RAJASTHAN HIGH COURT

Dayanand

Vs.

State, (Rajasthan)

S.B.C.R.P. No. 234 of 2000
(Arun Madan, J.)

02.03.2001

ORDER

Arun Madan, J.

1. It is a revision petition challenging the order of the Additional District Judge, Ramganj Mandi (Kota) who returned the claim of the petitioners (plaintiffs) holding that the suit was not of urgent nature inasmuch as notice under Section 80, Civil Procedure Code and 271 of the Municipalities Act ought to have been served upon the respondents-State and the Municipality prior to institution of the suit, but failed to do so.

2. Shri Mahesh Sharma, learned counsel for the petitioners contended that as per Section 271 of the Municipalities Act no prior notice is required to institute a suit for permanent injunction except for declaration, inasmuch as in a suit for twin reliefs, i.e. seeking permanent injunction and declaration against the State and the Municipality, which are independent of each other, each of them could be claimed separately and independently in one suit, either by denying or accepting one of them and in these circumstances, the trial Court ought not to have returned the suit for permanent injunction but only suit for declaration ought to have been return thereby it committed material illegality with irregularity by returning the plaint in to Second contention urged on behalf of the petitioners is that without framing the issues the trial Court could not have returned the plaint for want of prior notice under Section 80, Civil Procedure Code or 271 of the Municipalities Act as such a dispute is an issue of fact inasmuch as the respondent-State and AEN PWD both have not at all raised an objection as to such a notice in their written statement.

3. Sri Sharma cited decisions in (1) *Dhian Singh v. Union of India* [1] *State of Bihar v. Panchratna Devi* [2] *Vasant Ambadas v. Bombay Municipality,* [3] *Gowardhandas v. Calcutta Municipality,*[4] whereas Shri Rajesh Mootha appearing on behalf of the State and the Municipality while placing reliance upon decisions in (1) *State of Madras v. C.P. Agencies,* [5] and (2) *Ebrahimbhai v. State,* [6] vociferously contended that the impugned order is perfectly legal warranting no interference in exercise of revisional jurisdiction of this Court under Section 115 Civil Procedure Code.

4. Having heard the learned counsel for the parties and considered their rival contentions so also perused the impugned order, first of all I would like to have a look at the citations relied upon at the bar during the course of arguments.

5. In *Dhian Singh v. Union of India* (supra), the Apex Court observed that though the terms of Section 80, Civil Procedure Code are mean that the terms of notice should be scrutinized in a pedantic manner or in a manner completely divorced from common sense. It was a case where the appellants gave the requisite notice under Section 80, Civil Procedure Code to the respondent and the trial Court awarded to the appellants the price of the two trucks which had been fixed by them at Rs. 3,500/- both in the notice under Section 80, Civil Procedure Code and the evidence led on their behalf, and in appeal the High Court dismissed the claim of the appellants merely on the ground that they had only claimed Rs. 3500/- in the notice which they had served on the respondent under Section 80, Civil Procedure Code and, therefore, they were not entitled to recover anything more than Rs. 3500/-. The Apex Court then held that a common sense reading of the notice under Section 80 would lead any Court to the conclusion that strict requirements of that section had been complied with and there was no defect in the same such as to disentitle the appellants from recovering from the respondent the appreciated value of the trucks as at the date of the judgment. The Apex Court then observed as under (at Page 282) :-

> "It is relevant to note that neither was this point taken by the respondent in written statement which it filled in answer to the appellant's claim nor was issue framed in that behalf by the trial Court and this may justify the inference that the objection under Section 80 had been waived."

6. In *State v. Panchratna* (supra) there was an averment in the plaint that no notice under Section 80 was required in law to be served on the defendant as it is only in

continuation of the claim proceeding decided by the certificate officer. In reply thereto the defendants had vaguely stated that the suit was barred for want of such notice but this issue was not raised at the trial stage rather appeared to have been not pressed, so such conduct on the part of defendants would amount to waiver of right of notice under Section 80, Civil Procedure Code. The Patna High Court, therefore, held that there is no inconsistency in the principle that provision under Section 80 is mandatory but the right may be waived by the party for whose benefit it has been provided.

7. In *Vasant Ambadas v. Bombay Municipality* (supra) the Full Bench of Bombay High Court held that the giving of the notice is a condition precedent to the exercise of jurisdiction but this being a mere procedural requirement the same does not go to the root of jurisdiction in a true sense of the term, and it is capable of being waived by the defendants and on such waiver, the Court gets jurisdiction to entertain and try the suit. The Full Bench further observed that the question whether in fact there is waiver or not would necessarily depend on facts of each case and is liable to be tried by the same Court if raised. However, the Full Bench then held that the plea of waiver can always be tried by the Civil Court.

8. In *Gowardhandas v. Calcutta Municipality* (supra) in a suit against the Corporation for declaration and injunction the relief for permanent injunction restraining the Commissioner from giving effect to his invalid order for demolition of structure was claimed only as an additional relief, therefore, the Calcutta High Court held that the suit is nevertheless a suit for permanent injunction within the meaning of Section 54 of the Specific Relief Act and for, absence of notice under Section 586 (1) of the Municipality Act and under Section 80, Civil Procedure Code was held to be not fatal to suit.

9. In all the cited cases (supra), as would be evident from the above-quoted observations, it has categorically held by laying down that the terms of Section 80, Civil Procedure Code are to be strictly complied with, rather the giving of the notice was held to be condition precedent to the exercise of jurisdiction, because no suit can be instituted without service of notice if such service of notice is required statutorily as a condition precedent. The facts in those cases being distinguished raising plea of waiver in different sets of averments in written statements of the defendants are not applicable, therefore, the decisions cited at the bar do not render any help to the petitioners in advancing their case, because in some of the cases, though the

defendants raised objection as to the suit being not maintainable for want of service of notice under Section 80, Civil Procedure Code or the relevant provision of the Municipality Act, but did not appear to have been pressed at the trial stage but raised/pressed at the stage of appeal or revision, and where objection was raised then the Court decided in view of pleadings holding absence of service of notice as not fatal to the suit.

10. In *Ebrahim v. State of Maharashtra* (supra), while holding that merely because of late filing of written statement but raising the plea of want of notice under Section 80, Civil Procedure Code cannot amount to a waiver of such notice, the Division Bench of the Bombay High Court held that the Court has no jurisdiction in entertaining the suit in the absence of notice under Section 80, Civil Procedure Code, and that to that extent, the matter clearly relates to the jurisdiction of the Court to entertain the suit, and in such a case the question of waiver either by the State Government or by the Public Officer cannot arise. The Court further held that where waiver is sought to be relied upon by party, it is for that party to establish circumstances under which he wants an inference of either express or implied waiver to be drawn.

11. In *State of Madras v. C.P. Agencies* (supra) the Apex Court held that Section 80, Civil Procedure Code is express, explicit and mandatory and admits of no implications or exceptions. In order to enable the Government or the Public Officer to arrive at a decision it is necessary to meet out requirements of proper notice under Section 80, Civil Procedure Code that it or he should be informed of the nature of the suit proposed to be filed against it or him and the facts on which claim is founded and the precise reliefs asked for. On facts the Apex Court held that the cause of action was clearly stated in the notice so as to enable the first defendant, the State Government to know that the plaintiff's claim was about (sic) and whether the claim should be conceded or resisted.

12. Thus viewed, it is settled proposition of law that the provision under Section 80, Civil Procedure Code is mandatory but the right can be waived by the party for whose benefit it has been provided; and no suit can be instituted without service of notice because such service of notice either under Section 80, Civil Procedure Code or under the provisions of the relevant Act, e.g. the Municipality Act in the present case, is required statutorily as a condition precedent.

13. In the instant case, under the impugned order, the learned trial Court after having considered the pleading of the parties appearing in the plaint and written statement thereto, concluded that through the suit the plaintiffs (petitioners) have sought for relief of permanent injunction so also declaration against the defendant-Municipality that they have right of title and ownership over the disputed land, for which under Section 271 of the Rajasthan Municipalities Act, service of a notice two months prior to institution of suit seeking aforesaid relief of declaration is a condition precedent. The plaintiffs (petitioners) claimed right of regularization of the suit land and ownership thereof by seeking regularization thereof on the basis of long possession over it by paying regularly rent except for some defaults, whereas the defendant-Municipality denied the tenancy of the suit land claimed by the plaintiffs rather the defendant contended that no assurance or promise was ever given to the plaintiffs for allotment of the suit land by way of any regularization thereof, inasmuch as the defendant asserted in written statement that the suit land in fact has been a part of land situated on National Highway being adjoining thereto maintenance where-of was responsibility of the State Government being done by the Public Works Department which has also admitted and pleaded in the light of what has been averred by the defendant-Municipality in its written statement. The defendant PWD and the State Government has clearly averred that the suit land being part of National Highway as it adjoined 50 ft. land to the National Highway over which the plaintiffs have trespassed and encroached, for removal of such encroachment having been made by the plaintiffs the Assistant Engineer, PWD is a competent officer having right as enshrined under Sections 90 and 91 of the Rajasthan Land Revenue Act inasmuch as prior to exercise of powers for removal of such trespass on the part of the plaintiffs, a notice was also issued on 11-12-1995 to each of the plaintiffs who in their reply dated 11-12-1995 to that notice have agreed on 30-12-1995 to remove such encroachments within a week thereof, but despite that agreement to remove encroachment, they did not remove their possession and after a lapse of one year filed present suit on 10-1-1997. Be that as it may, as per pleadings of the plaintiffs themselves, they are stone merchants and have been keeping their stocks of stones at the suit land which has admittedly been situated being adjoining to the National Highway. Their case is that they have been paying rent for the suit land. In the plaint they have not at all specified the period for which they had been paying rent and even they have vaguely averred that they have been paying rent for which they have some receipts but the defendant No. 2 has not been taking rent in recent past. The defendant-Municipality categorically denied to the tenancy of the suit land of the plaintiffs as claimed. Along with written arguments before this

Court, some of rent receipts have been filed by the plaintiffs- petitioners though without expressing any opinion on merits but for the sake of consideration of this revision petition. I have looked at these Xerox copies of such rent receipts, which I find belonging to the period of 1976/1977/1978 whereas the present suit has been filed on 10-1-1997 much after 20 years claiming right of regularization on the basis of tenancy by way of present suit for permanent injunction and declaration against the State Government, its officer AEN PWD and the Municipality. In written statement the defendant-Municipality specifically denied the tenancy of the plaintiffs as claimed by them in para 3 of the plaint, rather it has been asserted that for the self-same cause of alleged tenancy the plaintiff's had instituted a suit in the Munsif Court Ramganj Mandi which stood decided in favor of the defendant-Municipality, thereby tenancy rights had already stood terminated. In additional pleas, defendant-Municipality asserted that the plaintiffs had trespassed over the Government and Municipality's land. Though the defendant- Municipality has specifically raised plea of want of notice under Section 80, Civil Procedure Code and under Section 271 of the Municipalities Act and while accepting such an objection against the plaintiffs and in favor of the defendant-Municipality, the trial Court held the suit against the State and AEN PWD (defendant Nos. 1 and 3) not bad for want of service of prior notice under Section 80, Civil Procedure Code, but returned the suit, itself, holding it not maintainable at this stage by virtue of proviso to sub-section (2) of Section 80, Civil Procedure Code, because it arrived at the conclusion that no urgent or immediate relief need be granted in the suit. In this regard the trial Court has rightly considered the pleading on record that admittedly the AEN PWD (defendant No. 3) had issued a notice of show cause under Section 91 of the Rajasthan Land Revenue Act to the plaintiffs who had also filed their respective replies to the show cause notice, where on the plaintiffs had agreed on 30-12-1995 to remove the encroachments made allegedly on their part over the suit land within a week and in this view of the matter, on 30-12-1995 the plaintiffs had apprehension as to their removal from the suit land but they instituted the suit after a lapse of one year which showed that there was no urgency necessitating immediate relief being granted in the suit and, therefore, in my considered opinion, the trial Court has committed no error of law or illegality muchless any material irregularity in returning the suit itself to the plaintiffs for being presented after complying with requirement of sub-section (1) of Section 80, Civil Procedure Code, in exercise of its powers conferred by proviso to sub-section (2) of Section 80, Civil Procedure Code.

14. Before parting with this order, I may point out that admittedly the defendant No. 3 issued notice under Section 91 of the Land Revenue Act to the plaintiffs who had also agreed to remove encroachments over the suit land adjoining to the National Highway on 30-12-1995 after filing their reply to the notice, and after a lapse of one year on or about 10-1-1997 the plaintiffs had instituted the present suit along with application for temporary injunction and on 27-1-1997 the trial Court had already dismissed the application for temporary injunction. But curiously enough it is surprising as to what prevented the Collector, Kota or the AEN PWD Sub-Division Ramganj Mandi Kota or even the Municipality Ramganj Mandi to exercise their powers either under the provisions of the Land Revenue Act or the Municipalities Act for removal of unauthorized encroachments on the part of the plaintiffs over the Govt. land despite they had agreed to remove their possession over the suit land on 30-12-1995 not only till the impugned order returning the suit was passed on 30-11-1999 by the trial Court against which this revision petition has been filed, but also till the revision petition was filed during which there was no stay order subsisting in favor of the plaintiffs of any nature restraining the defendants from acting under the relevant law. That apart, the Municipality though has denied the tenancy over the suit land of the plaintiffs as claimed by them, but despite that denial, how far and what for and why the Municipal authorities or even State Government functionaries are hesitant to take initiative for removal of encroachment over Government land under the relevant laws either under the Land Revenue Law or the Municipal Law for the purposes of safe traffic on National Highways so also on the roads inside town or city itself. Rather the conduct of the defendants in the present case shows collusiveness and callousness by not taking prompt action in the matter. A copy of this order be sent to the Chief Secretary of the State for such necessary action in the matter of safeguarding Govt. lands which are subject-matter of encroachment on National Highways or roads in the city in Rajasthan State as such action is warranted in seeking the cause of public interest at large.

15. As a result of the discussion made in judgment this civil revision petition being devoid of any merit is hereby dismissed. The impugned order dated 30-11-1999 passed by the Additional District Judge, Ramganj Mandi (Kota) in Civil Suit No. 47/98 whereby petitioners' suit was returned to them under proviso to Section 80(2), Civil Procedure Code, is upheld.
Revision dismissed.

Cases Referred.

1. (AIR 1958 SC 274)
2. AIR 1980 Pat 212
3. AIR 1981 Bom 394
4. AIR 1970 Cal 539
5. AIR 1960 SC 1309
6. AIR 1975 Bom 13