

(1970) 09 AHC CK 0023
In the Allahabad High Court
Case No : F.A.F.O. No. 199 of 1968

Union of India (UOI)

APPELLANT

Vs

Brij Nath Rai and Others

RESPONDENT

Date of Decision : 22-09-1970

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 39 Rule 1, 80

Citation : AIR 1971 All 209 : (1970) 40 AWR 745

Hon'ble Judges : S.K. Verma, J

Bench : Single Bench

Advocate : Lalji Sinha, for the Appellant; S.R. Misra, for the Respondent

Final Decision : Allowed

Judgement

S.K. Verma, J.—This is a defendant's first appeal from an order of remand.

2. The plaintiff respondents were employed by the defendant-appellant in various capacities. On September 30, 1967 an order was passed terminating their services. The plaintiff-respondents filed a suit on November 11, 1967, for a permanent injunction restraining the defendant-appellant from giving effect to the order, dated September 30, 1967. They also prayed for a temporary injunction. On December 4, 1967, an objection was filed on behalf of the defendant-appellant. It was said that the plaint ought to be rejected under Order VII. Rule 11 of the Code of Civil Procedure, because no notice u/s 80 of the CPC was sent or served on the defendant-appellant and such a notice was absolutely mandatory. The learned Civil Judge of Gorakhpur upheld the objection and dismissed the suit (he really ought to have rejected the plaint under Order VII, Rule 11 of the Code of Civil Procedure). In paragraph 17 of the plaint, it was pleaded that the purpose of the suit would be defeated if two month's notice were given u/s 80 of the CPC and that, therefore, "it must be deemed that the defendants had waived the protection and advantages of notice u/s 80 of the Code of Civil Procedure". The plaintiffs-respondents filed an appeal which was heard by the learned District Judge of Gorakhpur. He held that there ought to

have been an issue on the plea raised in paragraph 17 of the plaint, namely, whether the notice had been waived or not. Having come to this conclusion the learned District Judge remanded the case for a fresh trial.

3. The learned District Judge relied upon *Vellayan Chettiar v. Govt. of the Province of Madras*. AIR 1947 PC 197. This decision is not applicable to the facts of the present case. Their Lordships of the Privy Council held that the notice u/s 80 of the CPC could be waived. This means actual waiver in fact and not a waiver based upon a presumption. The plea in paragraph 17 of the plaint is clear. There is no allegation that the notice was actually waived. The plea related to some kind of supposed or presumed waiver.

4. Formerly, there was a conflict of opinion amongst the various High Courts on the question whether the provisions of Section 80 of the CPC were attracted in the case of suits for permanent injunction. That conflict was resolved by the Privy Council as far back as the year 1927 in AIR 1927 176 (Privy Council) It was held that the provisions of Section 80 of the CPC were "express, explicit and mandatory" and that they admitted of no implication or exceptions- It was laid down that notice u/s 80 of the CPC was necessary even in suit for permanent injunction. In *Sawai Singhai Nirmal Chand Vs. Union of India*, , relying upon the Privy Council decision mentioned above, their Lordships of the Supreme Court held that Section 80 of the CPC applied to suits where injunction was claimed. Reference may also be made to *Smt. Abida Begam and Others Vs. Rent Control and Eviction Officer, Lucknow and Another*, and *State of Bihar and Others Vs. Kamaksha Prasad Sharma and Others*, Before the Privy Council in AIR 1927 176 (Privy Council) it was argued that the plaintiffs had a right urgently calling for a remedy and waiting for the period of notice u/s 80 of the CPC to expire, would cause serious and irreparable damage. Their Lordships pointed out that it is not permissible to read as if Section 80 ran

"No suit other than a suit in which an injunction is claimed."

or as if it ran

"no suit shall be instituted except when serious or irreparable damage might be occasioned to the plaintiff, if not prevented by the previous grant of an injunction".

It was pointed out that to read any qualification into Section 80 would amount to an encroachment on the function of legislation.

5. Learned counsel for the respondents has relied upon the Privy Council decision in the case of *Vellayan Chettiar*. AIR 1947 PC 197(Supra). I have already distinguished that case. He has also relied upon *Raghunath Das Vs. Union of India (UOI) and Another*, and has particularly emphasized the observation of their Lordships to the effect that the purpose of law was the advancement of justice and that the provisions of Section 80 of the CPC were not intended to be used as booby traps against illiterate and ignorant persons. These observations

must be read in the context of the facts of that case. The defence of the Union of India in the case was that the notice u/s 80 of the CPC was defective as it was not given by the person who actually figured as plaintiff. Their Lordships said that the notice u/s 80 of the CPC should be construed with commonsense. They held that the notice was valid and overruled the objection raised on behalf of the Union of India. That decision cannot possibly be said to be in derogation of the Privy Council decision in AIR 1927 176 (Privy Council) and the Supreme Court decision in Durgadas Shirali Vs. union of india (UOI) and Others., . Lastly, learned counsel for the respondents referred me to a decision of my own in Sawan Mal v. Union of India through the General Manager, Northern Rly., Baroda House, New Delhi. 1970 All LJ 938. I undoubtedly took the view which has now been pressed before me by the learned counsel for the respondents. I relied upon certain decisions of the Madras, Patna and Gujarat High Courts. I have said this in my judgment:--

"Learned counsel for the opposite party has not been able to show me any authority of any Court to the contrary." I am, therefore, of the view that I did not lay down the correct law in that case because the relevant authorities were never brought to my notice."

6. Learned counsel for the respondents has contended that as I am differing from the view taken by me in Sawan Mal's case 1970 All LJ 938(supra) I should refer this case to a larger Bench. I would have done so, had the decision from which I am differing been of another learned Single Judge because, in that case, there would have been a conflict of decisions between two Single Judges of this Court and that conflict would have confused the subordinate courts. As the earlier decision with which I am differing is my own, no confusion will result. I, therefore, do not think it necessary to refer this case to a larger Bench. As I have said above if the Privy Council decision in AIR 1927 176 (Privy Council) and the Supreme Court decision in Sawai Singhai Nirmal Chand Vs. Union of India, had been brought to my notice, I would not have held what I did.

7. For the reasons given above, I allow this appeal, set aside the order of the learned District Judge and reject the plaint under Order VII, Rule 11 of the Code of Civil Procedure. Parties will bear their own costs.