
(1989) 08 KAR CK 0005
In the Karnataka High Court
Case No : Regular Second Appeal No. 56 of 1989

Mahadevaiah

APPELLANT

Vs

Sales Officer

RESPONDENT

Date of Decision : 04-08-1989

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Karnataka Co-operative Societies Act, 1959 — Section 125

Citation : (1989) 3 KarLJ 450

Hon'ble Judges : K.A. Swami, J

Bench : Single Bench

Advocate : C.N. Kamath, for the Appellant; N.K. Ramesh, for R-2, for the Respondent

Final Decision : Allowed

Judgement

Swami, J.—This second appeal arises out of O.S. No. 17/1978 filed by the plaintiff-appellant for a permanent injunction restraining the defendants from distraining or interfering in any manner with the movables of the plaintiff kept in the schedule premises and compelling the plaintiff in any manner to make payments and for costs.

2. The case of the plaintiff is that he had raised a loan from the 2nd defendant-society. It was a secured loan in a sum of Rs. 4,000/- in the year 1961; that an award was obtained by the 2nd defendant against him in the year 1963 for a sum of Rs. 4,480-47 and subsequently he paid a sum of Rs. 5,950/- and satisfied the award; that in spite of that, the 2nd defendant with his staff members surprisingly visited the schedule premises in which the plaintiff was residing and attempted to distrain the movables of the plaintiff by force though they had no authority to do so. Hence the plaintiff filed the suit for a permanent injunction as stated above.

3. The defendants resisted the suit.

4. The trial Court raised the following issues:

1) Does plaintiff prove the payment of Rs. 5,950/- in full satisfaction of the midterm loan due to Service Co-operative Society, Haralur as contended in plaint para-2?

2) Whether the plaintiff further proves the attempts of the defendants attaching his movables is illegal and without any authority as contended in plaint paras 4 and 5?

3) Is this present suit maintainable as contended in para 4 of the written statement of 1st defendant?

3A) Whether the. defendants prove that the sum of Rs. 5,500/- paid by the plaintiff as admitted by the defendants, has been appropriated towards the discharge of the loans referred to in para 3 other than that of the transactions pleaded by the plaintiff?

4) Whether the present suit is bad for nonjoinder of parties?

5) Has this suit cause of action?

6) Is this present suit in time?

7) To what reliefs the parties entitle?

8) What decree or order?

There is no doubt that the issues are not happily worded. The trial Court answered all the issues in favour of the plaintiff. Accordingly, it granted a decree for permanent injunction as prayed for by the plaintiff.

5. Being aggrieved by the Judgment and decree passed by the trial Court, the 2nd defendant went up in appeal before the Additional Civil Judge, Tumkur in R.A. No. 20/1981. In the appeal, the learned Appellate Judge has held that the plaintiff had satisfied the award and nothing was due from him. However, a question of law was raised before the lower Appellate Court that the suit itself was not maintainable as no notice as required by Section 125 of the Karnataka Co-operative Societies Act (for short the "Act") was issued to the defendants.

6. It was not disputed before the lower Appellate Court that no notice as required by Section 125 of the Act was issued. The lower Appellate Court held that Section 125 of the Act attracted to the relief prayed for by the plaintiff and therefore, in the absence of a notice u/s 125 of the Act, the suit could not have been instituted against the defendants. Accordingly, it allowed the appeal and set aside the Judgment and decree of the lower Court and dismissed the suit.

7. Sri C.N. Kamath, learned Counsel for the appellate contends that as no contention was raised in the written statement about the maintainability of the suit in the absence of a notice issued u/s 125 of the Act, as such the same ought not to have been entertained by the first Appellate Court.

8. It is not possible to accept this contention. Pure question of law going to the root of the matter can be raised at any stage of the proceeding. Therefore, a contention which goes to the root of the matter affecting jurisdiction of the Court and for deciding the same no fresh evidence is required to be recorded, can very well be allowed to be raised. In the instant case, it is not the case of the plaintiff that he had issued a notice as required by Section 125 of the Act. The contention does not require a fresh evidence to be recorded. The point urged before the first Appellate Court was as to whether Section 125 of the Act ought to have been complied with before instituting the suit.

9. The learned Counsel for the appellant has placed reliance on a Division Bench decision of this Court in SOMWARPET NAD AGRICULTURAL PRODUCE MARKETING CO-OPERATIVE SOCIETY LTD., SOMWARPET v. SHA MANGILAL MOHANLAL & CO. AND ORS., RFA No. 65 of 1989: DD 5-7-1971. It is also further contended that even if it is accepted that the lower Appellate Court was right in holding that in the absence of a notice issued u/s 125 of the Act, the suit could not have been instituted, the highest the lower Appellate Court could or should have done, was to return the plaint to the plaintiff and it should not have dismissed the suit. These contentions are refuted by the learned Counsel appearing for the respondent-defendants.

10. In view of these contentions, the points that arise for consideration are as follows:

- 1) Whether Section 125 of the Karnataka Cooperative Societies Act, 1959 is attracted to the reliefs sought for by the plaintiff-appellant?
- 2) Whether the lower Appellate Court out to have returned the plaint to the plaintiff?

POINT NO. 1

11. Section 125 of the Act reads thus:

"Notice necessary in suits - No suit shall be instituted against a Co-operative Society or any of its Officers in respect of any act touching the Constitution, management or the business of the society until the expiration of two months next after notice in writing has been delivered to the Registrar 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."

In this case, the plaintiff has sought for a permanent injunction restraining the defendants from distraining or interfering in any manner with the movables kept in the schedule premises and from compelling in any manner the plaintiff to make payment. It is averred in the plaint that the plaintiff has satisfied the award obtained by the 2nd defendant and in spite of that, the defendants and their officials have unauthorisedly entered the house and taken away movables on the ground that the plaintiff has not satisfied the sum due under the Award.

Thus the plaintiff has sought the relief in respect of the positive acts committed by the defendants.

12. Section 125 of the Act specifically provides that when in any suit, the relief is in respect of any act committed by the society or its Officers touching the Constitution, management or the business of the society, no such suit shall be instituted without issuing the notice as required by Section 125 of the Act. In the instant case, the act of the society and its officers relates to the amount due under the Award. Thus the act complained of relates to the business of the society since it relates to recovery of the amount due under the award. Consequently it follows that the provisions of Section 125 of the Act are attracted to the reliefs sought for in the suit. In *Somwarpet Nad Agricultural Produce Marketing Co-operative Society Ltd, Case*, what was challenged was the failure on the part of the society in not paying the amount due to the plaintiff. The Court has held that as long as the omission was not illegal, it did not result in an "act" within the meaning of the Mysore General Clauses Act, therefore, Section 125 of the Act was not attracted. The relevant portion of the Judgment reads thus:

"Section 125 of the Act follows the words of Section 70 of the Bombay Co-operative Societies Act, 1925. Section 70 of the Bombay Act reads thus:

"No suit shall be instituted against a society or any of its Officers in respect of any act touching the business of the society until the expiration of two months next after notice in writing has been delivered to the Registrar, 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."

Section 70 of the Bombay Co-operative Societies Act came up for consideration before this Court in *THE ANKOLA URBAN CO-OPERATIVE CREDIT BANK LTD. v. LAXMI BAI* (1959 ML.J. 523) and in *THE BANK OF CITIZENS BELGAUM v. BALWANT VENKATESH POTDAR* (1961 M.L.J. 397). In *Ankola Urban Co-operatives case*, the question was whether a suit for rent due by a Co-operative Society was bad for want of notice u/s 70 of the Bombay Cooperative Societies Act. Sri S.R. Das Gupta, learned Chief Justice held that the non-payment of rent which is an omission cannot be said to be an "act" within the meaning of Section 70 of the Bombay Act and that an omission to constitute an act within the meaning of the Bombay General Clauses Act must amount to an illegal omission and that an act becomes illegal when it is forbidden by law.

The said decision was followed by a Bench of this Court (Hegde and Mir Iqbal Hussain JJ) in the *Bank of Citizen's case*. In that case, a suit was brought on a mortgage by the Bank of Citizens Ltd., Belgaum against the Belgaum Pioneer Urban Co-operative Credit Bank Ltd., against others as the Belgaura Pioneer Urban Co-operative Credit Bank Ltd. had purchased the mortgaged properties subject to the suit mortgage. The contention of the Belgaum Pioneer Urban Co-operative Credit Bank Ltd., was that the suit was bad for want of notice u/s 70 of

the Bombay Act. Following the earlier decision, the Bench held that no notice was necessary to enforce the mortgage even though one of the defendants was a Co-operative Society.

Sri A.C. Nanjappa, learned Counsel for the appellant invited attention to the decision of the Supreme Court in *WARNA SAHAKARI SAKKARE KARKHANA LTD. v. VITHALRAO ANANDRAO DESHMUKH* [1969(1) S.C. 517] (Civil Appeal No. 2687 of 1966 decided on 20-8-1969). In the said decision, the Supreme Court was considering the meaning of the expression "touching the business of the society" and it was observed that the word "touching" is very wide and would include any matter which relates to or concerns the business of the society. The said decision does not deal with the question in issue in the instant case. The decision in *Citizen's Bank's* case is binding on us.

The society was due to the plaintiff the price of the goods sold. The non-payment of the said sale price which is an omission cannot be said to be an "act" within the meaning of Section 125 of the Act. An omission to constitute an "act" within the meaning of the Mysore General Clauses Act must amount to an illegal omission. Therefore, the suit for recovery of the sale price due from the society is not a suit in respect of an "act" touching the business of the society. Consequently, it has to be held that no notice u/s 125 of the Act was required preceding the suit. The reasoning of the learned trial Judge for holding that no notice u/s 125 of the Act was necessary however cannot be supported. In his view, notice is necessary only with regard to a dispute or transaction between the society and a member of the society and it does not apply to a non-member who files a suit for arrears due from a society. That view is wholly erroneous but his conclusion can be supported for the reasons already stated.

Thus it is clear that the decision in *Somwarpet Nao Agricultural Produce Marketing Co-operative Society Ltd.* is not applicable to the case on hand inasmuch as in this case, it is the positive act of the defendants that has been challenged in the suit. Therefore, it was all the more necessary for the plaintiff to issue a notice as required by Section 125 of the Act.

13. Whenever, a statute prescribes that a notice shall be issued before the institution of the suit, a suit brought without issuing such a notice is bad in law and the Court will not have jurisdiction to entertain such a suit. The Supreme Court considered this aspect of the matter while considering the institution of a suit without issuing a notice u/s 80 C.P.C. (*See Amar Nath Dogra Vs. Union of India (UOI)*, . What applies to the suit filed without issuing a notice u/s 80 of the C.P. Code will equally apply to the suit instituted without issuing a notice u/s 125 of the Act. Therefore, point No. 1 is answered in the affirmative.

POINT NO.2

14. The lower Appellate Court having held that the suit should not have been instituted without issuing a notice u/s 125 of the Act, it should have simply set aside the Judgment and decree of the lower Appellate Court and directed the

return of the plaint instead of dismissing the suit because it is still open to the plaintiff to issue notice and file a suit. Therefore, the lower Appellate Court, to the extent it dismissed the suit is not justified. Accordingly, point No.2 is answered in the affirmative.

15. For the reasons stated above, this appeal is allowed, the Judgments and decrees of both the Courts below are set aside and the plaint is directed to be returned to the plaintiff.