(2002) 10 KL CK 0025

In the High Court Of Kerala

Union of India (UOI) APPELLANT

Vs

Kerala State Small Scale Industries Development and Employment Corporation Ltd. RESPONDENT

Date of Decision : 04-10-2002

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 80
Limitation Act, 1963 — Section 12, 15

Citation : (2004) 1 ACC 806 : (2002) 3 ILR (Ker) 602

Hon'ble Judges : R. Bhaskaran, J

Bench : Single Bench

Judgement

R. Bhaskaran, J.—The appellant is the Union of India represented by the General Manager, Southern Railway, and the defendant in the suit. The suit was for damages on account of short delivery. The wagon containing the article arrived in the destination on 29th September, 1981 and a request for re-weighment of the goods was rejected by the Chief Goods Clerk on the same day. Thereafter the plaintiff got it weighed on 1st October, 1981 and Ext. A-5 certificate showing the actual loss was obtained. Therefore, the limitation for filing the suit will start on 1st October, 1981. u/s 12(1) of the Limitation Act, the day from which the period of limitation is to be reckoned is to be excluded. Thus the suit should t have been filed under Article 10 of the Limitation Act at least on 1st October, 1984. However, a notice u/s 80 of the CPC had to be sent and it was received by the defendant on 1st October, 1984. The suit was filed on 16th November, 1984 with a petition for permission to file the suit before the expiry of the two months required u/s 80 of the Code. The permission was granted by the Trial Court. Ultimately, the Trial Court dismissed the suit on the ground of limitation.

2. The Trial Court has given two reasons for holding that the suit is barred by limitation. The first reason is that the notice u/s 80 was received after the period of limitation and such a notice cannot extend the period. The second reason is that the suit is filed without waiting for the period fixed in the notice and, therefore, the plaintiff is not entitled to get the period excluded.

3. The lower Appellate Court allowed the appeal and granted a decree holding that Section 15(2) of the Limitation Act gives the plaintiff an extra period of two months and since the suit is filed within that period it is filed within time.

4. In the second appeal, the learned Counsel for the appellant pressed the following three questions of law formulated in the second appeal.

(i) Whether a notice u/s 80 of C.P.C. issued after the prescribed period of limitation can be taken and treated as an effective and legal notice as required under law?

(ii) Whether an ineffective notice u/s 80, C.P.C. not conforming to the statutory requirements can have the effect of extending the period of limitation as required under law?

(iii) Whether the permission of Court to file a suit before the expiry of 60 days after the issue of notice u/s 80, C.P.C. tantamount to a permission to dispense with such notice at all and at the same time add the notice period of 60 days for getting the limitation period extended?

The first two questions of law are formulated on the basis that the notice u/s 80, C.P.C. is received after the period of limitation. There is no doubt that a notice sent after the expiry of the period of limitation prescribed under the Limitation Act will not have the effect of extending the period by two months. The reason for stating that the notice is sent after the period of limitation is because according to the defendant the wagon reached the destination on 29th September, 1984 and if that is the starting point then the suit is clearly barred. But in the facts of this case, I am of opinion that 29th September, 1984 cannot be taken as the starting point. That is because all that was noticed on that day was that seal was seen tampered. But that does not mean that there will be short delivery. P.W. 1 has given evidence to the effect that the plaintiff could understand about actual occurrence of loss only on 1st October, 1984 when it was opened and weighed. It is not because the actual loss was ascertained on that date but the fact that there was really loss was known only on that date. In this connection the Supreme Court''s decision in Lakshmi Bangle Stores Vs. Union of India (UOI) and Others, , is of much use to resolve the dispute. The Supreme Court held as follows:

The knowledge of the accident may have given rise to an assumption that the goods were damaged in the accident but the burden of proving that the damage occurred three years before the date of suit has to be discharged by the Railways.

The Apex Court was following two earlier decisions of the same Court in Union of India (UOI) Vs. Amar Singh, , and Jetmull Bhojraj Vs. The Darjeeling Himalayan Railway Co. Ltd. and Others, . In this case the Railway has not adduced any evidence to discharge the burden as pointed out above. Therefore, I have to hold that the starting point of limitation was 1st October, 1981. If so the three years will be completed on 1st October, 1984 on which date the notice tinder Section

80 of the C.P.C. was received by the defendant. Therefore, notice was sent within the period of limitation.

5. The real question which is worthy of consideration is question No. (iii) framed in the appeal memorandum.

6. That question arises in the following manner. According to Mr. Sadananda Prabhu, the learned Counsel appearing for the appellant, the plaintiff cannot get the benefit of the extended period of two months and at the same time file a petition to dispense with the necessity of notice and file the suit before the expiry of the period of notice. In this case, the suit was filed on 14th November, 1984 which was after three years from 1st October, 1981. If the two months as required u/s 80 of the C.P.C. is also added, the suit is within time. Admittedly, notice u/s 80, C.P.C. was received on 1st October, 1981, the last date of the limitation. Therefore, u/s 15(2) of the Limitation Act, the plaintiff was entitled to get that period excluded. As pointed out by the learned Counsel for the appellant, once a notice is sent and if it is sent within the period of limitation, no suit could be filed before the expiry of the period of two months. Section 80, C.P.C. at it stood prior to the amendment in 1976 did not contain the present Sub-section (2) which enables the Court to grant leave of the Court to file a suit without complying with the requirement of notice in urgent matters. Therefore, prior to the amendment if a suit was filed before the expiry of the two months period the suit had to be dismissed as held by the Supreme Court in Bihari Chowdhary and Another Vs. State of Bihar and Others, . But after the 1976 amendment, the proviso to Sub-section (2) of Section 80 requires the Court to return the plaint to the plaintiff to present the same after complying with the requirements of Sub-section (1) if the Court feels that there is no urgency. In this case, the Trial Court did not return the plaint under the proviso to Sub-section (2) of Section 80, but granted the permission. According to me, while the exclusion of time is given by the statutory provision u/s 15(2) of the Limitation Act, the discretion as to whether the plaintiff should be allowed to file the suit dispensing with such notice is by a judicial order. If the Court was not inclined to grant that permission it could have returned the plaint which could be represented on the last date of the period of two months after adding to the original period of 3 years. Therefore, any omission by the Court to do that cannot deprive the plaintiff of the statutory benefit extended by Section 15(2) of the Limitation Act. If there was no such proviso to Sub-section (2) of Section 80, C.P.C, then there is merit in the contention of the learned Counsel for the appellant that once the notice period is dispensed with and the suit is filed after the period of three years it is barred by limitation. When there are two interpretations possible, one that will advance justice can be accepted as there is no dispute in the second appeal that the plaintiff has incurred loss and unless there is a clear case of limitation the suit should not be dismissed especially in the light of the pronouncement of the Apex Court as noted earlier.

For the above reasons, though there is substantial question of law involved in the appeal, it is found in favour of the respondent and against the appellant. The second appeal is dismissed without any order as to costs.

