
(2008) 02 SHI CK 0008

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 108 of 1977

The Himachal Fruit Growers Co-operative Marketing and
Processing Society Ltd.

APPELLANT

Vs

The Union of India (UOI) and Another

RESPONDENT

Date of Decision : 27-02-2008

Acts Referred:

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

Citation : (2008) 1 ShimLC 526

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Advocate : Bimal Gupta, for the Appellant; janesh Mahajan, Central Government Counsel, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sharma, J.—A challenge has been laid in this regular second appeal to the judgment and decree dated 23.11.1996 passed by the learned Additional District Judge, Solan, H.P. in Civil Appeal No. 52-S/13 of 1984 and cross-objections No. 46-S/13 of 1985 only on the issues which had been decided against the Appellant.

2. The brief facts necessary for the adjudication of this second appeal are that the Appellant-Plaintiff (hereinafter referred to as the Plaintiff for convenience sake) filed a suit for recovery of Rs. 18,577/- against the Respondents-Defendants (hereinafter referred to as the Defendants for convenience sake). The learned Sub-Judge dismissed the suit on 29.9.1984. An appeal was preferred against the judgment dated 29.9.1984 before the learned District Judge, Solan. The learned Additional District Judge, decided the appeal and cross-objections on 21.5.1986 by returning the finding that the suit was pre-mature by one day and was also barred by limitation. The Plaintiff filed regular second appeal No. 334 of 1986 against the judgment and decree dated 21.5.1986 passed by the learned Additional District Judge, Solan in appeal and cross-objections. This Court

accepted the regular second appeal No. 334 of 1986 on 1.7.1996 and remanded the matter to the first appellate Court. The first appellate Court decreed the suit against Defendant No. 2 on 23.11.1996, but dismissed the suit against Defendant No. 1 as pre-mature. Thus, this regular second appeal.

3. The trial Court on the basis of the pleadings of the parties had framed the following issues:

1. Whether the suit is bad for mis-joinder of Defendant No. 2 as alleged? OP.D/2.
2. Whether the suit is barred by period of limitation? OPD/1.
3. Whether no notice u/s 80 CPC has been served on Defendant No.1? OPP.
4. Whether Plaintiff has no locus-standi to file the present suit? OPD/1.
5. Whether Plaintiff is a co-operative society as alleged? OPP.
6. Whether Defendant No. 2 despatched 50 kgs. of Marvell Pectin through Defendant No. 1 as alleged? OPD/2.
7. Whether fraud on Defendant No. 1 by the employees of the Western Railway and Defendant No. 2 as alleged in para 15 of the plaint, if so its effect? OPD/1.
8. To what amount the Plaintiff is entitled to and from which of the Defendants? OPP.
9. Relief.

The trial Court had answered the issues framed as under:

Issue No. 1 : No.

Issue No. 2 : No.

Issue No. 3 : Suit is pre-mature.

Issue No. 4 : No.

Issue No. 5 : Yes.

Issue No. 6 : Yes.

Issue No. 7 : Not proved.

Issue No. 8 : Nil.

Issue No. 9 : Suit dismissed as pre-mature.

4. The learned appellate Court had framed the following points for determination:

(1) Whether the findings of the trial Court are justifiable and sustainable under the law and on the face of material brought on record by the parties?

(2) Final order.

The findings recorded by the learned Additional District Judge, Solan on the points framed are as under:

Point No. 1 : Yes.

Final Order : Appeal accepted and cross-objections dismissed as per operative portion of judgment.

5. It is evident from the issues framed by the learned trial Court that a specific issue was struck "Whether no notice u/s 80 CPC has been served on Defendant No. 1? OPP". The answer to this issue was that the suit filed by the Plaintiff was pre-mature. The appellate Court has also upheld the finding recorded by the trial Court that the suit was pre-mature.

6. Mr. Bimal Gupta had strenuously argued that the suit preferred by the Plaintiff was not pre-mature and the findings recorded by the trial Court and upheld by the learned appellate Court are contrary to law. He then contended that assuming that the suit was filed before the expiry of two months, still the Defendant No. 1 had waived this objection. Shri Janesh Mahajan had supported the judgment of the learned appellate Court.

7. I have heard the learned Counsel for the parties and perused the record.

8. The copy of notice dated 29.9.1980 Ex.P-56 has been perused by the Court. The notice was issued to the Union of India through the General Manager of Railways and it was received by it on 3.10.1980 as per acknowledgement due Ex.P-60 and Ex.P-61. The suit was filed by the Plaintiff on 3.12.1980. It is evident from the language employed in Section 80 CPC that two months notice was required to be served upon Defendant No. 1. The suit could not be instituted until the expiry of the period of two months after the notice in writing has been delivered to the authorities concerned and if the suit is filed before the expiry of two months, the suit is not maintainable.

9. Their Lordships of the Hon"ble Supreme Court in The State of Madras Vs. C.P. Agencies and Another, have laid down that Section 80 is express, explicit and mandatory and admits of no implications or exceptions. Their Lordships have held as under:

The only controversy arising in this appeal by special leave relates to the validity of a notice of suit given u/s 80 of the CPC by the Plaintiff, which is the first Respondent before us, to the first Defendant, which is the Appellant herein. The very language of Section 80 makes it clear, and it has been so held by the Judicial Committee in AIR 1927 176 (Privy Council) which decision has been adopted by the same tribunal in many later cases-that Section 80 is express, explicit and mandatory and admits of no implications or exceptions. Section 80 peremptorily requires that no suit shall be filed against the Government or a public officer in respect of anything done in his official capacity until after the expiry of two months from the service of a notice in the manner therein prescribed stating the cause of action, the name, description and place of

residence of the Plaintiff and the reliefs which he claims. There is no dispute that the name, description and place of residence of the Plaintiff and the reliefs claimed have been sufficiently stated in the notice. The only question is whether the cause of action has been so stated therein. Both the Courts below have held that it has been done.

The object of Section 80 is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the Plaintiff should be accepted or resisted. In order to enable the Government or the public officer to arrive at a decision it is necessary that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which the claim is founded and the precise reliefs asked for. As already stated, the reliefs claimed have been quite clearly formulated. The only question is whether the cause of action has been stated in the notice. The answer to the question depends on the interpretation of the notice given u/s 80. This being the true position, it is not necessary for us to refer to the decisions requiring the identity of the person who issues the notice and the person who brings the suit as in *Vellayan Chettiar v. Government of Madras* 74 Ind App 223 : (AIR 1947 PC 197) and in AIR 1949 143 (Privy Council) or those requiring the identity of the cause of action in two suits brought by the same Plaintiff against the same Defendant as a condition for the applicability of Order 11 Rule 2, Code of Civil Procedure, as in AIR 1949 78 (Privy Council)

10. Similarly, their Lordships of the Hon'ble Supreme Court have held in *Bihari Chowdhary and Another Vs. State of Bihar and Others*, that a suit against the Government or a public officer, to which the requirement of a prior notice u/s 80 CPC is attracted, cannot be validly instituted until the expiry of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the Section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable. Their Lordships have held as under:

It must now be regarded as settled law that a suit against the Government or a public officer, to which the requirement of a prior notice u/s 80, CPC is attracted, cannot be validly instituted until the expiration of the period of two months next after the notice in writing has been delivered to the authorities concerned in the manner prescribed for in the Section and if filed before the expiry of the said period, the suit has to be dismissed as not maintainable.

On behalf of the Appellants, strong reliance was placed on the decision of a learned single Judge of the High Court of Kerala in *Nani Amma Nannini Amma Vs. State of Kerala and Others*, Therein the learned Judge has expressed the view that Section 80 is not a provision of public policy and there is nothing in the Section expressly affecting the jurisdiction of the Court to try a suit instituted before the expiry of the period prescribed therein. The reasons stated by the learned Judge in justification of his taking the said view despite the clear

pronouncement of the Judicial Committee of the Privy Council in Bhagchand's case do not appeal to us as correct or sound. In the light of the conclusion expressed by us in the forgoing paragraphs about the true scope and effect of Section 80, Code of Civil Procedure, the aforecited decision of the learned single Judge of the Kerala High Court cannot be accepted as laying down good law.

11. In view of the observations made hereinabove and as per the law laid down by the Hon'ble Supreme Court, the suit filed by the Plaintiff against the Defendants-Railways was pre-mature and the findings recorded by the learned Sub-Judge and upheld by the learned Additional District Judge need not be interfered by this Court.

12. So far as the next contention of Mr. Bimal Gupta with regard to the plea of waiver and estoppel is concerned, the same cannot be considered since no such plea has been raised by the Plaintiff in the plaint. In absence of any plea taken in the pleadings, new plea cannot be permitted to be raised by the Appellant in the second appeal.

13. Consequently, there is no merit in this appeal and the same is dismissed. No order as to costs.