
(2012) 07 CAL CK 0042
In the Calcutta High Court
Case No : S.A. No. 921 of 1978

Sm. Susama Das Mahapatra

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 27-07-2012

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 14 Rule 2, Order 7 Rule 11, 80, 80(1)

Citation : (2012) 4 CHN 744

Hon'ble Judges : Prasenjit Mandal, J

Bench : Single Bench

Advocate : Asish Chandra Bagchi, Mr. Amal Krishna Saha and Mr. Souvik Sarkar, for the Appellant; Anit Kr. Rakshit, for the Respondent

Judgement

Prasenjit Mandal, J.—These four second appeals are directed against the Title Appeal No. 351 of 1975, Title Appeal No. 353 of 1975, Title Appeal No. 352 of 1975 and Title Appeal No. 362 of 1975 arising out of the Title Suit Nos., namely, Title Suit No. 517 of 1967, Title Suit No. 518 of 1967, Title Suit No. 520 of 1967 and Title Suit No. 519 of 1967 respectively. All the four second appeals are involved identical questions of law and as such, the said four second appeals are disposed of by this common judgment. The plaintiff of the respective suits filed the suit for declaration and permanent injunction against the Government of West Bengal in respect of the suit properties described in the schedule of the plaint. The State of West Bengal is contesting each suit by filing a written statement in each suit denying the material allegations raised in the plaint. Issues had been framed and the parties had adduced evidence in support of their respective contentions. Thereafter, the learned Trial Judge decreed all the four suits on contests with costs against the State of West Bengal and ex parte without costs against the proforma defendants. The right, title and interest of the plaintiff had been declared in respect of the suit properties as described in the schedule of the plaint. The learned Trial Judge had also granted the decree of permanent injunction restraining the State of West Bengal from interfering with plaintiff's possession over the suit properties in each suit.

2. Being aggrieved by such order, the State of West Bengal preferred four title appeals and in course of disposal of the said four appeals, the First Appellate Court passed orders to the effect that the plaints of all the suits out of which the those appeals had been filed, were rejected. The parties were directed to bear their own costs in those appeals. Being aggrieved by such order, the four plaintiffs of the respective suits preferred these second appeals. In these second appeals, the following two substantial questions of law are framed for decision, upon hearing both the sides.

(i) That whether there is any substantial error of law in holding that the appeals are allowed in view of the fact that for want of sufficient notice u/s 80 of the CPC, the plaints are rejected; and

(ii) That whether the court below has committed a substantial question of law by not considering whether notice u/s 80 of the CPC could be waived by the State in view of the submission as noted in the judgment of the learned Trial Judge.

3. Having heard the submissions of the learned Advocates of both the sides and on perusal of the materials-on-record, I find that in these second appeals we are concerned with the notice u/s 80 of the CPC. As noted above, the reliefs sought for by the plaintiffs of all the four suits are against the State and so, the notice u/s 80 of the CPC is a must. In this respect, the plaintiff of all the suits had served a notice u/s 80 of the CPC upon the State of West Bengal in all the suits. From the written statement, it does not appear that the State of West Bengal had contended that it did not receive any notice.

4. The observation of the First Appellate Court is to the effect that the notice was served upon the State but the said notice was not sufficient as the suit was filed before the expiry of two months from the date of service of the notice. For convenience, the Section 80 of the CPC is quoted below:-

80. Notice.-[(1)] [Save as otherwise provided in sub-section (2), no suit [shall be instituted] against the Government (including the Government of the State of Jammu and Kashmir)] or against 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, or left at the office of-

(a) in the case of a suit against the Central Government, [except where it relates to a railway], a Secretary to that Government;

(b) in the case of a suit against the Central Government where it relates to railway, the General Manager of that railway;]

[(bb) in the case of a suit against the Government of the State of Jammu and Kashmir, the Chief Secretary to that Government or any other officer authorised by that Government in this behalf;]

(c) in the case of suit against [any other State Government], a Secretary to that Government or the Collector of the district; and, in the case of a public officer,

delivered to him 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.

[(2) A suit to obtain an urgent or immediate relief against the Government (including the Government of the State of Jammu and Kashmir) or any public officer in respect of any act purporting to be done by such public officer in his official capacity, may be instituted, with the leave of the Court, without serving any notice as required by sub-section(1); but the Court shall not grant relief in the suit, whether interim or otherwise, except after giving to the Government or public officer, as the case may be, a reasonable opportunity of showing cause in respect of the relief prayed for in the suit:

Provided that the Court shall, if it is satisfied, after hearing the parties, that no urgent or immediate relief need be granted in the suit, return the plaint for presentation to it after complying with the requirements of sub-section (1).

(3).....

5. The First Appellate Court had observed that the suit was filed before the expiry of two months and as such, the notice was not sufficient. There were 2 days yet to pass before the filing of the suit and as such, the notice was prematured. Under the circumstances, the learned First Appellate Court had rejected the plaint by the impugned order.

6. If 2 months are equivalent to 60 days by taking into account that a month generally means 30 days, I find that notice u/s 80 of the CPC was served upon the State on September 22, 1967 and the suit was filed on November 22, 1967, that is, just after completion of 60 days from the date of service of notice upon the State. So, if it is held that 2 months are equivalent to 60 days, I find that the suit had been filed after expiry of 2 months from the date of service and so, the notice was sufficient. The learned First Appellate Court had observed that 2 months mean 2 months and not 60 days and as such, 2 days were yet to pass before filing of the suit and so, the notice was not sufficient. Accordingly, the learned Trial Judge had observed that the proper procedure would be rejection of the plaint at the appellate stage under Order 7 Rule 11 of the CPC. The rejection of the plaint at the appellate stage particularly when the suit had been decreed on contest, I hold, is not proper. Such a recourse is generally taken at the primary stage of the suit particularly before framing of issues and if issues are framed and the question of maintainability is raised that question of maintainability is decided under Order 14 Rule 2 of the CPC as a preliminary issue in the said suit. Such a recourse is generally adopted to give an opportunity to take appropriate steps to the plaintiff or to curb the unnecessary litigation under certain conclusions at the earliest opportunity of the suit. Moreover, if the suit is prematured by 2 days as observed by the learned Trial Judge, I am of the view that proper course that would have been taken by the learned First

Appellate Court was to return the plaint instead of rejection of plaint so that the plaintiff could ventilate his grievance by filing a suit after lapse of 2 months from the date of service of notice. The rejection of plaint at the appellate stage, I hold, cannot be upheld.

7. Above all, I find from the judgment of the learned Trial Judge that the Issue Nos. 1 & 2, that is, (i) if the suit is maintainable in its present form and law; and (ii) whether legal, valid notice u/s 80 of the CPC was served upon the State of West Bengal were "not pressed" by the learned Advocate for the State and as such, the learned Trial Judge decided those two issues in favour of the plaintiff. The submission that those two issues were "not pressed" by the learned Advocate for the State, amounts to waiver and so, when the learned Advocate for the State had waived those two issues, I hold, the Appellate Court was not justified in counting whether the suit was filed after expiry of 2 months. When the learned Advocate for the State did not press the Issue Nos. 1 & 2 before the learned Trial Judge, the Appellate Court was not justified to consider the legality and validity of the notice u/s 80 of the CPC. As noted earlier, if the notice was not sufficient, adequate opportunity should have been given to the plaintiff to pray for withdrawal of the suit with liberty to file a suit afresh or to return the plaint for presentation after compliance of Section 80(1) of the CPC, so that his grievance could be ventilated before the Court. If the Order passed by the First Appellate Court is upheld, the plaintiff will be permanently deprived of placing his case because of no fault on his part at all.

8. From the materials-on-record, I find that the defendant/State filed a written statement on behalf of the defendant No. 1 and subsequently, the defendant filed an additional written statement. While filing the original written statement, the Paragraph No. 4 of the said written statement lays down that the notice u/s 80 of the CPC is illegal, invalid and insufficient. But the additional written statement filed by the State does not lay down any whisper relating to notice u/s 80 of the CPC.

9. Under the circumstances, since the original written statement lays down the contention of want of legal, valid and sufficient notice u/s 80 of the CPC, and the additional written statement though does not contain the ground of notice u/s 80(1) of the CPC, according to decision of *Bishandayal & Sons v. State of Orissa & Ors.* reported in (2001) 1 SCC 555, such omission does not amount to waiver of the requirement of valid notice meaning thereby the Paragraph No. 4 as made in the original written statement would sustain and the plaintiff is required to prove that a legal, valid and sufficient notice u/s 80 of the CPC was served upon the State. Mr. Bagchi has contended that according to decision of *Bishandayal & Sons* (supra), a notice u/s 80(1) CPC could well be waived.

10. Mr. Bagchi appearing on behalf of the appellant has also referred to the decision of *Dhian Singh Sobha Singh and Another Vs. The Union of India (UOI)*, and thus, he submits by referring Paragraph No. 30 that the notice u/s 80 of the CPC could well be waived.

11. Mr. Bagchi also referred to the decision of Vellayan Chettiar and ors. v. The Government of the Province of Madras & anr. reported in AIR (34) 1947 PC 197 particularly the paragraph No. 14 and thus, he submits that the notice u/s 80 of the CPC could be waived if the authority concerned thinks fit to waive it. Thus, Mr. Bagchi has submitted that since the learned Advocate for the State had made the submission "not pressed" on the Issue Nos. 1 & 2, before the learned Trial Judge, the First Appellate Court was not proper and justified to reopen those issues again. He has also contended that since long years have passed since the date of service of notice and in fact, there was one day's delay, if it was considered that suit should have been instituted after lapse of 2 months, then the delay occurring for 1 day only and not for 2 days as calculated by the First Appellate Court, should have been waived by the learned First Appellate Court. I fully agree with the submission advanced by Mr. Bagchi since long years had passed since the date of filing of the suit and at the time of hearing argument before the learned Trial Court, the learned Advocate for the State had made submission "not pressed", the First Appellate Court was not at all justified to reopen the issue and make an exhaustive discussion over the same.

12. In an adversarial system, either of the parties are at liberty to make any issue or issues as "not pressed" and to admit any claim or an obligation wholly or in part to shorten the litigation. The concerned Court, Tribunal or the Authority can well pass appropriate orders/decrees thereon. Such orders/decrees thereon are quite valid save the ground of fraud etc. So, the effect of such submission of "not pressed" shall be treated as "waiver" or abandonment of that issue before the learned Trial Court. When such a situation happens in the lowest rung for the suit, that is, at trial stage of the suit or the proceeding, the question of waiver cannot be ignored in the subsequent stages of the suit such as in appeal, revision, etc.

13. Under the circumstances, since waiver had taken place in respect of the Issue Nos. 1 & 2, I hold, the First Appellate Court was not justified to reopen the Issue No. 2 again and to hold that notice was not sufficient and for that reason, the plaint should be rejected at the appellate stage. Accordingly, I am of the view that the rejection of the plaint on the ground of want of sufficient notice u/s 80 of the CPC cannot be upheld. The substantial questions of law are, thus, answered in favour of the plaintiff/appellant.

14. In that view of the matter, I hold, that the learned First Appellate Court has committed substantial errors of law as indicated above in the matter of deciding the legality, validity and sufficiency of the notice u/s 80 of the CPC. There was no question of reopening of the said Issue No. 2 as the same was "not pressed" by the learned Advocate for the State at the trial stage of the suit. These two issues, i.e., Nos. 1 & 2 stand decided in favour of the plaintiff of all four suits as decided by the learned Trial Judge. Accordingly, the judgments and decrees passed by the learned First Appellate Court in all the four appeals cannot be upheld and so, they are set aside. The learned First Appellate Court is directed to

hear out the said four title appeals on other issues as framed by the learned Trial Judge afresh and dispose of the four title appeals within a period of 2 months from the date of appearance of the parties before him.

15. The said four second appeals are allowed in the manner indicated above.

16. Considering the circumstances, there will be no order to as costs.

17. Send the Lower Court's records along with a copy of this judgment to the learned First Appellate Court at once by a "Special Messenger" at the cost of the plaintiff of all the suits within one week. Urgent xerox certified copy of this order, if applied for, be supplied to the learned Advocates for the parties on their usual undertaking.