under Section 34 of the Act of 1913. A harmonious construction of Section 80 CPC read with the provision of Section 34(3)(b)(iii) would, therefore, lead to the irresistible conclusion that the requirement of further notice under Section 80 CPC prior to institution of a suit under Section 34 of the Act 1913 would automatically stand dispensed with under the scheme of the Act of 1913. In view of the foregoing reasons, I am of the considered opinion that the impugned judgment and decree passed by the court below is not sustainable in the eye of law, and as such, the same is hereby set aside. It is held that the Certificate of Recovery issued by the defendant No. 4 was illegal since there is no amount recoverable against the plaintiff as public demand within the meaning of schedule-1 of the Act of 1913. Consequently, plaintiff's suit stands decreed in terms of the prayers made therein. It is, however, made clear that

notwithstanding the judgment and order passed by this Court in this appeal, it will remain open for the respondents to initiate appropriate legal proceeding against the appellant/plaintiff, for recovery of any amount found due under the contract agreement, in accordance with law. If any such proceeding is initiated against the plaintiff by the respondent No. 1 and 2, the same shall be decided on merit without being influenced by any observation made by this Court.

The second appeal stands allowed.

No order as to cost. Prepare a decree accordingly.

Send back the LCR.