

(1991) 01 SHI CK 0003

In the High Court Of Himachal Pradesh

Case No : Regular Second Appeal No. 108 of 1981

The Jawali Harijan Co-operative Agriculture Society

APPELLANT

Vs

Chet Ram

RESPONDENT

Date of Decision : 04-01-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 7 Rule 11, 7, 80
Himachal Pradesh Co-operative Societies Act, 1968 — Section 76

Citation : (1991) 2 ShimLC 142

Hon'ble Judges : Devinder Gupta, J

Bench : Single Bench

Advocate : K.D. Sood, for the Appellant; A.K. Goel, for the Respondent

Final Decision : Allowed

Judgement

Devinder Gupta, J.—This judgment will dispose of five regular second appeals filed by the Defendant-Appellant Society against the judgment and decree passed on March 23, 1981 by the District Judge, Mandi, Kullu and Lahaul Spiti Districts at Kullu dismissing its appeals and thereby confirming the judgment and decree passed on May 31, 1980 by Sub-Judge 1st Class, Kullu decreeing the respective civil suits of Plaintiff-Respondents.

2. Plaintiff-Respondent in each of the appeals filed a separate suit against Defendant-Appellant for grant of a decree for declaration to the effect that he was owner in possession of the land, particulars of which were given in the heading and in para 2 of each of the plaint, the District Welfare Officer, Kullu, got a deed of sale executed in respect of the suit land in favour of the Appellant Society which was a fictitious and bogus Society and as per the condition in the deed of sale, part of the sale consideration was to be paid subsequently which was not paid therefore, the transaction of sale due to non-payment of the balance sale consideration was null and void. Despite execution of this deed of sale, Plaintiff was in possession of the suit property openly, peacefully, continuously in assertion of his right as an owner considering the deed of sale to

be void and the right, title and interest, if any, of the Appellant Society had, by lapse of time, come to an end and he has otherwise become its owner by way of adverse possession. By way of consequential relief, decree for injunction was prayed by the Plaintiff against the Appellant Society.

3. The suits were contested by the Society on various legal grounds as well as on merits. One of the legal objections which was taken in each case was that the suit was bad for want of notice. The trial Court proceeded to determine all the legal and factual issues and, ultimately, decreed the suits. On the objection which had been raised by the Society that the suit was not competent and maintainable for want of notice, the trial Court held that as the onus of the issue was on the Defendant Society and it did not lead any evidence, therefore, the same was decided against the Society.

4. The Society preferred separate appeals. The lower appellate Court dismissed the appeals. In its judgment the Lower Appellate Court also recorded the arguments advanced on behalf of the Appellant that for want of service of notice, suit was not competent and maintainable but it did not decide the objection. The Society has now preferred this Regular Second Appeal in which the main attack to the decree is that it is vitiated due to non-compliance with the provisions of Section 76 of the H.P. Cooperative Societies Act.

5. In the suit, the relief was claimed against the Appellant Society, which is a Co-operative Society and by virtue of provisions of the Himachal Pradesh Co-operative Societies Act, 1968, hereinafter referred to as the "Act" will be deemed to be a Co-operative Society registered under the provisions of the Act. Section 76 of the Act provides that notice is necessary in case Society has to be sued in a court of law. Section 76 of the Act reads as under:

76. Notice necessary in suits--No suit shall be instituted against a Society or any of its officers in respect of any act touching the constitution, management or the business of the society, until the expiration of two months after notice in writing has been delivered to the Registrar 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.

6. The plaint nowhere discloses that such a notice as provided u/s 76 of the Act was ever served by Plaintiff upon the Society. The very language of Section 76 of the Act makes it clear that the provisions are mandatory and admits of no implications or exceptions. Section 76 of the Act is on similar terms as those of Section 80 of the CPC and while dealing with the scope of Section 80 of the Code, it has been held in *The State of Madras Vs. C.P. Agencies and Another*, that Section 80 of the Code is express, explicit and mandatory and admits of no implications or exceptions. It pre-emptorily 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 Plaintiff and the reliefs which he claims. Section 76 of the Act also provides that no suit shall be instituted against Society until the expiration of two months after notice in writing has been delivered to the Registrar or left at his office stating cause of action etc. It also provides that the plaint shall contain a statement that such notice has been so delivered or left. The requirement of service of notice in case of Society on the Registrar is manifest as the Registrar is Supervisory Authority in the case of cooperative societies and by service of notice, attention of Registrar is proposed to be drawn that some action is likely to be brought against the Society to enable the Registrar to consider the position and decide whether the claim is to be accepted or it is to be resisted. The very language of Section 76 of the Act leave no manner of doubt that its compliance is mandatory and no suit can be brought against a Society without notice having been served upon the Registrar.

7. In the instant case, objection about the maintainability of the suit for want of notice was taken at the initial stage. The plaint did not disclose that notice had been served in accordance with law. In such a case, the trial Court ought not have embarked upon trial of all the issues involved but ought to have proceeded to reject the plaint under Order 7, Rule 11(d) of the Code of Civil Procedure. The Supreme Court in *Gangappa Gurupadappa Gugwad Gulbarga Vs. Rachawwa Gugwad and Others*, Respondents, has held in para 10 of its judgment as under:

No doubt it would be open to a Court not to decide all the issues which may arise on the pleadings before it if it finds that the plaint on the face of it is barred by any law. If for instance the Plaintiff's cause of action is against a Government and the plaint does not show that notice u/s 80 of the CPC claiming relief was served in terms of the said section it would be the duty of the Court to reject the plaint recording an order to that effect with reasons for the order. In such a case, the Court should not embark upon a trial of all the issues involved and such rejection would not preclude the Plaintiff from presenting a fresh plaint in respect of the same cause of action. But, where the plaint on the face of it does not show that any relief envisaged by Section 80 of the Code is being claimed, it would be the duty of the Court to go into all the issues which may arise on the pleadings including the question as to whether notice u/s 80 was necessary. If the Court decides the various issues raised on the pleadings, it is difficult to see why the adjudication of the rights of the parties, apart from the question as to the applicability of Section 80 of the Code and absence of notice thereunder should not operate as *res judicata* in a subsequent suit where the identical questions arise for determination between the same parties.

8. The trial Court expected the Appellant Society to prove by way of evidence a negative fact that such a notice was not issued and on that assumption, it proceeded to decide that issue against the Society for want of evidence. To the contrary, it was incumbent for the Plaintiff to have made appropriate averments in the plaint and prove the fact that notice as required u/s 76 of the Act had been

duly served upon the Registrar. The lower Appellate Court also failed to consider the objection which was raised before it. In view of this, when no notice had been served as required u/s 76 of the Act above, upon the Registrar, therefore, the suit was barred and plaint ought to have been rejected under Order 7, Rule 11(d) of the Code of Civil Procedure. The Courts ought not to have proceeded to determine issues on merits. The judgment and decrees of the courts below as such are vitiated.

9. In view of the above, the appeals are allowed. judgment and decree passed by courts below are set aside. The plaint in each of the suits is rejected under Order 7, Rule 11(d) of the CPC for non-compliance of the provisions of Section 76 of the Act. Rejection of plaint, however, will not have the effect of preventing the Plaintiff from instituting a fresh suit on the same cause of action as the judgments rendered by courts below on merits will not operate as res judicata in subsequent suit where an identical question will arise for determination between the parties. Parties are left to bear their own costs.