

KERALA HIGH COURT

Nani Amma Nannini Amma

Vs.

State of Kerala

Appeal Suit No. 196 of 1958

(M. Madhavan Nair, J.)

30.08.1962

JUDGMENT

M. Madhavan Nair, J.

1. For realization of arrears of revenue the suit property came to be sold in auction on 30-9-1116 M.E. and the sale confirmed by the Assistant Peishkar, Alleppey, on 29-12-1116. Pursuant to the sale, delivery of possession was effected on 6-4-1120 in favor of the auction purchaser, who is a brother of the plaintiff. The plaintiff was a hypothecatee of the property under the original owners. She claims to have obtained assignment of the auction purchaser's rights and thereby to have become the absolute owner of the suit property. On 31-10-1122 defendants 2 and 3 claiming to be interested in the property moved a petition for revision of the order confirming the revenue sale before the District Collector, Quilon, which came to be disposed of on 12-9-1952 by an order which reads as follows :

"Heard the Vakil for the petitioners and the Advocate for the counter-petitioner and perused the records. It is clear from the records that the sale had been brought about during the pendency of a civil suit which ultimately was decided in favor of the revision petitioners. There is also a definite allegation that the sale was brought about at the instance of the pakuthy peon Aryan Padmanabha Pillai who is a nephew of the thandaperholder. The Proverthicar's detailed report is silent on this point. All these circumstances lead to the conclusion that there had been fraud and collusion in this case. The sale will be set aside on the revision petitioners paying up the arrears with commission within 15 days of their receipt of the notice therefor from the Tahsildar."

The revenue sale having thus been cancelled by the Collector the plaintiff issued a notice under section 80, Civil Procedure Code on 29-10-1952 to the District Collector, Quilon, and instituted this suit on 10-11-1952 before the expiry of two months of service of the notice. The suit was registered as O. S. No. 230 of 1952 on the file of the District Judge, Alleppey, subsequently transferred to and re-registered as O. S. No. 165 of 1957 in the court of the Subordinate Judge,

Alleppey. A question of defect in the institution of the suit having been raised by the State under section 80 of the Code of Civil Procedure, the Subordinate Judge held the suit unsustainable and dismissed the same without adverting even to the alternative claim to enforce the hypothecation. Hence this appeal and the question is of the effect of section 80, Civil Procedure Code on a suit instituted before the expiry of the period prescribed therein.

2. In *Bhagchand Dagadusa v. Secy. of State*¹, the Judicial Committee held section 80 (C. P. C.) to "impose a statutory and unqualified obligation upon the court" and therefore the suit instituted before the expiry of the period prescribed under the section "unsustainable in limine" as against the Government or the public officer concerned. Twenty years later, in *Veliayan Chettiar v. The Govt. of the Province of Madras*², the imperativeness of the section was again considered by the Privy Council and it was held that the provision was one that could be waived by the party for whose benefit it is enacted.

"In 54 Ind App 338 : AIR 1927 PC 176, to which reference has already been made, no question of waiver arose. The observations of Lord Sumner in delivering the opinion of the Board were directed solely to the construction of the section and cannot in their Lordships' opinion be regarded as deciding that it is not competent for the authority, for whose benefit the right to notice is provided, to waive that right. There is no inconsistency between the propositions that the provisions of the section are mandatory and must be enforced by the Court and that they may be waived by the authority for whose benefit they are provided.....there appears to their Lordships to be no reason why the notice required to be given under section 80, should not be waived if the authority concerned thinks fit to waive it. It is for his protection that notice is required if in the particular case he does not require that protection and says so, he can lawfully waive his right."

3. "The object of section 80" observed the Supreme Court in *The State of Madras v. C.P. Agencies*³,

"is manifestly to give the Government or the public officer sufficient notice of the case which is proposed to be brought against it or him so that it or he may consider the position and decide for itself or himself whether the claim of the plaintiff should be accepted or resisted."

It then follows that section 80, Civil Procedure Code is not a provision of public policy but one for the benefit of particular parties who are competent to waive or disregard it. The indication is then clear that the requirements of a notice and expiry of a particular period thereafter are not jurisdictional facts, for jurisdiction cannot be dependent on the consent or waiver of a party. Under section 9 Civil Procedure Code the Civil Courts have general jurisdiction "to try all suits of a civil nature excepting suits of which their cognizance is either expressly or impliedly barred." There is nothing in section 80 expressly affecting the jurisdiction of the court to try suits instituted before the expiry of the period prescribed therein. The section only makes suits instituted before the expiry of two months after service of notice premature and therefore dismissible in limine. But if it has not been so dismissed and the

¹54 Ind App 338 : AIR 1927 PC 176

³ AIR 1960 SC 1309

Government or the public officer does not show to have been prejudiced by the premature institution of the suit, it need not necessarily be dismissed long after the expiry of the period of its prematurity.

4. The observations and recommendations of the Law Commission of India in their Fourteenth Report - Reform of Judicial Administration - Volume 1, Chapter 20 tempt quotation, though they have not so far been adopted by the Legislature :

".....In a large majority of cases, the Government or the public officer made no use of the opportunity afforded by the section. In most cases the notice given under section 80 remained unanswered till the expiry of the period of two months provided by the section. It was also clear that in a large number of cases, Governments and public officers utilized the section merely to raise technical defenses contending either that no notice had been given or that the notice actually given did not comply with the requirements of the section. These technical defenses appeared to have succeeded in a number of cases defeating the just claims of the citizens.

Having regard to these considerations, we are clearly of the view that the provisions requiring notice in such cases should be omitted. There is no justification for placing Government and public officers in a different position from private parties in this respect. The interests of the State will, in our opinion, be sufficiently safeguarded by a provision to the effect that if a suit against the Government or a public officer is filed without reasonable notice, the plaintiff would be deprived of his costs in the event of a settlement of his claim by Government or the public officer before the date fixed for the settlement of issues." Of course, Courts cannot overlook the section so long as it is in our Statute-Book. Nor need Courts pay an over allegiance to it not demanded by its expression. The absolutism once attributed to the section in 54 Ind App 338 : AIR 1927 PC 176, has been watered down by the Judicial Committee in 74 Ind App 223 : AIR 1947 PC 197, by their declaration of its waivability. The section has to be viewed only as indicative of the time for presentation of a plaint in a suit against Government or a public officer.

5. In *Vallabram Purshottam v. Secy. of State*⁴, Broomfield, J. with whom Barlee, J. agreed, referred to 54 Ind App 338 : AIR 1927 PC 176 (cited supra), and observed :

".....the notice which has been given would have served equally for the suit which was filed prematurely and withdrawn and for the present suit which has been filed after allowing the prescribed period to elapse. If the language of the section is not to be strained for the benefit of the plaintiff, neither must it be strained against him, and, in my opinion, it would amount to an extremely technical and unwarranted construction of section 80 to hold that the notice given by the plaintiff in this case has ceased to be effective because of the false start which he made by filing his suit before the expiration of two months and being compelled therefore to withdraw it."

and held the institution of the second suit on the basis of the same notice valid.

⁴ AIR 1935 Bom 21

6. As the dismissal of a suit on the ground of premature institution will not bar a second suit after maturity, to dismiss the present suit so as to compel the plaintiff to file a second suit almost immediately would be a meaningless formality tending only to multiplicity of proceedings. The first suit might be allowed to be proceeded with after expiry of the period mentioned in section 80. If before the expiry of the period mentioned in section 80, the Government or the officer intimate the court of its or his readiness to accept the plaint claim, the defendant may be given its or his costs in the suit.

7. The Government has not so far stated that it is ready to accept the plaint claim or that it has in any way been prejudiced by the prematurely early institution of the suit. The dismissal of the suit as premature five years after expiry of the prescribed period was too technical a disposal to be upheld. The decree of the court below is discharged and the suit remitted for trial on the merits of the claim. The costs of this appeal will abide the result of the suit and be provided for in the revised disposal to follow.

Appeal allowed.