
(1971) 02 GAU CK 0001
In the Gauhati High Court
Case No : Second Appeal No. 150 of 1967

Sawkat Ali

APPELLANT

Vs

The Superintendent of Police

RESPONDENT

Date of Decision : 12-02-1971

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 80

Citation : (1971) 02 GAU CK 0001

Hon'ble Judges : P.K. Goswami, C.J.; D.M. Sen, J

Bench : Division Bench

Advocate : B. Islam, for the Appellant; T.N. Singh, for the Respondent

Judgement

P.K. Goswami, C.J.—This second appeal is directed against the judgment and decree of the learned Subordinate Judge, Jorhat, affirming those earlier of the learned Munsiff dismissing the Plaintiff's suit.

2. The Plaintiff's case in brief is that he is an Indian citizen. He states that he was born at Akbarpatty, Dibrugarh and lost his parents in his infancy. He was brought up by Yakub Hussain of Dibrugarh and at the age of ten, he migrated to Jorhat town. At first, he served under one Muktinath Bharali for seven years and then he opened his own shop of old motor tyres in 1958 and he was carrying on that business. On 28-01-1965 he was arrested by a police officer of the Jorhat Police Station and after detaining him at the Thana for a night was deported to East Pakistan on the following day on the allegation that he was a foreigner. He returned from Pakistan to Jorhat on 13-05-1965 and he was rearrested the following day and produced before the Additional District Magistrate who however enlarged him on bail till 28-5-1965. The Plaintiff apprehends that he will again be deported on or after 28-05-1965 and in that predicament was compelled to institute this suit on 28-05-1965 for declaration that he is an Indian citizen and for permanent injunction, without serving a notice u/s 80 of the CPC on the Defendant, who in this case is the Superintendent of Police and Registration Officer. He states in paragraph 9 of his plaint as follows:

That no notice u/s 80 CPC has been issued to the Defendant as he by his conduct has waived his right to receive such a notice. The issue of such a notice before the filing of the suit is not possible on the part of the Plaintiff with his running the grave risk of being deported again before the notice matures and the suit is filed.

3. No written statement was filed by the Defendant, who however, took a preliminary objection that in absence of a notice u/s 80, Code of Civil Procedure, the suit should be dismissed on this preliminary ground. After hearing the parties, the learned Munsiff rejected the plaint under Order VII, Rule 11(d), CPC for non-compliance with the provisions of Section 80 Code of Civil Procedure. In appeal the learned Subordinate Judge affirmed the decision. Hence this second appeal.

4. Mr. Baharul Islam the learned Counsel for the Plaintiff Appellant, submits that both the Courts erred in law in this case in dismissing the suit on the ground of absence of notice u/s 80, CPC According to the learned Counsel, the Defendant has waived the right to a notice u/s 80, CPC in this case. Section 80 provides that no suit shall be instituted against the Government or a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after notice in writing has been delivered to the public officer 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. Under the provisions of Order VII, Rule 11(d). CPC relied upon by the trial court, the plaint shall be rejected where the suit appears from the statement in the plaint to be barred by any law. We have, therefore, to consider whether, in this case on the averments in the plaint the suit is liable to be dismissed in the absence of a notice u/s 80, Code of Civil Procedure.

5. The Privy Council in AIR 1927 176 (Privy Council) Bhagchand v. Secy of State has held:

Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions. A suit in which inter alia an injunction is prayed is still "a suit" within the words of the Section and to read any qualification into it is an encroachment on the function of legislation. This decision was noticed by their Lordships of the Privy Council in a later case in AIR 1947 P.C. 197 Vellayan v. Govt. of Madras Province. There were two issues in the suit out of which the appeal came up for decision before the Privy Council:

9 -- (a) Whether the Defendants have waived their right to a proper notice of suit?

9 -- (b) Whether Defendants are estopped from contending that no proper notice of suit was given to them

Their Lordships observed in paragraph 12 as follows:

Upon the first issue the decision of this Board in AIR 1927 176 (Privy Council)

appears to be decisive. It was there said that Section 80 is express, explicit and mandatory and admits of no implications or exceptions. The question there was whether a suit, in which an injunction was claimed, was a "suit" within the section. This Board decided for the reason above briefly stated that it was. In the present case the question is whether, a notice having been given on behalf of one Plaintiff stating his cause of action, his name, description and place of residence and the relief which he claims a suit can then be instituted by him and another. It is clear to their Lordships that it cannot. The section according to its plain meaning requires that there should be in the language of the High Court of Madras "identity of the person who issues the notice with the person who brings the suit. x x x To hold otherwise would be to admit an implication or exception for which there is no justification.

Dealing with the first question, their Lordships held as follows:

In AIR 1927 176 (Privy Council) to which reference has already been made, no question of waiver arose. The observations of Lord Sumner in delivering the opinion of the Board were directed solely to the construction of the section and cannot in their Lordships' opinion be regarded as deciding that it is not competent for the authority, for whose benefit the right to notice is provided, to waive that right. There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the Court and that they may be waived by the authority for whose benefit they are provided.

x x x x x

On the other hand, there appears to their Lordships to be no reason why the notice required to be given u/s 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required. If in the particular case he does not require that protection and says so, he can lawfully waive his right.

6. It is therefore clear that when waiver is pleaded in the plaint, it is not permissible to reject the plaint relying upon Order VII Rule 11(d). Code of Civil Procedure. It is true that Section 80 is imperative and mandatory, but since it is for the benefit of the Government or the public officer concerned, the latter can, if they choose waive their right which is given to them by this provision. There is no legal bar against waiver of the right u/s 80. Since service of notice u/s 80, CPC is a condition precedent for the institution of a suit against the Government or a public officer, the cause of action for the institution of the suit will include even the service of such a notice and the plaint shall state that fact. Since, however, if there is no mention of the fact of service of a notice and, in fact, no notice has been served and the plaint does not contain a plea of waiver of the notice on the part of the Government or the public officer concerned, the plaint in that case may be straightway rejected under Order VII, Rule 11(d). But, when the Plaintiff, with the full knowledge of his obligation u/s 80, avers that service of notice has been waived by the Defendant, he should have an opportunity to

establish this fact if the Defendant denies the waiver by filing a written statement.

7. "Waiver" is defined in Halsbury's Laws of England, Volume 14 (Third Edition) at page 637 as follows:

Waiver is the abandonment of a right, and is either express or implied from conduct.

X X X X

Although there is no express waiver, the person entitled to the right may so conduct himself that it becomes inequitable to enforce it, and this is sometimes called an implied waiver....

It is therefore, clear that, waiver can be both express as well as implied. At any rate, this is a matter which has to be gone into by the court before which the plea is raised. In this case, the Plaintiff has raised the plea of waiver of the notice u/s 80, CPC by the Defendant. It is for the Defendant to admit or deny this averment when he files his written statement. Then an issue would be raised and the court, after taking evidence of both parties, if produced, and hearing both parties, will determine the issue. All that we say in this case is that mere absence of the service of notice will be sufficient to attract the provisions of Order VII, Rule 11(d), CPC if no waiver is pleaded by the Plaintiff. If waiver is pleaded, the Court will have to give an opportunity to the Plaintiff to establish it and if he fails to establish, the plaint will be rejected only after the issue is decided against the Plaintiff. In this case the courts below rejected the plaint on the sole ground that there was no notice served on the Defendant u/s 80, Code of Civil Procedure. In view of the plea of waiver raised by the Plaintiff, this order is clearly erroneous without a finding as to whether the plea has been established or not. The court will be free to come to its own independent conclusion in the matter after hearing the parties. Since, however, the suit is a long pending one we direct the trial court to dispose of all the issues that may arise on the pleadings in the suit after the Defendant files his written statement. We must, however, make it absolutely clear that we must not be understood to have expressed any opinion on the merits of the plea of waiver raised by the Plaintiff.

8. In the result, we set aside the judgments and decrees of the courts below and remand the suit to the learned Munsiff for disposal in accordance with law and in the light of the observations made hereinabove. The appeal is allowed and the suit remanded accordingly. We, however, make no order as to costs.

D.M. Sen J.

9. I agree.