

(2000) 04 MP CK 0030
In the Madhya Pradesh High Court
Case No : F.A. No. 146 of 1998

Manoj Kumar Shrivastava

APPELLANT

Vs

Arvind Kumar Choubey and Others

RESPONDENT

Date of Decision : 08-04-2000

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Madhya Pradesh Municipal Corporation Act, 1956 — Section 401, 401(2)

Citation : AIR 2002 MP 152 : (2002) 1 MPLJ 172

Hon'ble Judges : V.K. Agrawal, J

Bench : Single Bench

Advocate : Ravindra Shrivastava, for the Appellant; A.G. Dhande, for the Respondent

Final Decision : Allowed

Judgement

V.K. Agrawal, J.

This appeal is directed against the judgment and decree D/- 16-12-97 in Civil Suit No. 7-B of 1996, by First Additional District Judge, Sagar, whereby the Claim in suit of plaintiff/respondent No. 1, for damages was decreed against the appellant.

The facts no longer in dispute are that the appellant on the relevant time i.e., in December 1991 was posted at Sagar and was holding/three charges, viz., Administrator Municipal Corporation; Additional Collector and Settlement Officer. An encroachment removal drive was carried out by the Municipal Corporation, Sagar in December, 1991. It has also not been disputed in this appeal that the structure of the "Lily Hotel and Restaurant" run by plaintiff/respondent No. 1 was also demolished during the said drive.

The plaintiff's case stated in brief was that he was running the aforementioned hotel. The said hotel was situated on the land of Dev Janki Raman Trust, Sagar, at Civil Lines, Near Collectorate, Sagar. He had obtained tap connection from the

Municipal Corporation Sagar for the said Hotel. The said tap connection was illegally disconnected. The plaintiff therefore filed Civil Suit No. 22-B/90 against the Municipal Corporation, Sagar. It was also averred by the plaintiff/respondent No. 1 that lot of pressure was brought upon him, by the Municipal Corporation, Sagar for compromise in the said suit to which the plaintiff did not agree, hence, the then Administrator-the present appellant got annoyed with plaintiff/respondent No. 1.

It was further averred by the plaintiff/respondent No. 1, that Prem Narayan Choubey, the father of plaintiff/respondent No. 1, had complained to the Commissioner, Sagar, against the appellant, for non-supply of copy in a case decided by the latter as Settlement Officer. Hence, the appellant was annoyed with the plaintiff and his father. Therefore, during the encroachment removal drive, in which the encroachment on the land of Municipal Corporation and Government only were to be removed, the appellant without any legal authority on 21-12-91 got demolished the Hotel run by the plaintiff/respondent No. 1, by bulldozer resulting in loss of property and causing damage to the plaintiff.

It was further averred by the plaintiff/respondent No. 1 that no prior notice was served by the appellant to plaintiff/respondent No. 1, before the said demolition. It was also averred that the appellant had mis-used his offices, which he held under defendants Nos. 1 and 2 the State Government and Municipal Corporation and by, using the Police force as also the Personnel of P. W. D. and Municipal Corporation, had caused damage as above to the plaintiff/respondent No. 1. According to the plaintiff/ respondent No. 1 his father Prem Narayan Choubey served a notice u/s 80, C. P. C. to the defendants. Since there was non-compliance of notice, hence the suit was filed for recovery of damages of Rs. 80,568/-.

The defendants resisted the suit and denied the aforesaid allegations.

The learned trial Court framed issues as to whether the appellant/defendant No. 3 on 21-12-1991 had illegally demolished Lily Hotel of plaintiff/respondent No. 1, causing damage to the furniture and articles kept therein and as to whether the suit was maintainable in the absence of statutory notice u/s 80, C. P. C. and under the Municipal Corporation Act, 1956 (hereinafter referred to as "Act" for short). An issue regarding quantum of damages claimed by plaintiff/respondent No. 1 was also framed.

The trial Court held that Lily Hotel was illegally demolished on 21-12-91, and due to the said demolition articles kept in the Hotel were also destroyed. The trial Court also held that in, the absence of statutory notice u/s 80, C. P. C. and under the "Act", the suit was not maintainable, as against the defendant Nos. 1 and 2 the State of M. P. and Commissioner. Municipal Corporation, Sagar respectively. However, it was held that the appellant did not act as a public servant while demolishing the hotel of plaintiff/respondent No. 1 and the said act was arbitrary, illegal and without any authority, for which the appellant was personally liable.

Accordingly, it was held that it was not necessary to serve him with a notice u/s 80 of C. P. C. or u/s 401(1) of the "Act". Therefore, though the suit was dismissed against defendants Nos. 1 and 2, but it was decreed as against the appellant/ defendant No. 3.

The learned counsel for appellant has submitted that the complained action of appellant of demolition of hotel of plaintiff/ respondent No. 1 was an act done by him in the performance of his duty, as an Administrator of Municipal Corporation. It has been submitted in the above context that the pleadings in plaint paras 3, 4 and 6 itself would clearly indicate that the case of plaintiff/respondent No. 1 was that the appellant" undertook the encroachment removal drive in the capacity of Administrator, Municipal Corporation, Sagar. Therefore, he could not have been held personally liable, as the above act was done in bona fide discharge of duty by him. It was also submitted that before filing the suit, a statutory notice u/s 401 of the Act or u/s 80, C. P. C. was necessary. Since, such a notice was not served on the appellant, the suit was not maintainable against him.

It has further been submitted in the above context that in the instant case, admittedly no notice was served by plaintiff/ respondent No. 1 himself on the appellant. A notice was served by the father of plaintiff/respondent No. 1. It has also been sub-mitted that even in the said notice the relief of damages as claimed in the suit, has not been asked for. It has therefore been, contended that the suit was not maintainable and ought to have been dismissed.

It has also been urged by the learned counsel for appellant that the suit is barred by limitation. It has been contended in this regard that Section 401(2) of the Act, prescribed period is of six months for filing a suit, after the accrual of cause of action against the corporation or any officer or servant thereof. Alternatively the suit would be covered under Article 72 of the Limitation Act, which prescribes a period of one year from the date of accrual of cause of action. As the averments in the plaint are, that the cause of action accrued on 21-22 December, 1991 and as the suit was filed on 8-11-94, i.e. after about three years of the accrual of cause of action, the same was obviously barred by limitation.

As against the above, the learned counsel for respondent has urged that the finding of learned trial Court that the appellant did not demolish the hotel of the respondent, while discharging his duty as Administrator, Municipal Corporation, and as he also had no legal authority to demolish the respondent's hotel. Therefore, notice either u/s 401 of the "Act" or u/s 80, C. P. C. was not necessary. It has further been submitted that the notice (Ex. P-3) was served by the father of plaintiff. Therefore, relying on Ghanshyam Dass and Others Vs. Dominion of India and Others, , it has been urged, that statutory requirement of service of notice was duly complied with and a fresh notice by the plaintiff/ respondent No. 1 was not required to be served on the appellant. It has also been urged that the plaintiff having acted in his personal capacity and as his act was illegal and without authority, the appellant was liable to pay damages, as has been rightly awarded, by the learned trial Court.

As noticed earlier, it is no longer in dispute that plaintiff/respondent No. 1 was running "Lily Hotel and Restaurant", at Civil Lines, Sagar. The said hotel was demolished during anti-encroachment drive undertaken by the Municipal Corporation, Sagar. The appellant/defendant No. 3 was admittedly the Administrator of Municipal Corporation, Sagar at the relevant time. The learned trial Court has held that the said hotel was demolished on the direction of appellant-the administrator without serving any prior notice to plaintiff/respondent No. 1.

Therefore it will have to be first considered as to whether the said act of demolition of Hotel could not be said to have been done by the appellant/defendant No. 3 in his personal capacity; and not in the capacity as Administrator, Municipal Corporation, Sagar?

As noticed earlier, even the plaint allegations clearly indicate that the plaintiff's case itself was that the appellant/defendant No. 3 was Administrator of Municipal Corporation, Sagar, at the relevant time; and had acted in that capacity while ordering removal of encroachment. In the above context paras 3, 4 and 6 of the plaint are relevant. Pleadings in the said paras of plaintiff/respondent No. 1 are that the appellant/ defendant No. 3 was the Administrator, Municipal Corporation, Sagar and that the Municipal Corporation, Sagar had undertaken anti-encroachment drive at Sagar. It was further specifically pleaded in para 6 of the plaint, that the appellant though had no legal authority to demolish the hotel of plaintiff, but had demolished the said hotel by using his authority as the Administrator, by utilising Police force as well as the staff of Public Works Department and Municipal -Corporation, Sagar. It was further averred that the hotel was demolished without serving any notice to plaintiff/respondent No. 1. It was averred in para 4 of the plaint, that the appellant acted in the above manner, as he was annoyed with plaintiff/ respondent No. 1.

The plaintiff/respondent No. 1 has also adduced evidence in support of his pleadings. which may now briefly be referred to. Prem Narayan (P.W. 1), the father of plaintiff/respondent No. 1 has himself stated that during the anti-encroachment drive on 21st December 1991, the defendant No. 3/appellant, had demolished the hotel. Similar statement was given by Ishwarlal Sahu (P.W.2). The plaintiff Arvind Kumar Choubey (P.W.3) has also stated in para 4 that on 21st December 1991 the appellant, the Administrator of Municipal Corporation, Sagar, came with the Municipal Corporation personnel and asked him to remove the encroachment within a period of a day, and after demolishing the part of the hotel, the appellant had given him time for removal of his articles from the hotel. He has further stated that despite his protests, the hotel was demolished on the next day.

From the above evidence as well as other material on record, it is abundantly clear that the appellant is alleged to have acted in the capacity as Administrator of Municipal Corporation, Sagar and not in his personal capacity. It would appear that the grievance of the plaintiff was that the appellant acted without authority

in demolishing the Hotel and his grievance also was that proper notice was not served on him, by the Municipal Corporation, before demolition of his hotel. However, the above averments as well as the evidence do not go to show that the appellant/defendant No. 3 acted in his personal capacity, -shorn of his status as Administrator.

In the above circumstances, it cannot be said that the appellant/defendant No. 3 acted in his personal capacity and not in the capacity of a Public servant. It is clear from the above pleadings and evidence that the hotel of plaintiff/respondent No. 1 was got demolished by the appellant during the discharge of his duty as public servant, as the Administrator of Municipal Corporation, Sagar. It is one thing to say that the appellant acted without authority or in excess of authority vested in him as public servant; and it is entirely another to say that the act done was not done in the capacity of a public servant and infact, was done in his personal capacity.

It may be noted that the Privy Council in AIR 1948 128 (Privy Council) . while considering the meaning and purport of the words used in Section 197(1) of Cr. P. C. "In respect of any act done or purporting to be done in the execution of his duty as a servant of the Crown", observed that a public servant can only be said to act or to purport to act in the discharge of his official duty, if his act is such as to lie within the scope of his official duty. Similarly in AIR 1949 117 (Privy Council) , the above view was reiterated and it was observed :

"A public servant can only be said to act or purport to act in the discharge of his official duty, if the act is such as to lie within the scope of his official duty. The test may very well be, whether the public servant, if challenged, can reasonably claim that what he does, he does in virtue of his office."

In Matajog Dobey Vs. H.C. Bhari, it was laid down that, in order to find out whether a particular act was done in discharge of official duty, the Court must find out whether the act and the official duty are so inter-related that one can postulate reasonably that it was done by the accused in the performance of the official duty, though possibly in excess of the needs and requirements of the situation.

Reference may also be made in the above connection to AIR 1939 43 (Federal Court) ; Albert West Meads v. The King, AIR 1948 PC 156 and Bhagwan Prasad Srivastava Vs. N.P. Mishra, .

In the light of the above pronouncements the averments of the plaintiff/respondent No. 1, even if they are accepted on their face value, would only show that the appellant acted in excess of authority vested in him in ordering demolition of hotel of plaintiff. However, the averments certainly do not indicate, that the case of the plaintiff was that the appellant acted in his personal capacity, while the plaintiff's hotel was demolished. It is abundantly clear that the plaintiff's case itself was that his hotel could not have been removed by the appellant-the Administrator of Municipal Corporation,, Sagar in the anti-

encroachment drive, inasmuch as, it was not standing on the property of State Government or the Municipal Corporation and also as no notice was served on him. Hence, it does not appear either from the pleaded case of the plaintiff/respondent No. 1, or the evidence adduced by him in that regard, that the appellant did not act in the capacity of public servant -- as Administrator Municipal Corporation. In fact his stand and evidence is otherwise, as would be clear from the averments in the plaint, as noticed above. Therefore, the assertion made on behalf of the appellant that he acted in the discharge of his duties, while demolishing the hotel, deserves to be accepted.

Therefore, the finding of learned trial Court in para 27 of the impugned judgment that the complained act of appellant was not performed in his capacity as public servant or in the discharge of his duty as such, is obviously grossly erroneous and the same cannot be upheld. In view of above, it is clear that the appellant was acting in the discharge of his public duty as a public servant and got demolished the hotel of plaintiff/respondent No. 1 in his capacity as such.

In the above circumstances, statutory notice u/s 401(2) of the Act should have been mandatorily given to appellant/ defendant No. 3. However, in the instant case admittedly no notice was given by the plaintiff/respondent No. 1 to the appellant/defendant No. 3. The averments of plaintiff/ respondent No. 1 are that a notice was served by his father u/s 80, C. P. C. to the defendants. The notice by the father would certainly not constitute proper notice by plaintiff/respondent No. 1. Hence, even if the father of the plaintiff had given a notice, the same would not fulfil the requirement of statutory notice by the plaintiff.

The learned counsel for plaintiff/respondent No. 1 has submitted in the above connection that since the father of plaintiff/ respondent No. 1 had served a notice, the requirement of law u/s 80, C. P. C. was fulfilled. Learned counsel has relied upon the case of Ghanshyam Dass and Others Vs. Dominion of India and Others, . In that case the plaintiffs father was a contractor and had supplied charcoal to the Government under the agreement with the latter. There was a dispute regarding payment of price of coal supplied, therefore the contractor-the father of plaintiff served a notice u/s 80 of C. P. C. to the Government. But before the suit was filed, the contractor, plaintiffs father died. The plaintiff filed a suit for recovery of the amount. It was held that no further notice u/s 80, C. P. C. was necessary, and that the notice served by plaintiff's father, enured to the benefit of plaintiff. The Supreme Court upheld the contention as above of plaintiff and held that no further notice by the plaintiff was necessary.

However, facts in the instant case are entirely different. The plaintiff is the aggrieved, party and therefore should have himself served statutory notice to the appellant u/s 401(2) of the Act. Therefore, as the notice served by the father of plaintiff, was not by the aggrieved person and since the plaintiff's father had no cause of action in his favour, the notice served by the plaintiff's father would not enure to the benefit of plaintiff, who nurtures the grievance, giving rise to the alleged cause of action in the suit.

It may be noticed in the above context, that the learned trial Court has observed that notice u/s 401(2) of the Act was not necessary as the defendant No. 3/ appellant did not act in the capacity of a public servant. However, as pointed out earlier the said finding was not justified, in view of the plaintiff's pleaded case and evidence placed on record. The finding as above deserves to be and has been set aside, as would be clear from the foregoing discussion. In view of above, without statutory notice the suit filed by the plaintiff/respondent No. 1 could not have been instituted and was not maintainable.

In *State of Maharashtra and Another Vs. Shri Chander Kant*, which was a case under the M. P. Public Trusts Act and the requirement of notice u/s 80, C. P. C. was considered, referring to AIR 1927 176 (Privy Council) as also *Prasaddas Sen and Others Vs. K.S. Bonnerjee*, it was held that the language of Section 80 of C. P. C. requires that a notice is to be given not only to the Government but also to the Public Officer, in respect of any act purporting to be done in his official capacity. Reference in the above context may also be made to *Mohanta Raghavananda Das Vs. D.V.A. Naidu and Another*, *Jageshar Thakur Vs. Mahabharath Thakur*, and *The Regional Transport Officer, Kozhikode Vs. N.V. Motor Service, Kozhikode and Others*.

In the instant case, even if the averments of the plaintiff regarding the demolition of his hotel without prior notice and illegally by the appellant were to be accepted; even then it would at worst be said to be a case of misfeasance and or nonfeasance on the part of appellant. As noticed earlier also, since the alleged act of demolition of hotel of plaintiff was done by the appellant/ defendant No. 3 in the capacity of administrator and such an act was performed by him in the discharge of his official duties; therefore, requirement of service of notice u/s 401(2) of the Act on the appellant must have been complied with, by the plaintiff/respondent No. 1. Notice having not been given, the suit was not maintainable and was liable to be dismissed. The learned trial Court therefore erred in holding that notice was not required to be served on the appellant.

It may also be noticed that the suit was dismissed by the trial Court as against defendants No. 1 and 2 -- the State Government and the Commissioner, Municipal Corporation, Sagar on the ground that statutory notice was not served on them. The same principle would apply in the case of defendant No. 3/ appellant and the suit in the absence of notice to him should also have been dismissed.

It may further be noticed that u/s 401(2) of the Act, such a suit should have been brought within six months after the accrual of cause of action, which admittedly arose on 21-22 December 1991, when the hotel of plaintiff was demolished. The suit was brought in November, 1994. Therefore the suit was obviously barred by limitation.

The suit of the plaintiff/respondent No. 1 has therefore been brought by him against the appellant regarding an act performed by him in the discharge of his

public duties. Malice or ill will on the part of the appellant has not been duly proved, by the plaintiff/respondent No. 1, by leading satisfactory evidence. Moreover, the suit was filed by the plaintiff/respondent No. 1; without service of statutory notice. Hence the suit was not maintainable. Further, the suit was also barred by limitation. Therefore, the suit deserved dismissal.

The impugned judgment granting decree of damages against the appellant, was therefore erroneous and cannot be maintained. Accordingly, the appeal is allowed. The impugned judgment and decree is set aside. The suit of plaintiff/respondent No. 1 is dismissed. In the circumstances of the case, the parties are left to bear their own costs of this appeal.