PATNA HIGH COURT

Ramcharan Mahto

Vs

Custodian of Evacuee Property

A.F.O.D. No. 325 of 1960

(H. Mahapatra and Tarkeshwar Nath, JJ.)

01.05.1963

JUDGMENT

Mahapatra, J.

1. Plaintiffs are the appellants who instituted a suit on the 8th of January, 1957, in the Court of the Subordinate Judge at Bihar in the district of Patna against two defendants, one of whom was the Custodian of Evacuee Property, Bihar (defendant No. 2). The other defendant was Syed Salahuddin Ahmad son of Syed Imamuddin Ahmad. Another son of Syed Imamuddin Ahmad was Maslehuddin who was declared an evacuee under the Administration of Evacuee Property Act and half share in the suit property was also declared to be that evacuee's property. As that property rested in the Custodian, he was made a party defendant to the suit. Plaintiffs' allegations in the plaint were that they were coming in possession of the suit lands as their raiyat holdings and defendant No. 1 or his predecessors-in-interest were never in possession of the same. There were proceedings under Section 145 of the Code of Criminal Procedure in regard to the suit properties, but they were ultimately quashed by the High Court on an application in revision made by the defendant. Alter the decision in that criminal revision case, defendant No. 1 with the Custodian, defendant No. 2 contemplated to dispossess the plaintiffs from the suit lands. To repel that apprehension, the present suit was brought in which the plaintiffs alleged that the Custodian had declared the defendant No. 1's brother Syed Maslehuddin as an evacuee and half the property in suit to be the evacuee property without proper materials and legal evidence and, as such, he (Custodian) had no right to take possession of any portion of the lands which never vested in him in law. It is not necessary to refer to several other allegations made in the plaint, challenging the title and possession of defendant No. 1 as they will not be necessary for the disposal of the appeal. The reliefs sought in the plaint were declaration of the plaintiffs' title as occupancy raiyats and confirmation or, in the alternative, recovery of their possession over the suit lands. They prayed for mesne profits in case they were held to be out of possession and they wanted to withdraw the money which lay in deposit in the case under Section 145 of the Code of Criminal Procedure.

2. Two separate written statements were filed by the defendants on the 21st of August and the 19th of December, 1957, respectively. Several objections were taken against the suit. It was

pleaded that the suit was barred under Section 46 of the Administration of Evacuee Property Act, and that the suit lands being a composite property, a proceeding under that Act was pending in the Court of the competent officer for separation of the interest of the evacuee (defendant No. 1's brother) and, as such, the suit was also barred under Section 20 of that Act. Plaintiffs' possession was denied and the defendant's possession asserted. Defendant No. 2, the Custodian, pleaded that all proceedings taken under the Administration of Evacuee Property Act were in compliance with the law and the order declaring Syed Maslehuddin as an evacuee was legal and his properties had vested in the Custodian who had come in joint possession of the lands in suit with defendant No. 1.

3. Issues were framed on these pleadings on the 21st of August, 1957. From the order-sheet of the trial Court it appears that on the 21st of August, 1957, defendant No. 1 filed his written statement but the cost as ordered before was not paid. The Court ordered that day the case to be put up on the next day for payment of cost and settlement of issues on acceptance of the written statement. It was noticed in the order-sheet that defendant No. 2 had taken no steps. On the 12th of November, 1957, defendant No. 2 made an application for time for filing his written statement on the ground that he had not received the same from the Legal Remembrance. The suit was fixed for the 3rd of January, 1958, for hearing and defendant No. 2 was ordered to file his written statement at an early date. On the 19th December 1957, a written statement was filed by defendant No. 2 and that was ordered to be put up on the date already fixed for hearing of the suit. It was accepted on the 3rd of January, 1958, and the hearing was adjourned to the 27th of February, 1958, but the actual hearing did not commence before two years later. On the 20th of July, 1959 defendant No. 1 made an application for amendment of his written statement and so did defendant No. 2 on the 10th of August, 1959. Both the amendments were to introduce a new paragraph in the written statement to the effect that the plaintiffs did not comply with the provisions of Section So of the Code of Civil Procedure and, as such, the suit was fit to be dismissed. This bar against the suit or want of notice under Section 80 was not taken in the original written statements, and in their applications for amendment the defendants stated that they had omitted to mention this bar through oversight. To both the applications for amendment, the plaintiffs objected but on hearing both sides, the Court below allowed the amendments subject to the payment of a cost of Rs. 4/- to the plaintiffs. This was on the 10th of August, 1959, and on the 4th of December, 1959, the issues were recast by introducing issue No. 3 as follows :

> "Is the suit maintainable in absence of service of notice under Section 80, Civil Procedure Code?"

On that day that issue was taken up for hearing as defendant No. 1 had filed a petition on the 23rd of September, 1959, to decide that point first. The Court after hearing the arguments on both sides held that the Custodian, defendant No. 2, was a public officer and a notice under Section So, Civil Procedure Code, was necessary to be given to him before the institution of the suit, and in absence of an averment in the plaint that such a notice was given, the Court below rejected the plaint by its judgment dated the 14th of December, 1959. Against that, the plaintiffs preferred the appeal here.

4. The first contention for the appellants was that the Custodian appointed under the Administration of Evacuee Property Act was not a public officer and, as such, for a suit to be

instituted against him no notice as provided under Section So, Civil Procedure Code, was necessary to be given to him. Section 2 clause (17) of the Code defines "public officer" and in sub-clause (h) it lays down that every officer in the service or pay of the Government, or remunerated by fees or commission for the performance of any public duty is a "public officer". There cannot be any doubt that the Custodian performs public duty under the Act and that he is in the service and pay of the Government. He is thus a public officer within the definition. Section So provides that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after notice in writing has been delivered to, or left at his office stating the cause of action, the name, description and place of residence of the plaintiff and the relief which he claims and the plaint shall contain a statement that such notice has been so delivered or left. "Public Officer" mentioned in this section will be such person who comes within the definition given in Section 2(17) of the Code of Civil Procedure. The averments made in the plaint in the present suit challenged the acts done by the Custodian in his official capacity and one of the reliefs sought by the plaintiffs was to confirm or recover their possession as against the Custodian in respect of half of the property. A notice under Section 80 was thus necessary to be given to him before the suit could be instituted by the plaintiffs impleading the Custodian as a defendant.

5. Next, it was urged for the appellants that the amendment to the written statements of the defendants, giving them permission to introduce for the first time the bar against the suit with reference to Section 80, Civil Procedure Code, should not have been allowed by the trial Court two years after the original written statements were filed. No doubt, the amendments were opposed by the plaintiffs; but after hearing both sides the trial Court allowed them. The plaintiffs withdrew the cost of Rs. 4/- that was given as a condition precedent for allowing the amendments. As I have stated above, the amendment was brought on record on the 4th of December, 1959, by framing a new issue in accordance with that, although the Court had allowed the amendment on the 10th of August 1959. The plaintiffs cannot now raise any objection against the amendments as they accepted the cost allowed by the Court in that respect. In the case of *Kapura Kuer v. Narain Singh*[1], the trial Court had restored an application under Order 9 Rule 13, Civil Procedure Code, in relation to a suit, subject to the condition of payment of some cost to the other side. The cost was paid and thereafter the application was restored; but the other side came in revision to the High Court against that order of restoration. It was held that the party having accepted the amount of cost awarded to her as a condition precedent to the restoration of the application in question was estopped from challenging the legality or propriety of that order made by the trial Court. As early as 1881 In the case of *King v. Simmonds*[2], it was recognised that where a party accepts costs under the order of a Court which, but for the order, is not payable at that time, he cannot afterwards object that the order was made without jurisdiction. In the case of *Tinkler v. Hilder*[3], the same principle was upheld. The appellants before us obtained money which they could not otherwise have got and however small it be, after availing that benefit, they must be taken to have admitted that the order allowing the amendment was within the jurisdiction of the Court below.

6. The more important point advanced on behalf of the appellants was that in the circumstances of the case the Court below, while considering the issue in relation to the notice under Section 80, Civil Procedure Code, should have held that the notice was waived by the Custodian. Some controversy was raised at the Bar that there can be no waiver of a mandatory requisition made

under any law. When a notice for institution of the suit was prescribed in an obligatory form under Section 80 of the Code, it was not open to any party to plead that there was a waiver of such notice and, as such, the suit could be maintainable without serving a notice on the opposite party concerned. I can usefully refer to the case of *Province of Bihar v. Kamakshya Narain Singh*[4], where the Lordships held that the object of the notice under Section 80 was to give the Government an opportunity of considering their attitude and to give them a chance of making amends. The mandatory nature of the provision is not a bar to waiver of notice by the Government. It was held that where the cause of action against the Government was the passing of an Act which deprived the plaintiff of his rights to property and the Government was going to give effect to the Act within a month of the coming into force of the Act, the Government must be held to have waived their right to notice under Section 80. It is true that in that case a notice under Section So had been served, but it was contended that the notice was not in sufficient compliance with the law as all the necessary details of the suit, as required were not given in that notice. The matter before the High Court came by way of an appeal by the defendant, the Province of Bihara against an order of temporary injunction passed by the Subordinate Judge, Hazaribagh, in a title suit restraining the defendant from taking over the management of the estate of the plaintiff until the disposal of the suit. The appellate Court was to consider if there were fair questions to be more properly determined in the suit itself in which case a temporary injunction was justified. In the context, the argument on behalf of the respondent (plaintiff) that the notice served on the Government was a sufficient compliance with Section So or, alternatively, by the conduct of the defendant and the circumstances of the case, the defendant was to be taken to have waived the notice came for consideration. Their Lordships relied upon the case of *Vellayan Chettiar v. Government of the Province of Madras*[5A], I shall refer to that case a little later in detail.

7. Another Bench decision of this Court in the case of *State of Bihar v. Kamaksha Prasad*[6], took a similar view about the possibility of waiver in regard to a notice under Section So, Civil Procedure Code. In that case, a proclamation under Section 15 of the Police Act for stationing additional police force in a particular area was made and notices for payment of costs in relation thereto were served upon the inhabitants of that area, requiring them to pay the amount within less than two weeks from the date of service of that notice. Thereupon the plaintiff filed a suit for injunction restraining the Government from realizing the cost, without serving notice under Section So, Civil Procedure Code. He contended that as the Government, knowing that the notice required a period of two months, proceeded to realise the money in less
than a fortnight's time, the Government was to be held to have waived their right to notice. Their Lordships accepted, in principle, that though Section 80 was explicit and mandatory and admitted of no exceptions, it was competent for the authority, for whose benefit the right to notice was provided, to waive that right. But, on the facts of that case the Court came to the conclusion that a short interval between the service of notice for payment of costs for additional police and the date of payment was not sufficient to constitute waiver of the notice under Section So, on the part of the Government, because the proclamation for stationing additional police was published long before and that afforded a cause of action to the plaintiff to file a suit if he so desired, and there was no valid reason for him to wait until the costs of additional police were apportioned and demand notices were served upon him. I have referred to this case to show that the argument that in no case there can be waiver of a notice under Section 80, Civil Procedure Code, is not tenable.

8. The strong basis for the argument against waiver was the case of *Bhagchand Dagadusa v. Secretary of State*[7], The appellants before the Privy Council and other plaintiffs brought a suit against the Secretary of State for India in Council and the Collector and District Magistrate of Nasik, challenging the validity of a, Notification published by the Bombay Government under the Bombay District Police Act, 1890, and for an injunction restraining the defendants from recovering from the plaintiffs money under that notification. The District Judge dismissed the suit for non-compliance with the provisions of Section So, Civil Procedure Code, though he was also of the view that the impugned notification was valid. Against that, an appeal was brought to the High Court of Bombay which was dismissed but not on the ground of want of notice. The High Court held that the notification challenged in the suit was valid. The Judicial Committee, however, came to the opposite conclusion and found that the demand made by the Collector for payments, in recovery of the costs of additional police, was premature and not in accordance with the Act. After that, it became necessary to consider if the plaintiff-appellants were to be non-suited for not giving a previous notice of two months as contemplated under Section 80, Civil Procedure Code. In that case, a notice was given to the Collector but the suit was filed before the expiry of two months thereafter. The Secretary of State, who was a party, was not given any notice. In the plaint it was stated that

> "as the suit is for an injunction, and as the defendants are about to recover the amount demanded in the notices soon, the suit is filed before the completion of the period of two months."

No particulars, however, were stated or proved to show that the Collector intended to enforce the orders before the expiry of two months of notice. The main argument was that as it was a suit for injunction, a notice under Section 80, Civil Procedure Code, was not called for. On that point, there was diversity of opinion in different High Courts of India, but the judicial Committee repelled the argument that serious or irreparable damage, that may be apprehended by the delay in instituting a suit two months after a notice to the public officer, would be sufficient to exempt suits of that nature from the operation of Section 80, and held.

> "Section 80 is express, explicit and mandatory, and it admits of no implications or exceptions. A suit in which (inter alia) an injunction is prayed is still 'a suit' within the words of the section, and to read any qualification into it is an encroachment on the function of legislation. ..... To argue, as the appellants did, that the plaintiffs had a right urgently calling for a remedy, while Section 80 is mere procedure, is fallacious, for Section 80 imposes a statutory and 'unqualified obligation upon the Court."

Finally, their Lordships held that the plaintiffs' suit was unsustainable in limine and the plaintiffs' position was as if their action had never been brought, and observed :

> "Whatever may be the case between other parties, as against the respondents, they must fail. They have taken their own course and have brought this result on themselves..... The evidence did not prove risk of serious or immedicable damage to anybody, and was not directed to doing so. The sums payable were in many cases very small, and were throughout far from being oppressive ..... There was no reason for not complying with

> the words of the section, except over confidence in what may be called the Bombay view of it"

The argument based upon this case was that, according to the Judicial Committee, Section 80 being "a statutory and unqualified obligation upon the Court", there could be no occasion for waiver by the public officer or the authority concerned because it imposes a restriction on the Court itself, and that restriction cannot be negatived at the option of one of the parties to the litigation. In support of this contention, reference was made to a Bench decision of this Court in the case of *Secretary of State v. Sagarmal Marwari*[6A], where it was observed that no question of waiver based upon the hardship or irreparable injury, which may be caused to the plaintiff if the provisions of the statute were rigorously enforced, arose in such a case by reason of the fact that the objection to the maintainability of the suit on account of want of notice under Section 80, Civil Procedure Code, was not taken in the written statement but was raised only at the time of hearing when a second suit by the plaintiff, based on the original cause of action, would be barred. What would constitute a waiver, if at all, is a different matter, but the view that in no case there can be a waiver, either express or implied, either by conduct or otherwise, by a public officer or the Government cannot prevail in view of what the Judicial Committee observed in the case of AIR 1947 PC 197 where their Lordships explained what was really meant in the case of 54 Ind App 338 : AIR 1927 PC 176, Another case of the Judicial Committee on this point *Gaekwar Baroda State Railway v. Hafiz Habibul Haq*[7], was also explained. It was said that the observations of Lord Sumner in delivering the opinion of the Board in the case of 54 Ind App 338 were directed solely to the construction of the Section and it had not been decided that it was not competent for the authority for whose benefit the right to notice was provided to waive that right. Their Lordships observed :

> "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". About the case
> of 65 Ind App 182 , it was said that the sections under consideration in that case were Sections 86 and 87 which in effect made the consent to the Governor-General in Council a condition of a suit being brought against a Sovereign Prince and the decision there was that that condition could not be waived by the Sovereign Prince. Their Lordships explained that since that decision which related to a consent by a third party, who was not a party to the suit, could not be a governing authority where the only person concerned is himself a party to the suit, and in that context there could be no waiver of the consent of the Governnor-General by a Sovereign Prince. Finally, therefore, the view established in the case of AIR 1947 PC 197 was that a notice under Section 80, Civil Procedure Code, could he waived and the Court can take note of that either from the express words of the authority concerned or from their conduct. That completely answers the argument of the respondents against the plea of waiver raised by the plaintiff-appellants.

9. It is now for consideration whether the appellants have proved that there was a waiver by the Custodian, defendant No. 2. The ground, on which this plea, was based, was the delay suffered by him in raising the question of non-maintainability of the suit on account of want of notice

under Section So, Civil Procedure Code. As I have stated before, the suit was instituted on the 8th of January 1957 and the written statements by defendants 1 and 2 were filed on the 21st of August and 19th of December 1957, respectively, At first, objection about the valuation of the suit was taken by defendant No. 1 on the 27th of February 1958, and it was raised to Rs. 99150/- on the 5th of January and the deficit court-fee was paid on the 18th of May; 19597 It was after that, that defendant No. 1, at first, asked for amendment of his written statement to raise the bar against the suit with reference to Section 80, Civil Procedure Code. This was on the 20th of July, followed by a similar prayer of defendant No. 2 on the 10th of August, 1959. The amendment was allowed on that date subject to payment of cost to the plaintiff. A new issue, based on that amendment, was settled on the 4th of December, 1959. Learned Counsel for the appellants urged that the long delay between the filing of the written statement in December 1957 and the prayer for its amendment in August, 1959, after making the plaintiffs pay a large sum of money by way of deficit court-fee, was sufficient to establish that the Custodian waived his right to a notice under Section 80 by his dilatory conduct. To support this argument, reliance was placed on the case of *Puma Chandra v. Radharani Dassya*[8], where their Lordships observed that the plea of bar under Section 80 must be taken at the earliest possible opportunity and if it is raised at a very late stage when the plaintiff would be precluded, by the law of limitation, from bringing a further suit, the defendant must be deemed to have waived the privilege of notice. In that case, the suit was filed on the 1st of February and the written statement on the 16th of June and issues were settled on the 19th of July, 1924. The plea of bar under Section 80, Civil Procedure Code, was raised on the 11th of January, 1926. The suit was against a receiver for accounts without giving any notice under Section 80. The suit was dismissed by the Subordinate Judge, and the appeal against that was brought to the High Court. One of the contentions on behalf of the appellant was that the receiver was not a public officer and no notice under Section 80 was required to be given before institution of the suit. Costello, J. dealing with that argument and
referring to the case of *Sm. Radharam Dassya v. Purna Chandra Sarkar*[9], observed :

> "Speaking for myself and also I think for my learned brother, I must say that I was somewhat startled to hear it argued that receivers must be treated as public officers within the meaning of Section 80. But for the purposes of this appeal, however, we do not think it necessary to express any definite opinion of our own upon the point because in the view which we take with regard to the peculiar circumstances and the facts of the present case, we think that even upon the assumption that the Courts below were right in thinking that the receiver is entitled to a notice under Section 80, the defendants in the present suit have so conducted themselves in these proceedings as to lose the privilege afforded by Section 80".

Thus it appears that not merely the delay in raising the bar of suit under Section 80 but also the doubt about the receiver being a public officer within the definition given in the Code of Civil Procedure, were responsible for the conclusion of waiver against the defendant. Secondly, in that case, the plea was not at all raised till the hearing of the suit, but in the case before us it was allowed to be raised before the evidence commenced in the trial Court. Further, it appears that their Lordships took into account the fact that the plaintiff's further suit had by that time become barred by limitation. I do not, therefore, think that the reported decision will give support to the appellants' contention.

10. The case of *Ramnarain Prasad v. Kara Kishun Prasad*[10], on which reliance was also placed by the appellants is of little help. There, after the acquittal in a criminal case, a suit for damages for malicious prosecution was initiated against a post-master. The bar under Section 80 was not raised till the suit came in second appeal before a single Judge of this Court. In a Letters Patent Appeal arising out of that, Courtney, Terrell, C.J., with whom Varma, J. agreed, held that as the plea of bar was not raised till the second appeal by which time more than two years had elapsed from the accrual of the cause of action and the plaintiff's farther suit had become barred by limitation the defendant was to be taken to have waived the want of notice. Their Lordships relied upon the case reported in AIR 1931 Calcutta 175 to which I have just referred. The Privy Council decision in 54 Ind App 338 : AIR 1927 PC 176 was also 'noticed as that was placed in counter argument. The facts of the present case are different inasmuch as neither the plaintiffs' action can be said to have become barred by limitation with reference to the case under Section 145, Criminal Procedure Code, which by the orders of the High Court was quashed, nor the plea of bar was postponed till after the hearing of the suit in the trial Court. In that view I cannot see how the dictum of the reported case can be applied here.

11. For the appellants the case of *Wasani Shripat v. G.M. Khandekar*[11], was also cited in support of the contention that the circumstances of the present case which were similar to those in that reported case, were sufficient to warrant a conclusion that the defendant Custodian would be deemed to have waived the privilege of notice. In the Nagpur case, AIR 1949 Nagpur 25 the liquidator of a Co-operative Society passed a
contributory order against the plaintiffs and when that order was under execution, the plaintiffs raised an objection that the order was null and void. This objection was overruled, against which the plaintiffs moved the High Court where further proceedings in the execution case were stayed, to enable the plaintiffs to file a civil suit. Accordingly, the suit was commenced against the liquidator for a declaration that the contributory order was void. No notice, however, under Section 80 was given to the liquidator. The suit was on the 7th of January and the written statement was filed on the 3rd of March 1938, in which objection in regard to the court-fee and many other matters but not the bar under Section 80, Civil Procedure Code, were raised by the defendant. The parties joined in issue about the valuation and the court-fee payable, and ultimately the plaintiffs had to pay Rs. 630/ on the 15th of November 1939 as deficit court-fee. On the 5th of December of that year the liquidator, defendant No. 1, filed an additional written statement raising the plea of bar of notice under Section 80 to which the plaintiffs objected but without success. Issue was framed on that point and decided against the plaintiffs, whereupon the appeal was brought to the High Court. In paragraph 10 of the reported judgment their Lordships of the Nagpur High Court observed that mere delay in taking a plea was not the only ground in that case. The parties had been litigating for some years about the validity of the contributory order right up to the High Court and the defendant No. 1, the liquidator, fully knew about the controversy and also knew that the plaintiffs had commenced the suit in pursuance of the directions of the High Court, While he filed a full and complete written statement on merit and joined issues with the plaintiffs on the question of court-fee and fought them tip to the High Court, he kept back his plea of bar against the suit under Section 80; the knew that he was a public officer and was entitled to a notice which was not given. With these facts on the background, coupled with the delay of one year and nine months, their Lordships did not have any hesitation in holding that the liquidator should be deemed to have waived his rights to the notice in the particular circumstances of the case. The suit was commenced under the directions

of the High Court in a proceeding where the liquidator was a party and, as such, he had full notice and knowledge of the suit before hand. His conduct in keeping back the plea till the plaintiffs were made to pay ad valorem court-fee was taken to constitute a waiver. Learned Counsel before us argued that in the present case the Custodian with the defendant No. 1 also raised objection about the court-fee and the plaintiffs had to pay a large sum on the valuation determined by the Court. In the Nagpur case, AIR 1949 Nagpur 25 the suit being for a declaration the objection was raised that in the nature of that suit, ad valorem court-fee was payable and not that the suit had been under-valued to avoid larger court-fee. In the present action the plaintiffs decided from the beginning to pay ad valorem court-fee on the valuation of their action but they had under valued it, and when the proper valuation was fixed, the plaintiffs were required to make up the deficit court-fee which they should have paid at the initiation of the suit. Secondly, the knowledge and notice of the nature of the suit with the reliefs claimed therein could not be attributed to the custodian as it could be to the liquidator, in the Nagpur case, AIR 1949 Nagpur 25. Besides, as their Lordships clearly observed, mere delay in taking the plea was not the ground for holding in that case that there was a waiver of the plea of bar of the suit.

12. There is still another view from which the present case can be looked at. The delay suffered by the defendants in pleading Section 80 against the suit was mooted by the plaintiffs while the amendment of the written statement was before the trial Court and that delay was condoned after hearing both the sides and the amendments were allowed, on payment of some costs to the plaintiffs. The same question of delay is not to be raised again to be the only ground of waiver. If the plaintiffs are estopped from agitating against the permission of the Court below to the amendment of the written statement at a late stage in the suit, they cannot take advantage of the same in another form and plead that the defendant No. 2 by his conduct had waived the notice.

13. For all these reasons I am not able to accept the argument for the appellants that in the present case there was any estoppel or waiver against defendant No. 2.

14. What will be the result of this finding is the next question to be decided. Will the suit against defendant No. 2 alone or the whole suit will be affected against both the defendants? Learned Counsel contended that for want of notice to which defendant No. 2 alone was entitled, the suit could not be instituted against him and he may be expunged from the plaint and the suit will proceed against the other defendant. To this contention the respondents replied that where there has not been a notice as contemplated under Section 80 and a statement in the plaint that such notice had been given, the only course open to the Court is to reject the whole plaint under Order 7, Rule 11, Civil Procedure Code, because that would be covered by clause (d) of that rule, which is where the suit appears from the statement in the plaint to be barred by any law". Section 80 prescribes :

> "No suit shall be instituted against.....a public officer in respect of any act purporting to be done by such public officer in his official capacity, until the expiration of two months next after the notice in writing has been delivered to or left at his office..... stating the cause of action, the name, description and place of residence oft the plaintiff and the relief which he claims, and the plaint shall contain a statement that such notice has been so delivered or left."

Because of the mandatory nature of this provision, it was argued that this amounts to a legal bar against a suit and, as such, will be covered, by clause (d) of Rule n of Order 7. To me the contention appears to be faulty, particularly to view of the decisions in the cases of AIR 1947 PC 197, AIR 1950 Patna 366 and AIR 1932 Patna 303 where it was clearly laid down that, in some circumstances, waiver of a notice by a public officer can be deemed from his conduct, either expressly or impliedly. In such a case, for absence of a notice or a statement in that regard in the plaint the suit does not become defective. Learned Counsel urged that in a case of that nature, the plaintiff must state in his plaint hat there has been a waiver by the defendant. There is no provision in law to compel him to make such a statement. When the bar of notice under Section 80 is raised by the defendant, it will be enough for the plaintiff to prove from the conduct of the defendant that he had waived such notice. In many suits, bar under Section 80 is raised along with other pleas in defence and at the fall trial of the case, all issues are determined. If the view is that the issue about notice under Section 80, when determined, will result in the rejection of the plaint, the decision on other issue cannot be within the jurisdiction of the Court for the simple reason that if the plaint is rejected there is no case before the Court to proceed with. Perhaps there may be, as there are, cases in which the defendant may press upon the Court to decide the issue about Section 80 first and that may completely dispose of the case. But it is not uncommon for the appellate Court to desire that all issues should be determined by the trial Court so that the parties may not be faced with a second trial and further expenditure, if the trial Court's view about the preliminary issue, such as Section 80 notice, is not accepted by the Court; of appeal. Taking a circumspective view of the matter, I think that clause (d) of Rule n of Order 7, Civil Procedure Code, will not apply to a case where the bar in relation to Section 80 is established after the parties are heard. That clause is attracted where the suit appears to be barred by any law from the statement in the plaints and not where the bar can be inferred from absence of a statement in the plaint - like the statement required under Section 80. If there is no clear or specific admission in the plaint suggesting that the suit is barred, the rejection of the plaint under clause (d) is not called for. In many cases where the plaint can be rejected the Courts allow the plaint to be amended instead of being rejected. That clearly indicates that the rejection of plaint, even when clause (d) is applicable, is not mandatory. The word "shall" used in R. 11 does not make any difference. The same word "shall" occurs in Rule 68 of Order 21, Civil Procedure Code, about the sale of immovable property by a Court. There it is laid down :

> "No sale hereunder shall..... take place until after expiration of at least thirty days in the case of immoveable property.....calculated from the date on which a copy of the proclamation has been affixed in the court-house of the Judge ordering the sale."

This provision corresponded to Section 290 of the old Code. In the case of *Tasadduk Rasul Khau v. Ahmad Hussain*[12], the Judicial Committee dealt with the question whether the non-compliance with the requirements of Section 290 by holding the sale before the expiry of 30 days made the sale itself a nullity. Their Lordships rejected the argument that non-compliance within the interval of 30 days between the proclamation and sale by itself invalidated the sale because Section 290 prescribed that no sale shall take place until after the expiration of at least 30 days from the date of the proclamation fixed up in the court house. Their Lordships thought, at the most it was an irregularity and could be covered by Section 311. Substantial injury was to be proved in addition to this irregularity before the sale could be set aside. Thus the use of the word "shall" in Rule 11 of Order 7 will be viewed in similar light. The provisions in the Civil

Procedure Code do not affect the jurisdiction of the Court. They only regulate the exercise of such jurisdiction. I can refer here to a Bench decision of this Court in the case of *Secretary of State v. Amarnath*[13]; The plaintiff was the respondent in the High Court. He instituted a suit for rent payable for the snit holding. That rent was payable in equal shares to the proprietors of two estates, one of which was a Khas Mahal. The Secretary of State was impleaded as the defendant (proforma). but no notice under Section 80 was served on him before the suit. When objection was taken before the trial Court against the maintainability of the suit for want of notice, the plaint was rejected. On appeal, the District Judge held that as the Secretary of State was a proforma defendant, no notice under Section 80 to him was necessary. He remanded the case to the Court of the Munsif. Against that, an appeal was brought to the High Court. This Court held that notice under Section 80 to the
Secretary of State was necessary and for want of that, the suit couldnot proceed against him. Accordingly, the order of the District Judge remanding the case to be disposed of on merits was varied to the extent that the name of the Secretary of 'State was directed to be expunged from the action. This case is very much applicable to the point under discussion. For want of notice necessary under Section 80 the whole plaint was not rejected and the order of rejection of the plaint as made by the trial Court or the order for trial of the whole suit as given by the District Judge was varied by the High Court. Instead of rejecting the plaint, only the name of the Secretary of State was expunged from the suit. This supports the view that I have taken above.
15. Against this, however, a single Judge decision of this Court in the case of *Baldeo Prasad v. Sukhi Singh*[14], was cited by the respondents where a contrary opinion was expressed by Rowland, J. Non-compliance with the requirements of Section 80 was held to be a ground covered by Order 7 Rule 11 clause (d). In that case the plaintiff brought his action claiming to recover certain property that had been sold in a proceeding under the Public Demands Recovery Act on a declaration that all the certificate proceedings were fraudulent and his title to the property was not affected by them. The suit was dismissed by the trial Court as barred under Sections 45 and 46 of the Public Demands Recovery Act as well as under Section 80, Civil Procedure Code, as the Secretary of State was a party defendant. The Subordinate Judge, before whom the appeal was brought, accepted all the findings but he held that for want of notice under Section 80, the suit was not maintainable against the Secretary of State but it could proceed against other defendants. In second appeal against that, it was contended that where Section 80 is applicable, want of notice will bar the entire suit which must fail as a whole. That was accepted but the basis of that appears to be the case of 54 Ind App 338 where Section 80 was stated to be mandatory admitting of no exceptions. The learned Judge also referred to the case of Venkata Rangiah y. Secretary of State, ILR 54 Mad 416 in which the same Privy Council decision was stressed upon and followed. But in view of what was held in the case of AIR 1947 PC 197 that there can be exception to Section 80, where the waiver of the prescribed notice can be established, the total prohibition against a suit viewed from the section (Section 8o); as the only ground for bringing a suit involving that point, under clause (d) of Rule 11 Order 7 for compulsory rejection of the whole plaint can no longer prevail. The complexion is bound to be taken as changed after the decision in AIR 1947 PC 197.

16. The case of *Bachha Singh v. Secy, of State*[15], was of the year 1902. That was also referred by Rowland, J., in support of his conclusion. There the person who intended to institute a suit against the Secretary of State for India in Council served a notice prescribed by Section 424 of the old Code (corresponding to Section 80 of the present Code), but before he could file the suit, he died. His legal representatives instituted the suit. It was held that the notice served by the

deceased did not enure for the benefit of his representatives, and the Court could not, under such circumstances, stay the proceedings of the suit and allow time to the plaintiffs to serve the requisite notice. The only course open to the Court was, as held in that case, to reject the plaint. It appears that that suit was for recovery of possession of the property that was taken, by way of escheat, on behalf of the Secretary of State who was the sole defendant in
that case. The main and only argument before the Allahabad High Court was whether a notice by the deceased would entitle his legal representatives to institute the suit without any further notice to the Secretary of State. The decision is on that point. Only in the last but one sentence in the judgment it was observed that the plaint ought to have been rejected under the provisions of Section 54(c) of the Code (which correspond to Order 7 Rule 11). This part of the observation was not on any discussion; besides, the Secretary of State was the solo defendant and, as such, dismissal of the suit or rejection of the plaint did not make any material difference, the question where there are more than one defendant and notice under Section 80 was only required to one of such defendants, whether the whole plaint will be rejectedor the defendant concerned will be expunged did not come for consideration in that case.

17. I may refer to an interesting case which cams before a Division Bench of the Calcutta High Court in *Sreedam Chandra v. Tencori Mukherjee*[16], There, the plaintiff-appellant filed a suit against some individuals in their personal capacity and also as members of the Council of Administration or the Municipal assembly of the free city of Chandernagar, for a declaration that a certain resolution passed by that Council was illegal and invalid and for some mandatory orders on the defendants including the Council and the Assembly and the other defendants in their capacity as members thereof. No sooner the suit was filed, the Subordinate Judge. Chandernagar, rejected the plaint under Order 7 Rule 11(d) as no notice as contemplated under Section So was given. He took the view that the Council of Administration was the Government. Chandernagar is a French possession in West Bengal. Next day, another fresh plaint was filed and it met the same fate. The plaintiff thereupon came to the High Court. Their Lordships observed that clause (d) of Rule 11 of Order 7 was attracted only when, on the admitted facts as appearing from the plaint itself, the suit was prima facie barred. They gave an example of a plaint where it appears that the cause of action arose beyond the period of limitation fixed under the statute and there is no indication in the plaint that such limitation is saved in any way. Even in a case of that nature, according to their Lordships, an opportunity is to be given to the plaintiff to amend the plaint by setting out an acknowledgment in writing signed by the defendant within the period of limitation if it is so prayed and that without passing any order for rejection of the plaint. In support of that, they referred to the case of *Gunnaj Bhavaji v. Makanji Khoosal*[17], They quoted with approval some observations in the case of *Ratan Chand v. Secretary of State*[18], to the effect that Order 7 Rule n is to be acted upon only if there is a clear and specific admission in the plaint from which it follows that the suit is barred. Another case - *Pran Krishna v. Kripanath*[19], was also referred in support. In the case before their Lordships it was noticed that in the body of the plaint there was no admission that the Council of Administration or the Municipal Assembly of the free city of Chandarnagar was the Government under Section So. They came to the view whether the Code of Civil Procedure applied to Chandarnagar and if so, those bodies would come within the purview of Section 80 could not be decided merely as the plaint stood. In their opinion, the trial Court should have registered the plaint, issued notice to the defendants, allowed them to file their written statement and after issues were raised it would have been open to the
trial Court to take up one or more of the issues as the preliminary points and decide the same. The order of rejection of the plaint was set aside. Therefore, even if clause (d) can be applicable

to a case with reference to want of notice prescribed under Section 80, it can only be in those cases where a clear and specific admission in the plaint makes the suit barred. Tested in that light, averments in the plaint in the present suit did not reveal such position.

18. That the suit could not be maintained against defendant No. 2, the Custodian, for want of notice in compliance with the provisions of Section 80, there is no doubt; following the course adopted in the case of AIR 1936 Patna 339 he must be directed to be expunged from the action. I would allow the suit to continue against defendant No. 1 if that be possible on the facts of the case. Learned Counsel for the appellants brought to our notice that on the 3rd of June, 1960, the interest of the evacuee in the suit property has been separated by the appropriate authority. That property may be excluded from the suit along with the Custodian and in respect of rest of the property, the action wilt continue against defendant No. 1. An application under Order 41 Rule 27, Civil Procedure Code, for admitting the order of the competent officer separating the interest of the evacuee was made before us. It had to be rejected as no sufficient cause was shown to explain the delay in filing the order. We have thus no material before us to come definitely to a conclusion in this respect. Even if we take notice of the subsequent legal proceeding and decision in this regard, as a Court of appeal can do, that will not be helpful to the plaintiffs until they amend their plaint suitably and change their averments in accordance with the changed position. Whether the suit on the plaint, as it stands, can be maintained against the defendant No. 3 or what amendment, if applied for by the plaintiffs, will be allowed to the plaint, are matters for the trial Court to decide.

19. The result is that the appeal is allowed in part and the judgment and decree of the trial Court are modified to the extent that the defendant No. 2 is expunged from the suit and the case against the defendant No. 1 is remanded for disposal according to law. The defendant No. 2 will be entitled to costs from the plaintiffs in this Court. The costs of other parties will abide the result of the suit.

Tarkeshwar Nath, J.

20. I agree.

Appeal allowed in part.

Cases Referred.

[1] AIR 1949 Pat 491
[2](1881) 7 QRD 289
[3](1849) 4 Ex. 187
[4] AIR 1950 Pat 366
[5]74 Ind App 223 : AIR 1047 PC 107
[5A]4 Ind App 338 : AIR 1927 PC 176
[6] AIR 1962 Pat 303
[6A] AIR 1941 Pat 517
[7]65 Ind App 182
[8] AIR 7931 Cal 175
[9] AIR 1930 Cal 737
[10] AIR 1934 Pat 354
[11] AIR 1949 Nag 25

[12] ILR 21 Cal 66 (PC)
[13] AIR 1936 Pat 339
[14] AIR 1938 Pat 127
[15] ILR 25 All 187
[16] AIR 1953 Cal 222
[17] ILR 34 Bom 250
[18]18 Cal WN 1340
[19]21 Cal WN 209