

(2005) 02 AHC CK 0103

In the Allahabad High Court

Case No : Civil Misc Writ Petition No. 36809 of 2001

U.P. Avas Evam Vikas Parishad

APPELLANT

Vs

Additional District Judge (9th), Addl. Civil Judge, Khera
System Private Limited and Smt. Amarjeet Kaur

RESPONDENT

Date of Decision : 28-02-2005

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 29 Rule 2, Order 7 Rule 11, Order 9 Rule 13, 80
Constitution of India, 1950 — Article 226
Uttar Pradesh Avas Evam Vikas Parishad Adhiniyam, 1965 — Section 28, 32, 88, 88(1), 88(2)

Citation : (2005) 3 AWC 2582 : (2005) 2 ESC 1053 : (2005) 2 UPLBEC 1322

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Advocate : R.D. Gupta, for the Appellant; K.M. Asthana, M.A. Misra and B.P. Singh and S.C., for the Respondent

Final Decision : Allowed

Judgement

Rakesh Tiwari, J.—Heard counsel for the parties and perused the record.

2. This writ petition is directed against the orders dated 27.7.2001, 16/23.10.2000 and 18.9.1998 passed by respondent Nos. 1 and 2 respectively. The impugned orders have been filed as Annexures 7, 6 and 4 respectively to the writ petition. It is prayed that the aforesaid orders be quashed and a direction be issued to the Additional Civil Judge (respondent No. 2) to decide Suit No. 590 of 1998 on merits after affording opportunity of hearing to petitioner Nos. 1 and 2, i.e., U.P. Avas Evam Vikas Parishad, Lucknow through the Housing Commissioner, Lucknow and Executive Engineer, Construction Division-I, U.P. Avas Evam Vikas Parishad, Vasundhara, Ghaziabad.

Brief Facts of the case

3. Petitioner No. 1 U.P. Avas Evam Vikas Parishad, Lucknow is a Corporation of

the State Government having its office at Lucknow. It is governed by the statutory provisions of the U.P. Avas Evam Vikas Parishad Adhiniyam, 1965 (hereinafter referred to as the Act). The petitioner-Corporation prepared a housing scheme at Ghaziabad known as "Vasundhara Housing Scheme" in 1982. The Scheme was finalized and notified by the State in 1987 u/s 32 of the Act comprising 50 acres of land approximately excluding part of land of plot No. 527/4 in dispute. Respondent No. 3 filed a Civil Suit No. 590 of 1998 on 22.5.1998 for permanent injunction alleging that the land in dispute of plot No. 5237/4 was purchased by him by a sale deed in 1998 which was not included in the "Vasundhara Housing Scheme" of the petitioner-Corporation. Service of summons in suit was affected through Court Amin on 23.5.1998 on the clerk of the office of the respondents. The suit was decreed ex-parte on 16.9.1998 treating the service upon the respondents as sufficient. On 16.10.2000 the Civil Judge dismissed the application for restoration under Order IX Rule 13 C.P.C. moved by the petitioners on 10.9.2000. Aggrieved, the petitioners filed an appeal/revision before the Additional District Judge, which was also dismissed on 27.7.2001. These orders are impugned to this writ petition.

4. The counsel for the petitioners has assailed the order on the following two grounds: -

1. Summons were not at all served on defendant No. 1 at Lucknow
2. Suit is not maintainable.

5. In support of his first submission the counsel for the petitioners submits that defendant No. 1 is Housing Commissioner with Head Office at Lucknow. He can sue and to be sued in Court but in view of Section 88 of the U.P. Avas Vikas Parishad Adhiniyam, 1965 read with Order XXIX Rule 2 (a) C.P.C., when there is more than one defendant, the service should be affected on each defendant.

6. He submits that no service was at all affected on defendant No. 1, the Housing Commissioner at Lucknow, as such service on defendant No. 2 at Ghaziabad is not proper and sufficient; that defendant No. 2 is the Estate Management Officer, Housing Scheme at Ghaziabad. He was not a proper and necessary party at the time of filing the suit in 1998, as the land in the scheme vested in the District Magistrate-cum-S.L.A.O. Meerut after notification in 1987 for taking process to acquire the land and pay compensation to tenure holder who handed over the possession of the land to the Executive Engineer on 6.7.99. It is urged that the Estate Management Officer therefore does not come in the picture at all. It is also stated that Court Amin affected the service of summons on 23.5.1998 on a Class III employee in the office of the Estate Management Officer who was not authorized to receive the notice. The courts below therefore have wrongly and illegally treated the service on an employee as sufficient service.

7. In support of his second submission the counsel for the petitioners submits that the suit filed on 22.5.1998 before the Civil Judge is not maintainable as requisite notice was not served on the petitioners/defendants in accordance with

Section 88 of the Act before filing the suit as is clear from the plaint and is also admitted by the respondent in its Counter-Affidavit, hence the plaint is liable to be rejected under Order VII Rule 11 C.P.C. and the suit is barred by Section 88 of the Act.

8. It is further stated that defendant No. 2, the Estate Management Officer, Vasundhara Scheme, Ghaziabad is a public officer in the service of the State and hence prior notice on him was necessary and mandatory u/s 80 C.P.C. In the plaint it is alleged that the officials at Ghaziabad committed illegal acts in their official capacity, hence the plaint is liable to be rejected under Order VII Rule 11 C.P.C. being barred by Section 80 C.P.C. It is urged that the land in dispute after notification in 1987 got vested in the State through the District Magistrate and was handed over to the Executive Engineer in July 1999. The suit should have been filed against individual trespasser and not against the officials of the Corporation.

9. It is lastly submitted that writ jurisdiction is equitable and the court has to do substantial justice.

10. The counsel for the respondents submits that the recall application was filed after 690 days. Admittedly the service was affected on the clerk of the respondents through Court Amin and not on a Class III employee. Relying upon the averments made in the Counter Affidavit he submits that it is evident from para 19 of the Counter Affidavit as well as Annexure 8 to the writ petition that the land which is in his possession was out side the acquisition proceedings. The averments made in Counter-Affidavit in this regard are admitted in para 7 of the Rejoinder Affidavit filed by the petitioners.

11. This fact is apparent from the judgments given in Appeal No. 120 of 2000 and Civil Revision No. 90 of 2000. He has relied upon the decision rendered in P.K. Ramachandran Vs. State of Kerala and Another, in support of his contention.

12. In the aforesaid cases it has been held that it is settled law that condonation of delay is discretionary matter and this discretion has been conferred on the courts in order to advance substantial justice. The law regarding limitation is a question of jurisdiction where no explanation much less a reasonable or satisfactory explanation is offered by the respondent-State for condonation of delay. The apex court held that the High Court was not justified in exercising its discretion to condone the delay. Section 88 of the Act is relevant for the decision of the question whether the service on respondent No. 1 was sufficient or not. Section 88 of the Act is as under: -

"88. Suits and legal proceedings. - (1) The Housing Commissioner-may, on behalf of the Board and subject to its control, -

(a) institute, defend, or withdraw from any legal proceedings; and

(b) admit, compromise or withdraw any claim,

(2) No suit shall be instituted against the Board, the Adhyaksh, the

Housing Commissioner, the Tribunal, the prescribed authority or any member, officer or servant of the Board, in respect of any act done or purported or intended to be done under this Act or any rule or regulation Until the expiration of two months next after notice in writing has been delivered to, or left at the office of, the Board, the Adhyaksh, the Housing Commissioner, the Tribunal, the prescribed authority, or such officer or servant, as the case may be, stating the cause of action, the name and place of abode of the intending plaintiff, and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left."

13. The counsel for the petitioners has pressed only the provisions of Order XXIX Rule 2 (a). Order XXIX provides for service on corporations. It provides that: -

"subject to any statutory provisions regulating service of process, where the suit is against a corporation the summon may be served-

(a) on the secretary or on any director or other principal officer of the corporation, or

(b) by leaving it or sending it by post addressed to the corporation at the registered office or if there is no registered office then at the place where the corporation carries on business".

14. Section 88 (1) of the Act is. a statutory provision providing for service of process, hence the provision of Order XXIX would not be applicable in view of non-obstante clause of Order XXIX (a).

15. From a perusal of Section 88 of the Act it is clear that service on corporation can also be affected by leaving it or sending it by post addressed to the corporation at the registered office, or if there is no registered office then at the place where the corporation carries on business. The Corporation was having its office at Ghaziabad where it was carrying on its business. It was served upon the clerk of the Corporation at the place where the Corporation was carrying on its business. Such service is, therefore, sufficient and there is no illegality in the orders of the courts below holding that the service is sufficient on the Corporation.

16. In so far as two months" notice before filing suit is concerned, there is mandatory provision of Section 88 (2), which requires that such notice have to be given before filing suit, which has been quoted above. Section 88 of the Act is para material to Section 80 C.P.C. Section 80 C.P.C. has been partly amended in 1976 but Section 88 of the Act is as Section 80 C.P.C. before its amendment.

17. It is settled law that suit without giving notice u/s 80 C.P.C. or u/s 88 in this case as provided in the Act is not maintainable. The apex court in the case of Bihari Chowdhary and Anr. v. State of Bihar and Ors. 1984 (10) ALR 315 held thus:

"The effect of the Section is clearly to impose a bar against the institution of a suit against the Government or a public officer in respect of any act purported to be done by him in his official capacity until the expiration of two months after notice in writing has been delivered to or left at the office of the Secretary to Government or Collector of the concerned district and in the case of a public officer delivered to him or left at his office, stating the particulars enumerated in the last part of Sub-section (1) of the section. When we examine the scheme of the section it becomes obvious that the section has been enacted as a measure of public policy with the object of ensuring that before a suit is instituted against the Government or a public officer, the Government or the officer concerned is afforded an opportunity to scrutinize the claim in respect of which the suit is proposed to be filed and if it be found to be a just claim, to take immediate action and thereby avoid unnecessary litigation and save public time and money by settling the claim without driving the person, who has issued the notice, to institute the suit involving considerable expenditure and delay. The Government, unlike private parties, is expected to consider the matter covered by the notice in a most objective manner, after obtaining such legal advice as they may think fit, and take a decision in public interest within the period of two months allowed by the section as to whether the claim is just and reasonable and the contemplated suit should, therefore, be avoided by speedy negotiations and settlement or whether the claim should be resisted by fighting out the suit if and when it is instituted. There is clearly a public purpose underlying the mandatory provision contained in the section insisting on the issuance of a notice setting out the particulars of the proposed suit and giving two months' time to Government or a public officer before a suit can be instituted against them. The object of the section is the advancement of justice and the securing of public good by avoidance of unnecessary litigation.

When the language used in the Statute is clear and unambiguous, it is the plain duty of the Court to give effect to it and considerations of hardship will not be a legitimate ground for not faithfully implementing the mandate of the legislature."

18. In paragraph 7 of the writ petition it has not been averred that two months' notice as required u/s 28 of the Act was given prior to filing of the suit and no statement is made in the plaint in this regard. Paragraph 7 of the writ petition is replied in paragraph 17 of the counter-affidavit and has not been specifically denied but it has been stated that the petitioner is a corporate body and is not a State. It is wholly irrelevant whether the petitioner is a corporate body or not as the provisions of Section 88 (2) of the Act are statutory provision which are to be complied with. Thus the contention of the petitioner has force. The courts below have not considered this vital aspect of the matter. If the suit was not maintainable the ex-parte decree would be void and can be considered under Article 226 of the Constitution.

19. I, therefore, allow the petition and remand the case for decision afresh about maintainability of the suit. No order as to costs.