
(1957) 04 MP CK 0007
In the Madhya Pradesh High Court
Case No : S.A. No. 10 of 1951

Municipal Committee, Sagar

APPELLANT

Vs

Chhotabhai Jethabhai

RESPONDENT

Date of Decision : 09-04-1957

Acts Referred:

Central Provinces and Berar Municipalities Act, 1922 — Section 48(1)

Citation : (1958) MPLJ 27

Hon'ble Judges : V.R. Sen, J;G.P. Bhutt, J

Bench : Division Bench

Advocate : S.C. Dube, for the Appellant; A.L. Halve and S.L. Golcha, for the Respondent

Final Decision : Dismissed

Judgement

Two suits (i) Civil Suit No. 10-B of 1950 by Messrs Chhota Bhai Jetha Bhai Patel and Company and (ii) Civil Suit No. 11-B of 1950 by Chhota Bhai were consolidated in the Court of Additional District Judge, Sagar, and disposed of by one common judgment. The first suit was for recovery of Rs. 16,926-8-0, and the other of Rs. 6,884-1-0 on account of double octroi duty paid to the Municipal Committee, Sagar. Both the suits were decreed with costs and future interest at 3 p. c. p. a. This appeal is filed by the Municipal Committee through its Secretary against the decree.

The Plaintiffs in the two suits deal in the manufacture and sale of bidis at Sagar. They used to import tobacco within the limits of the town for purposes of their trade on payment of octroi duty. In the year 1946, firm Ramkrishna Ramnath of Kamtee filed a suit against the Municipal Committee of that place in which imposition of octroi duty on tobacco was challenged. Accordingly the bidi dealers of Sagar, including the Plaintiffs, requested, the Municipal Committee to defer collection of tax until the decision of that suit. Simultaneously they suspended payment of the duty but declared the goods each time they were brought into the octroi limits.

What took place afterwards is fully set out in Secretary, Municipal Committee, Sugar v. Messrs Vrajlal Manilal and Company F.A. No. 146 of 1950. That appeal has been filed by the Committee against the decree passed in favour of Messrs Vrajlal Manilal and Company by the lower Court in Civil Suit No. 3-A of 1949. The facts there are similar and, therefore, need not be repeated. The facts which are necessary for the disposal of the present appeal, may, however, be stated:

A. Civil Suit No. 10-B of 1950.-The Plaintiff paid the double duty on 22nd August 1949. Notice u/s 48(1) of the C.P. Municipalities Act, 1922, was delivered to the Committee on 7th September 1949 and the suit was instituted on 24th April 1950. Ex. P-15 is admitted to be the notice that was received by the Committee but the fact that it was delivered was not mentioned in the plaint. The application has, however, been filed by the Plaintiff under Order 6, Rule 17, read with Section 151, Code of Civil Procedure, for permission to amend the plaint in this behalf.

B. Civil Suit No. 11-B of 1950.-The Plaintiff paid the double duty on 24th August 1949. Notice u/s 48 (1) of the C.P. Municipalities Act was delivered to the Committee on 22nd September 1949 and the suit was instituted on 24th April 1950. Averment of the delivery of the notice has, in this suit, been made in the plaint.

One of the points urged in the appeal is the legality of the double octroi duty. The matter is referable to Rule 17 (b) of the Octroi Collection Rules. This question has been dealt with by us in Secretary, Municipal Committee, Sagar v. Messrs Vrajlal Manilal and Company (supra), in which we have held that the rule is not ultra vires the power of the Committee. For the same reasons, we hold likewise in this appeal. On the further question whether there was intentional evasion of the duty by the Plaintiffs, the facts of the two appeals are similar.

Our finding in Secretary, Municipal Committee, Sagar v. Messrs Vrajlal and Co- (supra) is that there was no such intentional evasion by the Plaintiff. We find similarly in this appeal. The recovery of double duty by the Committee from the Plaintiffs, therefore, was not proper.

The further questions that arise in the present appeal are the following:

(1) (a) Whether the Plaintiff should be permitted to amend the plaint in Civil Suit No. 10-B of 1950 by incorporating therein the averment regarding the delivery of notice u/s 48(1) of the C.P. Municipalities Act; (b) if the amendment is not allowed, whether the suit should be dismissed, or alternatively the plaint rejected.

(2) Whether the suits are within limitation.

Point No. 1:-There is no question that the notice required by Section 48(1) of the C.P. Municipalities Act was duly delivered to the Committee within time. In the other suit (No. 11-B of 1950), the necessary averment in regard to the delivery of the notice was expressly made. There was apparently no reason why the said averment should not also have been made in the plaint in Civil Suit No. 10-B of

1950, unless the omission was accidental. The Committee also had not raised any plea of want of delivery of notice. Therefore, there is no doubt that both the parties were aware of the delivery of the notice and it was only through a bona fide mistake that the necessary averment was not made in the plaint. As the facts are not in dispute, we see no reason why, in the interest of justice, the defect in the plaint should not be allowed to be corrected. We, therefore, permit the Plaintiff to amend the plaint by making the averment regarding the delivery of notice u/s 48 (1) of the C.P. Municipalities Act.

As the defect is allowed to be remedied, the plaint would be deemed to be properly framed. There is, therefore no question of the dismissal of the suit, or rejection of the plaint. We may, however, briefly notice the law on the point.

We are concerned in this appeal with Sub-sections (1) and (2) of Section 48 of the C.P. Municipalities Act which are reproduced below:

48 (1) No suit shall be instituted against any committee or any member, officer or servant thereof or any person acting under the direction of any such committee, member, officer or servant for anything done or purporting to be done under this Act, until the expiration of two months next after notice in writing, stating the cause of action, the name and place of abode of the intending Plaintiff and the relief which he claims, has been, in the case of a Committee, delivered or left at its office and, in the case of any such member, officer, servant or person as aforesaid delivered to him or left at his office or usual place of abode; and the plaint shall contain a statement that such notice has been so delivered or left. (2) Every such suit shall be dismissed unless it is instituted within six months from the date of the accrual of the alleged cause of action.

The wordings of Sub-section (1) are similar to those of Section 80 of the Code of Civil Procedure. Respecting the latter section, it was observed by their Lordships of the Privy Council in *Bhagchand Dagadus v. Secretary of State* 54 I A 338 that the provisions thereof are express, explicit and mandatory and admit of no implications or exceptions. Those observations, however, were in connection with the provisions regarding the service of the notice. Their Lordships had not the occasion in that case to consider the other provision regarding the form of the plaint. Therefore, keeping in view the different nature of the two provisions, we do not think that the same observations would govern them alike.

In *Bachchu Singh v. The Secretary of State for India in Council* ILR 25 All. 187, which appears to be the first case on the subject, the notice u/s 80, Code of Civil Procedure, was given by the predecessor of the Plaintiff. Their Lordships held that this notice did not enure for the benefit of his representatives and since there was no service of the notice, the proper course for the Court was to reject the plaint u/s 54 (c) of the Code. This decision also only emphasizes the imperative nature of the provision relating to the service of notice and does not deal with the question whether the plaint is liable to be rejected where the notice was duly served and only the necessary averment was not made in the plaint. It

is doubtless true that in *Hiralal Murarka v. Mangtural Bagaria* ILR 1944 (2) Cal. 513 it was stated that the language of the section was imperative, not only regarding the delivery of the notice but also as regards the inclusion of the averment in the plaint and that in the absence of the notice or of the statement, there is no suit with which the Court is empowered to deal. In that case, however, no notice was served and accordingly the observations of their Lordships regarding the statement in the plaint are only obiter dicta. It is also true that in the case of *Bhagchand Dagadusa* their Lordships of the Privy Council negated the contention that Section 80, Code of Civil Procedure, was merely procedural, but again the observations were confined to the question of the delivery of the notice.

The matter came up directly for consideration in *Baldeo Prasad and Others Vs. Sukhi Singh and Others*, , in which Rowland J., who decided the case, rejected the plaint under Order 7, Rule 11 (d), Code of Civil Procedure, on the ground that it contained no averment regarding the service of the notice. From the facts of that case, however, it does not appear that any notice was actually served. Therefore, the plaint observations on the provision regarding the form of the plaint appear to be only incidental. The point that really arose in that case was whether the suit, in which the Secretary of State was only one of the Defendants, should be dismissed for want of necessary averment in the plaint or whether the plaint should be rejected under Order 7, Rule 11 (d) of the Code. An incidental question was whether the suit should be dismissed as against the Secretary of State but allowed as against the other Defendants. These questions are different from those arising in a suit where the necessary notice was delivered but only an averment regarding its delivery was not mentioned in the plaint.

In *Jagdishchandra Deo Dhabal Deb v. Debendraprasad Bagchi* ILR 58 Cal. 850, no notice of the suit was served and what was contended was that the notice for leave to sue should be deemed to be a proper notice u/s 80, Civil Procedure Code. This contention was repelled. Then the question was taken up whether the suit should be dismissed or only the plaint rejected. Their Lordships observed that the provision regarding the mode of service of the notice is also mandatory and that as Section 80 itself provides that the plaint shall contain a statement as to the notice, it is the duty of the Court to look into the plaint and for want of the necessary averment, reject it instead of going on with the suit. These observations do not deal with the question whether the inclusion of the averment in the plaint where there is a valid service of notice, is also mandatory or merely procedural.

It appears to us that although the first part of Section 80, CPC is mandatory in character and, therefore, where no notice has been served and as a consequence thereof there is no averment in the plaint, the case is covered by Order 7, Rule 11 (d) and the duty of the Court is to reject the plaint and not to proceed with the suit. However, the provision relating to the inclusion in the plaint of the

statement as to the notice only deals with the form of the plaint which is a matter covered by Order 7, Rules 1 to 8 of the Code and is of a procedural nature. This was the view that was taken by Ray J. in *Kanailal Karmakar Vs. Governor General for India in Council and Others*, with which we are in respectful agreement. The intention of legislature underlying the provision is obviously to provide material to the Court to satisfy itself whether the notice has been given. Therefore, where this statutory duty has been complied with, it would be only deemed to be a formal defect in the plaint if the necessary averment is not made in it.

The question of the inclusion of a statement in the plaint regarding the service of the notice does not really arise in a case where no notice has been served. In such a case, even if the averment is made, the suit would still be liable to be dismissed for want of service of the notice. In this view, the opening words of Section 80, namely, "No suit shall be instituted" would qualify only the first part of the section and not the second part dealing with the form of the plaint: See *Kanailal v. G.G. for India in Council* (supra). In *A. Sankunni Menon Vs. South Indian Railway and Others*, it was observed by Panchapagesa Sastry J. that although section 80 is mandatory, the Court should nevertheless not be hypercritical in examining its language. The Courts should, therefore, lean towards a liberal construction of the provisions. Applying this principle, it appears to us clear that the provision of Section 80 relating to the form of the plaint is only of a directory and not of mandatory nature.

In the light of the above, it was indeed the duty of the Court to scrutinise the plaint and either to get it amended, or to reject it under Order 7, Rule 11 (d) if the Plaintiff persisted in default. If the defect was then noticed there would have been no occasion even for the rejection of the plaint because the Plaintiff would doubtless have supplied the omission. It would, in our opinion, be defeating the ends of justice, if the provision of Order 7, Rule 11 (d) were to be applied at this late stage, when both the parties went to trial with the knowledge that the necessary notice was served and there was no default on the part of the Plaintiff in complying with the provisions of Section 48(1) of the C.P. Municipalities Act in regard to the delivery of the notice. Therefore, apart from the question of the amendment of the plaint, it would not, in circumstances of the case, be proper to dismiss the suit or even to take action under Order 7, Rule 11 (d).

Point No. 2:-The contention of the Learned Counsel for the Committee is that in view of the imperative nature of words used in Sub-section (2) of Section 48 of the C.P. Municipalities Act, it should be held that it expressly excludes the provision in Section 15(2) of the Indian Limitation Act, 1908, within the meaning of Clause (a) of Sub-section (2) of Section 29 *ibid*. The meaning of the expression "express exclusion" was considered in *Rewachand v. Karachi Municipality* AIR 1930 Sind 93 in which it was observed that it means an exclusion by express reasoning. Their Lordships in that case were dealing with the question arising u/s 167 of the District Municipal Act, which provided that no

suit shall be commenced without giving a previous notice of one month to the municipality, nor after six months from the date of the act complained of. In this connection, it was observed by Bailee A.J. C, who delivered the judgment, as below:

It has been contended, however, by Mr. Dipchand for the Respondent municipality that Section 29, Limitation Act, does not affect Section 167 because the latter section does not prescribe a period of limitation but rather is a bar to suit similar to those created by Section 48, Code of Civil Procedure. The learned pleader would distinguish between an enactment which forbids filing of suits such as Section 167, and one which prescribes that suits brought after certain period shall be dismissed. With due respect I do not think that the distinction is just. For apart from the fact the note in the marginal note to Section 167 is "Limitation of Suits etc.," I am of opinion that in fact it does prescribe a period of limitation just as much as does Section 3, Limitation Act, for it limits the time within which a suit may be instituted. It is the effect which has to be seen and not the exact words used. I would add that Section 48, CPC does not afford help to the learned pleader.

These observations equally apply to the present case. Although Sub-section (2) of Section 48 of the C.P. Municipalities Act, has been worded emphatically, it, in effect, only provides a period of limitation, even if it does so by stating the result that would follow on its breach. It cannot, therefore, imply an express exclusion of the provision of Section 15(2) of the Indian Limitation Act. The provision accordingly would apply to the present suits and save them from the bar of limitation. This has also been the view of other High Courts in respect of similar provisions in the local Acts: See *Tinsukla Municipal Board v. Benkim Chandra* AIR 1950 Assa 101 , *Mohamed Sharif Vs. Nasir Ali and Others*, *Chhaganlal v. Thana Municipality* AIR 1952 Bom. 359 and AIR 1948 49 (Oudh)

It was, however, contended that the effect of applying Section 29 (2) of the Indian Limitation Act would not be to make the date on which the right to sue accrued as the starting point of limitation, and, therefore, the period of limitation of six months would still have to be counted from the date of the cause of action. This would be the result if Section 15 (2) were not applicable, and as the Plaintiffs are entitled to its benefit, the suits cannot be held to be barred by limitation.

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