

ALLAHABAD HIGH COURT

Mast Ram Ram Charan

Vs.

Deputy Commissioner

Second Appeal No. 267 of 1959. against judgement and decree of Civil J. Bahraich,
(H.C.P. Tripathi, J.)

28.02.1959. 25.01.1968

JUDGMENT

This is a plaintiffs' second appeal.

2. The plaintiffs first instituted a suit No. 163 of 1954 in the Court of Munsif, Bahraich, against the defendants praying that the defendant No. 1 (Deputy Commissioner, Bahraich) be permanently restrained from attaching or putting on sale the suit property of which the plaintiffs held jointly with defendant No. 2 on account of the dues from the defendant No. 2. Subsequently the plaintiffs sought permission of the Court to withdraw the suit with permission to file a fresh suit on which the following order was passed by the Munsif :

"The plaintiff is allowed to withdraw the suit with permission to file a fresh suit subject to payment of the cost to the defendant No. 1".

3. The suit (No. 294 of 1954) out of which the present appeal arises was subsequently filed by the plaintiffs against the same set of defendants on the assertion that the property mentioned at the foot of the plaint is the joint property of the plaintiffs and defendant No. 2 and it be declared that they are in possession of the property as owners and the defendant No. 1 cannot proceed against the same by way of attachment or sale on account of any dues from the defendant No. 2. In the plaint it was specifically alleged that a notice under Section 80 of the Code of Civil Procedure had been served on defendant No. 1 and a period of two months had expired thereafter before the presentation of the plaint in the Court.

4. Defendant No. 1 contested the suit. In the written statement the receipt of notice

was admitted but it was pleaded that "the notice is defective". It was, however, not mentioned as to what was the defect in the notice.

5. The trial Court dismissed the suit on the following grounds :-

1. That the entire property was liable to be proceeded against by the defendant No. 1 for the amounts due from defendant No. 2.
2. That as the cost awarded to defendant No. 1 in the previous suit has not been paid by the plaintiffs the suit was not maintainable.
3. That "no valid notice has been shown to have been sent by the plaintiff".

6. Plaintiffs came up in appeal before the learned Civil Judge who did not go into the question as to whether the property being ancestral could or could not be proceeded against the dues of defendant No. 2 alone but affirmed the dismissal of the suit on the ground of the failure of the plaintiffs to have paid the cost of the previous suit to defendant No. 1 before instituting the suit and also because in his opinion they have also failed to prove to have given a valid notice under Section 80 Civil Procedure Code, to defendant No. 1.

7. I have heard learned counsel for the parties.

8. It is significant to note that when the plaintiffs were permitted to withdraw their previous suit with liberty to file a fresh suit no time limit was fixed by the Court for the payment of the cost nor if was directed that in case of failure to pay the cost within a fixed period their application for withdrawal of the suit shall stand dismissed. That being so, it is obvious that it was open to the plaintiffs to have paid the cost even before the decision of the present suit. In a case of the present nature, therefore, the Courts below ought to have stayed the proceedings and fixed a date for payment of the cost by the plaintiffs to defendant No. 1 and if the plaintiffs had failed to pay it by that date only then their suit could have been dismissed. I am supported in this view by a Division Bench decision of the Calcutta High Court reported in AIR 1920 Calcutta 897, in which it was inter alia held that where a plaintiff is allowed to withdraw a suit with liberty to bring a fresh suit on his depositing the costs of the defendant within a specified time, but the order contains no direction to the effect that on failure to pay within that time the suit will stand dismissed, the non-payment of such costs within the specified time does not bar the fresh suit. The only course to be adopted by the Court in such a case is to stay the hearing of fresh suit until the costs are paid, and,

when they are paid, to proceed with the trial of the suit.

9. The second ground taken by the lower Court for dismissing the suit too in my opinion is erroneous in law. As the defendant No. 1 had admitted the receipt of notice under Section 80, Civil Procedure Code, it was for him to produce the notice and to show in what manner it was defective. Once the defendants admitted to have received the notice under Section 80 Civil Procedure Code, the onus which lay on the plaintiffs to prove that they had given a notice under Section 80 had shifted to the defendants and if they alleged that the aforesaid notice was not in accordance with Section 80 it was for them to produce the notice and show to the Court that it did not fulfil the requirement of law. The original notice was with defendant No. 1 and it was for him to produce it before the Court. What were the contents of the notice could not be proved by oral evidence in view of Section 92 of the Evidence Act. The onus being on the defendant No. 1 to prove that the notice was defective the Courts below have erred in law in holding that it was for the plaintiffs to have produced that notice and to have held that the notice was defective on the basis of the oral statement of one of the plaintiffs.

10. In the case of *Kishan Prasad v. Union of India*,¹ a Division Bench of the Calcutta High Court reported in held that when the receipt of notice is not denied but an objection is taken that the notice as served was not a valid and sufficient notice it is necessary for the Court to look into the notice. Where the notice has not been produced nor has any explanation been given for its non-production, the defendant cannot be permitted to say that the notice is not valid or sufficient. It is proper and reasonable to decide from the non-production of the notice, which on its admission of service must be taken to be in the defendant's custody, that if the notice had been produced it would have shown that, it was valid and sufficient.

11. Following the rule of law laid in the aforesaid decision it must be held that the notice which was served on defendant No. 1 was a valid notice under Section 80, Civil Procedure Code and the decision to the contrary with law (sic).

12. Thus the two grounds on which the lower appellate Court has affirmed the dismissal of the suit by the trial Court are wholly illusory in law.

13. In the result this second appeal is allowed with costs and the case is remanded to the lower appellate Court with a direction that it will allow one month's time to the appellants from the date of the receipt of this record for payment of cost to defendant No. 1 and, if the cost is paid, to hear the appeal on merits and decide the question as to whether the property in suit is or is not liable or attachment and sale by defendant No. 1 for the alleged dues from defendant No. 2 and whether the plaintiffs are entitled to any such declaration. If the cost is not paid within the time specified by it the appeal shall stand dismissed.

Appeal allowed.

Cases Referred.

1. AIR 1960 Cal 264