

(1976) 01 PAT CK 0021
In the Patna High Court
Case No : A.F.O.D. No. 48 of 1968

Lakshmi Narain Ram Narain

APPELLANT

Vs

The State of Bihar

RESPONDENT

Date of Decision : 06-01-1976

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 6 Rule 2, Order 8 Rule 2, Order 8 Rule 3,
Order 8 Rule 4, 80
Limitation Act, 1963 — Article 55

Citation : AIR 1977 Patna 73 : (1976) 9 PLJR 478

Hon'ble Judges : Lalit Mohan Sharma, J;B.P. Sinha, J

Bench : Division Bench

Advocate : N.S. Chatterjee and Nawal Kishore Prasad Sinha, for the Appellant;
Ram Balak Mahto, Govt. Pleader No. 4 and Syed Nafat Alam, J.C. to Govt.
Pleader No. 4, for the Respondent

Final Decision : Dismissed

Judgement

Lalit Mohan Sharma, J.—This appeal by the plaintiff is directed against the dismissal of the suit by the trial Court, The plaintiff has prayed for a money-decree for a sum of Rs. 23,12,484/-(Rupees twenty three lakhs twelve thousand four hundred and eighty four) by way of damages for breach of a contract The State of Bihar is the sole respondent.

2. According to the case of the plaintiff, he has been supplying Mahua-Molasses spirit to the Government Warehouses in different districts of the State of Bihar, under licences issued for a term of three years at a time, under the provisions of the Bihar and Orissa Excise Rules. The Government has been calling for tenders for the said supply before entering into a contract and issuing the licences. The plaintiff obtained such a contract for a period of three years ending on the 31st of March, 1959 and supplied Mahua-Molasses spirit during this period. For the subsequent period of three years ending on the 31st of March, 1962, various tenders were invited by the Commissioner of Excise. Bihar, and the plaintiff filed

his tender along with other persons. After a negotiation in regard to the terms, an agreement was reached between the plaintiff and the State of Bihar through the Excise Commissioner for supply of Mahua-Molasses spirit at a particular rate and the plaintiff started making the supply. However, the licences for the purpose were not issued until the 26th September, 1960. The licences which were granted on the 26th of September, 1960 in favour of the plaintiff were again for a period of three years ending on the 31st of March, 1962. According to these licences, the commodity to be supplied was not Mahua-Molasses spirit, but pure Molasses spirit. This was according to the plaintiffs case, in breach, of the contract. The price of pure Molasses spirit is higher than that of Mahua-Molasses spirit and the terms settled and mentioned in the licences were not profitable for the plaintiff for supply of pure Molasses-spirit. From the 10th December, 1959, it is further averred, that the State Officers forced the plaintiff to supply pure Molasses spirit in accordance with the actual terms mentioned in the licences. The plaintiff protested and did not want to accept the licences on the terms mentioned therein, but under undue pressure which was put on him and under coercion, he started supplying pure Molasses-spirit. On account of this, he had to suffer loss, for the compensation thereof, he filed the suit.

3. A notice u/s 80 CPC (hereinafter referred to as the "Code") was served on the State on the 31st March, 1965 and the suit was filed on 31st of May, 1965,

4. The defendant filed a written statement denying the liability and pleading, inter alia, that the suit was barred by limitation and was also bad for non-compliance of the provisions of Section 80 of the Code. A number of issues were framed including issue no. 3 relating to the question of limitation and issue no. 4 about the maintainability of the suit for non-compliance with the provisions of Section 80 of the Code. These two issues were taken up by the Court below as preliminary issues and were heard. The Court decided both these issues against the plaintiff and dismissed the suit. The plaintiff has appealed.

5. No grievance has been made before us on behalf of the appellant against the trial of the two issues as preliminary issues. Mr. N. S. Chatterjee, learned counsel appearing for the appellant, has contended that the findings reported by the Court below on both the questions, are erroneous and are fit to be set aside.

6. In the first instance, Mr. Chat-terjee contended that the suit cannot be thrown out for non-compliance with the conditions mentioned in Section 80 of the Civil Procedure Code, because Section 80 is not applicable at all to the present suit. He invited us to interpret the plaint as making a claim not against the State of Bihar which is the only defendant in the suit, but against the Commissioner of Excise, Government of Bihar. Proceeding further, it was contended that Section 80 would not be a bar unless it was shown that the Excise Commissioner acted in his official capacity in refusing to make payment of the damages. In the present case, it is said, that there is no positive act of the Excise Commissioner in his official capacity which is the foundation of the relief; the claim is made, on the basis of an omission on the part of the Commissioner to make payment. Strong

reliance was placed by Mr. Chatterjee on the decision of Amalgamated Electricity Co. (Belgaum) Ltd. Vs. Municipal Committee, Ajmer, .

7. On a perusal of Section 80 of the Code, it appears that it deals with two classes of cases, namely, suits against the Government and suits against public officers. In the first class of suits, notice under this section must be given in all cases. It is only the second class of suits in which public officers are defendants that the question whether the act purporting to be done by the State public officer has been done in his official capacity or not, arises. This aspect of the matter is not referable to a suit against the Government. In the case of Amalgamated Electricity Co. (Belgaum) Ltd. Vs. Municipal Committee, Ajmer, , the suit had been filed by the Electricity Commissioner for the realisation of dues against the Municipal Committee, Ajmer, Section 233 of the Ajmer Merwara Municipalities Regulation which was applicable to the case, read as follows:

"Section 233: Suits against Committee or its officers -- No suit shall be instituted against a Committee, or against any member, Officer or servant of a Committee, in respect of any act purporting to be done in its or his official capacity, until the expiration of one month next after notice in writing has been, in the case of a Committee, delivered or left at its office, and in the case of an officer or servant, delivered to him or left at his office or place of abode, stating the cause of action and the name and place of abode of the intending plaintiff; and unless the plaint contains a statement that such notice has been so delivered or left:

Provided that nothing in this section shall apply to any suit instituted u/s 54 of the Specific Relief Act, 1877 (I of 1877)."

8. Mr. Chatterjee seriously urged that although the suit in that case was filed against the Municipality and not against the members, the fact whether the "act" complained of was an act within the meaning of the section, was considered and further the Supreme Court also considered the question whether the said "act" was in the official capacity or not. Great emphasis was laid on the observations made towards the end of paragraph 7 of the judgment wherein, after discussing Section 80 Civil Procedure Code, it was said that. "Similar is the position u/s 233 of the Ajmer Merwara Municipal Regulation."

9. The language of Section 233 of the Municipalities Regulation is similar to that of Section 80 of the Code, but with one great difference. The question whether the offending act has been purported to be done in official capacity or not, is relevant u/s 80 of the Code in only such suits which are against public officers, but is applicable to all suits referred to u/s 233 of the Municipalities Regulation, whether filed against the Committees or its officers. The words "its or" in the quoted section above make all the difference. The word "its" refers to Committee and not to any member, officer or servant of a Committee. For covering the suits against the members, officers or servants, further words "his official capacity" have been mentioned. The Supreme Court pointed out the similarity of the conditions of suits covered by Section 233 of the Municipalities Regulation and

the suits against public officers contemplated u/s 80 of the Code. This aspect of the matter is absolutely clarified in paragraph 10 of the judgment in the following words:--

"It is true that in AIR 1927 176 (Privy Council) , the Privy Council laid down that Section 80 should be strictly complied with and is applicable to all forms of action and all kinds of reliefs claimed against the Government. But here in this case we are not concerned with a claim against the Government Therefore that decision has no application to the facts of the present case." (emphasis is mine)."

I am, therefore, of the opinion that the Amalgamated Electricity Co. (Belgaum) Ltd. Vs. Municipal Committee, Ajmer, has no application to this appeal.

10. Besides, it is not possible to read the plaint in the way suggested by Mr. Chatterjee. The claim is clearly made against the State of Bihar and there is no other defendant at all. The cause of action is based upon a breach of the contract and in paragraph 11 of the plaint, it has been, specifically mentioned that it is the defendant, i.e. the State of Bihar, which committed the breach of contract. The suit being against the Government, it must be held that it will be governed by the provisions of Section 80 of the Code.

11. The argument of Mr. Chat-terjee that like the case of the Amalgamated Electricity Co. AIR 1960 SC 227 , here also, there is no positive act complained of and it is merely a case of nonpayment of certain sum of money which is the basis of the suit, cannot be accepted. There is no material to suggest that the Commissioner of Excise was the person who had to make the payment to the plaintiff and that he failed to do so. It is also not a case of mere non-payment of a certain sum of money. There is a clear allegation of a breach of contract, which must be interpreted to include an element of positive act attracting the provisions of Section 80 of the Code. For all these reasons, I hold that the suit is governed by Section 80 of the CPC and must suffer from the consequences of the non-compliance of the conditions mentioned therein.

12. Learned counsel next contended that in view of absence of denial in the written statement regarding the non-fulfilment of the conditions mentioned in Section 80 of the Code, the point should not have been considered by the Court below on merits. Paragraph 10 of the written statement is in the following terms:

"That the suit is bad for non-service and non-compliance of the provisions of Section 80 of the Civil Procedure Code. Allegations made in para 18 of the plaint are denied."

The learned counsel argued that this is a vague kind of pleading and falls short of the requirements of Order 6 Rule 2 and Order 8, Rules 2, 3, and 4 of the Code of Civil Procedure. Reliance was placed on the case of Secretary of State Vs. Sagarmal Marwari and Another, . After having considered the plaint and the written statement in the suit, I am of the view that there is no merit in the contention of the learned counsel. Rule 2 of Order 6 enjoins that every pleading

shall contain and contain only a statement in a concise form of the material facts on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which they are to be proved. The sole object of the pleading is, as was pointed out by the Privy Council in (1895) 22 I.A 4 ,that each side may be fully alive to the questions that are about to be argued in order that they may have an opportunity of bringing forward such evidence as may be appropriate. So far the relevant facts in the present case are concerned, they are (a) that the notice u/s 80 was served on the 31st of March, 1965 and (b) that the suit was filed on the 31st of May, 1965. These facts are mentioned in the plaint itself and the defendant has not failed in its duty by not repeating the same in the written statement. In Secretary of State Vs. Sagarmal Marwari and Another, , it was held that if the applicability of Section 80 depends upon proof of certain facts and the defendant does not deny the facts alleged in the plaint, then it would, under the ordinary rule of pleadings, be held to have waived his objection to the proof of those facts. In the present appeal, the defendant not only does not deny the facts alleged in the, plaint, but relies on the same. The plea raised in paragraph 10 of the written statement, in the circumstances, is adequate in law. The court was, accordingly, right in framing a specific issue on the point.

13. The trial Court has held that inasmuch as the notice u/s 80 of the Code was admittedly served on the defendant on the 31st of March, 1965, the suit could not have been filed earlier than the 1st of June, 1965; and the same having been filed on the 31st May, 1965, was premature Mr. Chatterjee contended that the suit, filed on the 31st May, 1965, was not insituted prematurely. It is suggested that the plaint was filed on the 61st day, excluding the day on which Section 80 notice was served and, therefore, was validly filed. The argument proceeds on the assumption that a month is equivalent to 30 days. This cannot be accepted. The relevant portion of Section 80 CPC is in the following terms:--

".....Until the expiration of two months next after notice in writing has been delivered to or left at the office of"

The 31st of March, 1965, on which date the notice was served, has to be excluded. The full period of two months must intervene between this day and the day on which the plaint is filed. There is no warrant for the proposition that the period of two months should mean 60 days. This period may, at times, be 61 days or 60 days or 59 days depending on the season in which the notice is served. The calculation of the period has to be made month-wise. Similar was the view taken in Lakshmi Narain Vs. The Union of India (UOI) and Another, . I, therefore, confirm the finding of the court below that the suit was filed prematurely by one day.

14. Mr. Chatterjee then urged that the provision relating to the duration in Section 80 is not mandatory and the suit should not, therefore, be dismissed on the ground that it wag instituted prematurely. Reliance was placed on Hiralal Agrawal etc. Vs. Rampadarath Singh and Others, etc., . He has not challenged

the mandatory nature of the requirement of service of a notice. To test the proposition, it may be useful to examine the object of the provisions of the section. It is plain that the section is intended to afford the defendant opportunity to reconsider the position and make amends or settle claim without recourse to litigation. This can be done only if sufficient time for the purpose is granted, and the element of time, therefore, must be held to be important. The defendant must also be held to be entitled to avail of the entire period mentioned in the section while considering the matter and taking a decision. The duration of the period, therefore, to my mind, appears to be of vital importance. In the case of Hiralal Agar-wal, the Court was considering the object of Rule 19 of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Rules framed under the provisions of the Bihar Land Reforms (Fixation of Ceiling Area and Acquisition of Surplus Land) Act, prescribing that the application u/s 16 (3) of the said Act must be accompanied by a copy of the registered deed. It was pointed out that the purpose was to enable the Collector, the prescribed authority, before he exercises his power to ascertain, the purchase price, the terms and conditions of the sale in question and readiness of the applicant to have the land in question conveyed to him on the same terms and conditions as in the sale deed. The object is fully achieved if the copy of the document is produced before the Collector in time before the orders are passed. This can, therefore, be of no avail for interpreting Section 80 of the Civil Procedure Code. The learned counsel then argued that in the present suit, the defendant did not indicate any intention of accepting to the claim of the plaintiff even on the 1st of June, 1965. This aspect of the matter appears to be wholly irrelevant. The interpretation of the language of a section cannot depend on the individual act in a particular litigation. I must, therefore, overrule the last argument also addressed on behalf of the appellant in relation to Section 80 notice.

15. Lastly, Mr, Chatterjee challenged the finding of the court below that the suit is barred by limitation. It has been argued that from the plaint, it appears that different quantities of the commodity in question had to be supplied by the plaintiff from tune to time and this continued right up to the 31st of March, 1962. The suit, therefore, having been filed on the 31st of May, 1965 must be deemed to be within time after excluding the period taken in serving the notice u/s 80, in regard to the supply made on the 31st of March, 1962. The counsel therefore, stated that even if the claim relating to the supply made on the earlier dates be deemed to be barred, the suit should be decreed in part in regard to the supply made on the last date of the period of the contract, i. e. 31-3-1962. There are several difficulties in this argument. The plaint does not mention the quantity of the Commodity supplied on the 31st of March, 1962. The claim is not founded on the basis of successive breaches of the contract. The statements made in paragraphs 6, 7, 9, 10 and 11 of the plaint, clearly indicate that the relief claimed in the suit is based upon an alleged breach of contract. The alleged breach took place on the 16th of December, 1959. The suit, therefore, is governed by Article 55 of the Limitation Act and the period available to the

plaintiff was three years from the 16th of December, 1959. The suit, therefore, is held to be barred by limitation.

16. For the reasons stated above, the appeal, fails and is dismissed with costs.

B.P. Sinha J.

I agree.